BEFORE
THE OHIO POWER SITING BOARD

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

APPLICATION FOR REHEARING OF INTERVENORS GARY J. BIGLIN, KAREL A. DAVIS, BRETT A. HEFFNER, MARGARET RIETSCHLIN, JOHN WARRINGTON, ALAN PRICE, AND CATHERINE PRICE

Pursuant to R.C. 4906.12, R.C. 4903.10, and O.A.C. 4906-2-32(A), Intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, John Warrington, and Alan and Catherine Price (together, the "Intervenors") hereby apply for rehearing of the Board's March 24, 2016 Entry ("Entry") in this matter granting Black Fork Wind Energy, LCC's ("Black Fork") motion to amend a material condition of its January 23, 2012 Certificate of Environmental Compatibility and Public Need ("Certificate") – the five-year deadline for Black Fork to commence construction of its facility -- and extending that material condition for two additional years, from January 23, 2017 to January 23, 2019. The specific grounds for this Application for Rehearing are as follows:

(1) The Entry is unlawful and unreasonable because it purports to amend an express, material term of the January 23, 2012 Certificate without complying with the statutorily-required procedure for amending a certificate.

(2) The Entry is unlawful and unreasonable because the Board lacks the authority to alter, waive, or otherwise dispense with the statutorily-required procedure for amending a certificate.

(3) The Entry is unlawful and unreasonable because Black Fork has failed to show good cause for an extension of the Certificate by motion or otherwise.

(4) The certificate-amendment-by-motion granted by the Board's Entry is unlawful and unreasonable because it illegally effects Black Fork's evasion of the now-applicable setback requirements of R.C. 4906.20 and R.C. 4906.201.

The basis for this Application for Rehearing is set forth in detail in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Black Fork filed its application for a certificate to construct the Black Fork Wind Energy project in Crawford and Richland counties on March 10, 2011. On August 30, 2011, the Board granted the motions to intervene of, *inter alia*, Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, John Warrington, Alan Price, and Catherine Price. *In re Application of Black Fork Wind Energy, LCC,* No. 10-2865-EL-BGN, slip op. at 2-4, ¶¶7, 9, 11-12 (Aug. 30, 2011).

The case proceeded to an adjudicatory hearing before the Board on September 19 and October 11-13, 2011. On January 23, 2012, the Board issued its Opinion, Order, and Certificate ("Decision") granting the requested certificate (the "Certificate"). *In re Application of Black Fork Wind Energy, LCC,* No. 10-2865-EL-BGN (Jan. 23, 2012). In relevant part, the Board's order provided that "a certificate be issued to Black Fork pursuant to Chapter 4906, Revised Code, for the construction, operation, and maintenance of the wind-powered electric generation facility, *subject to the conditions set forth in the Stipulation*, as amended," and that "the certificate contain the conditions set forth in the Stipulation, as amended." *Id.* at 74 (emphasis added). The "Stipulation" that the Board adopted in its Decision, and made part of the Certificate issued by the Board, contained a list of 80 separate conditions that Black Fork was required to satisfy in exchange for the Board's authorization to construct the facility. Among those conditions was No. 70 ("Condition No. 70"), which became an express and material condition of the Certificate:

> The certificate shall become invalid if the applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.

Id. at 50, ¶70.

Following the required applications for rehearing, which the Board denied on March 26, 2012, *In re Application of Black Fork Wind Energy, LCC,* No. 10-2865-EL-BGN (March 26, 2012), the case was appealed to the Ohio Supreme Court. On December 18, 2013, the Supreme Court affirmed the Board's Decision. *In re Application of Black Fork Wind Energy, L.C.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478.

On September 12, 2014 – almost 9 months after the Supreme Court decision – Black Fork filed a document titled "Motion for Extension of Certificate" ("Motion"), requesting the Board to extend its Certificate from January 23, 2017 to January 23, 2019. By its Motion, Black Fork sought to amend the Board's January 23, 2012 Certificate, and specifically, material Condition No. 70. However, Black Fork did not file an application to amend its Certificate as required by R.C. 4906.06(E) and O.A.C. 4906-3-11(B). Instead Black Fork sought to circumvent the required application process by filing its Motion to amend the material 5-year time limitation of its Certificate.

The Intervenors joining in this Application for Rehearing (excepting Alan and Catherine Price) filed objections or memoranda contra to the requested extension on September 29, 2014. On March 24, 2016, the Board – without requiring Black Fork to file the statutorily-required application, without a staff investigation, and without conducting a hearing – issued its Entry granting Black Fork's Motion and amending the material time limitation of the original Certificate to prevent the Certificate from becoming invalid on January 23, 2017. The Entry created a new material condition for the Certificate: Black Fork now must commence a continuous course of construction of its proposed wind turbine facility by January 23, 2019. The Intervenors hereby seek a rehearing of the Board's March 24, 2016 Entry amending the material 5-year time limitation of Black Fork's original Certificate.

II. ARGUMENT

A. STANDARD ON REHEARING

"The board has exclusive authority to issue certificates of environmental compatibility and public need for construction, operation, and maintenance of 'major utility facilities,' such as the proposed wind farm at issue here." *In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513 at ¶8 (Ohio) (citing *In Re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 449, 2012-Ohio-878 at ¶2 and R.C. 4906.01, 4906.03, and 4906.13). See also R.C. 4906.04 ("A certificate may only be issued pursuant to Chapter 4906. of the Revised Code.").

R.C. 4906.12 provides that "[s]ections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of the Revised Code, in the same manner as if the board were the public utilities commission under such sections." R.C. 4903.10 provides that "[a]fter any order has been made . . . , any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding."[1] See also O.A.C. 4906-2-32(A). That section further provides that "[s]uch application shall be filed within thirty days after the entry of the order upon the journal of the" Board. See also O.A.C. 4906-2-32(A) & (C).

The application "shall set forth specifically the ground or grounds on which the applicant considers the order to be *unreasonable or unlawful*." R.C. 4903.10 (emphasis added). See also O.A.C. 4906-2-32(A). "If, after such rehearing, the [Board] is of the opinion that the original order or any part thereof is *in any respect unjust or unwarranted*, or should be changed, the

[1]A "party" includes "[a]ny person granted leave to intervene . . . ." O.A.C. 4906-2-11(A)(3). See also R.C. 4906.08(B).

[Board] may abrogate or modify the same; otherwise such order shall be affirmed." R.C. 4903.10 (emphasis added).

Intervenors contend that the Board's Entry granting the extension is unreasonable and unlawful for each of the reasons discussed in detail below. Accordingly, Intervenors respectfully urge the Board to grant this Application for Rehearing.

B. THE ENTRY IS UNLAWFUL AND UNREASONABLE BECAUSE IT PURPORTS TO AMEND AN EXPRESS, MATERIAL TERM OF THE JANUARY 23, 2012 CERTIFICATE WITHOUT COMPLYING WITH THE STATUTORILY-REQUIRED PROCEDURE FOR AMENDING A CERTIFICATE.

1. Standards Governing the Issuance of a Certificate.

R.C. 4906.04 provides, in pertinent part, that "[n]o person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility. Any facility, with respect to which such a certificate is required, *shall thereafter be constructed*, operated, and maintained *in conformity with such certificate and any terms, conditions, and modifications contained therein.*" (emphasis added). R.C. 4906.10 further provides that the Board "shall render a decision upon the record either granting or denying *the application* as filed, *or granting it upon such terms, conditions, or modifications of the construction*, operation, or maintenance of the major utility facility as the board considers appropriate." R.C. 4906.10(A). Moreover, the Board may only issue a certificate after determining that the facility satisfies eight factors:

> The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:
>
> (1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline;
>
> (2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

R.C. 4906.10(A).

As noted, in addition to the eight mandatory factors an applicant must satisfy, the Board may include other terms and conditions in the certificate. R.C. 4906.04 & 4906.10(A). In this regard, the Board has stated that:

> [i]t is a long-standing policy of the Board to include as *a condition of each certificate* to construct *a provision which requires the applicant to commence a continuous course of construction within the specified time period.* The purpose of the provision is to encourage the efficient use of land and to limit the applicant's ability to hold the rights to construct on the property indefinitely.

> Furthermore, it is important to ensure that the information upon which the Board initially relied in granting the certificate is still valid and accurate.

In re Application of Lima Energy Co., Nos. 00-513-EL-BGN & 04-1011-EL-BGA, slip op. at 7, ¶8 (July 30, 2012) (emphasis added). See also *In re Application of Norton Energy Storage, LLC,* No. 99-1626-EL-BGN, slip op. at 2, ¶9 (Sep. 30, 2013).[2]

The rationale for routinely including this material condition in the certificates issued by the Board is readily apparent: the passage of time unquestionably will impact each of the eight factors the Board must determine in issuing the certificate in the first instance. For example, the passage of time may well affect the determinations that "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives," R.C. 4906.10(A)(3), and that "the facility will serve the public interest, convenience, and necessity." R.C. 4906.10(A)(6). As stated by the Board, "it is important to ensure that the information upon which the Board initially relied in granting the certificate is still valid and accurate." *In re Application of Lima Energy Co.*, Nos. 00-513-EL-BGN & 04-1011-EL-BGA, slip op. at 7, ¶8 (July 30, 2012)

2. Standards Governing the Amendment of a Certificate.

Once the Board has issued a certificate, R.C. 4906.06(E) provides that "[a]n *application for an amendment of a certificate* shall be in such form and contain such information as the board prescribes. Notice of such an application shall be given as required in divisions (B) and (C) of this section" [requiring notice of initial applications to affected political subdivisions and the public]. Indeed, the Board's rules expressly provide that "[a]pplications for amendments to

[2]Indeed, R.C. 4906.06(A) expressly provides that "[t]he application shall be filed not more than five years prior to the planned date of commencement of construction. The five-year period may be waived by the board for good cause shown."

certificates *shall be submitted in the same manner as if they were applications for a certificate.*" O.A.C. 4906-3-11(B) (effective Dec. 15, 2015) (emphasis added).[3]

R.C. 4906.07 requires that the Board's chairperson "*shall* cause each application filed with the board to be investigated," that a report of that investigation be made available to the Board, the applicant, and any person requesting a copy, and that such report be made so available at least fifteen days prior to any hearing on the application. R.C. 4906.07(C) (emphasis added).[4] In this regard, while the General Assembly has mandated that all applications—including applications for an amendment to a previously-issued certificate—be investigated, not all applications for an amendment must be scheduled for a hearing before the Board:

> On *an application for an amendment* of a certificate, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate *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.*

R.C. 4906.07(B)[5] (emphasis added). The import of this statutory provision is clear—the Board must conduct a hearing if the proposed change in the facility would increase its environmental

[3]Former O.A.C. 4906-5-10, in effect until December 15, 2015, similarly provided that "[a]pplications for amendments to certificates shall be submitted in the same manner as if they were applications for a certificate, unless such amendment falls under a letter of notification or construction notice pursuant to the appendices to rule 4906-1-01 of the Administrative Code." Former O.A.C. 4906-5-10(B) (rescinded effective Dec. 15, 2015).

[4]See also Former O.A.C. 4906-5-10(B)(1) (rescinded effective Dec. 15, 2015) ("The board staff *shall review applications for amendments to certificates* pursuant to rule 4906-5-05 of the Administrative Code [requiring notice and investigation of each application filed with the Board] and make appropriate recommendations to the board and the administrative law judge.") (emphasis added); O.A.C. 4906-3-11(B)(1) (effective Dec. 15, 2015) ("Staff *shall review applications for amendments to certificates* pursuant to rule 4906-3-06 of the Administrative Code [requiring notice and investigation of each application filed with the Board] and make appropriate recommendations to the board and the administrative law judge.") (emphasis added).

[5]See also Former O.A.C. 4906-5-10(B)(1)(a) (rescinded effective Dec. 15, 2015) ("If the board, its executive director, or the administrative law judge determines that the proposed change in the certified facility would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility other than as provided in the alternates set forth in the application, then a hearing shall be held in the same manner as a hearing is held on a certificate application."); O.A.C. 4906-3-11(B)(1)(a) (effective Dec. 15, 2015) (same).

impact or if there is a proposed change in the location of the facility not encompassed in the alternatives set forth in the initial application.[6] However, R.C. 4906.07(B) expressly presupposes, consistent with R.C. 4906.07(E), that all amendments to certificates will be initiated by "*an application for an amendment;"* some of those applications will require a hearing, and some of those applications will not. The statute does not absolve—or even purport to absolve—the certificate-holder of its obligation to file an application for an amendment or the Board of its duty to investigate and prepare a report on the application.

3. An Extension of a Certificate is a Modification of One of the Terms and Conditions of the Certificate, and Therefore, Constitutes an Amendment of the Certificate.

As noted, Condition No. 70 is one of the express, material "conditions of the certificate." *In re Application of Black Fork Wind Energy, LCC,* No. 10-2865-EL-BGN, slip op. at 34 (Jan. 23, 2012). That 5-year limitation is one of the terms and conditions the Board is required to include in the Certificate pursuant to R.C. 4906.04, unless the Board expressly waives the requirement on a showing of good cause. R.C. 4906.06(E) and O.A.C. 4906-3-11(B). Any change in the terms and conditions that are part of the Certificate is, by statutory definition, an amendment of the Certificate. Accordingly, any request to extend (amend) the 5-year deadline for commencing construction that is an express condition of the Certificate must be processed by the Board as an application to amend the Certificate.

Because the modification of an express condition contained in the Board's January 23, 2012 Certificate constitutes an amendment of the Certificate, Black Fork and the Board were required to comply with the statutorily-mandated procedures for such an amendment, *i.e.,* that the request for an amendment be made by application, R.C. 4906.06(E), that the application be investigated by the Board, and that Board staff prepare a report on the application which must,

[6]Of course, the Board retains discretion to conduct a hearing in all other instances.

inter alia, "contain recommended findings with regard to division (A) of section 4906.10 of the Revised Code . . . ." R.C. 4906.07(C*).* The Board's rules—both the prior rules and those adopted effective December 15, 2016—make this statutory command clear: "[a]pplications for amendments to certificates ***shall*** *be submitted in the same manner as if they were applications for a certificate.*" O.A.C. 4906-3-11(B) (effective Dec. 15, 2015) (emphasis added). See also Former O.A.C. 4906-5-10(B) (rescinded effective Dec. 15, 2015). "It is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with commands of that statute *is mandatory*." *Ohio Dep't of Liquor Control v. Sons of Italy Lodge 0917,* 65 Ohio St.3d 532, 534, 1992-Ohio-17 (emphasis added).

In this case, Black Fork filed only a motion to extend the term of the Certificate. Black Fork did not comply with the statutory and regulatory mandate that it seek an amendment to its Certificate by application. Moreover, the Board, by cursorily granting Black Fork's motion for extension, failed to require compliance with this statutory and regulatory mandate. It unreasonably and unlawfully permitted the amendment of a material condition of the Certificate via an avenue other than that commanded by statute and the Board's own rules.

Furthermore, because no application for an amendment was filed by Black Fork or demanded by the Board, the Board completely dispensed with the requirement that it conduct an investigation of such an application. Instead, only the arguments of counsel—and the opposing arguments of the then-*pro se* Intervenors—were considered by the Board in granting the requested extension. No evidence was considered, either that gathered during a required investigation or that introduced at a formal hearing that the Board, in its discretion, could have conducted. And, because no investigation was conducted, no staff report was prepared that contained recommended findings with regard to the eight factors set forth in R.C. 4906.10(A). The Board did not consider, and could not possibly have considered, whether the eight factors

mandated for its consideration in R.C. 4906.10(A), and as determined in the original Certificate, were materially affected by the 4-year passage of time. The Board's failure to require compliance with the statutory and regulatory procedures for amending the Certificate render the Entry granting the requested extension both unreasonable and unlawful. The Board should, therefore, grant a rehearing of its March 24, 2016 Entry.

C. THE ENTRY IS UNLAWFUL AND UNREASONABLE BECAUSE THE BOARD LACKS THE AUTHORITY TO ALTER, WAIVE, OR OTHERWISE DISPENSE WITH THE STATUTORILY-REQUIRED PROCEDURE FOR AMENDING A CERTIFICATE.

Despite the clear command that amendments to issued certificates by made pursuant to applications, and that all applications be investigated, the Board has taken the position that it retains discretion to dispense with such requirements. The Board, however, lacks the authority to alter, waive, or otherwise dispense with these statutory commands, and its doing so in this case renders its March 24, 2016 Entry unreasonable and unlawful.

In its Entry, the Board, in effect, concluded that because no hearing was required pursuant to R.C. 4906.07(B), it was free to dispense with the requirements that an amendment be sought by application and that the Board investigate all applications. Entry at 5, ¶11 (accepting Black Fork's argument "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"). This conclusion has no support in the plain language of the statute.

First, Division (B) of R.C. 4906.07 only concerns whether a hearing is required "*[o]n an application*" to amend a certificate. Again, it presupposes that an application to amend is required in the first instance. This is because R.C. 4906.06(E) requires that all requests to amend a certificate be by application. R.C. 4906.06(E) ("An *application* for an amendment of a certificate shall be in such form and contain such information as the board prescribes.")

(emphasis added). So do the Board's own regulations. O.A.C. 4906-3-11(B) (effective Dec. 15, 2015) ("*Applications* for amendments to certificates *shall be submitted in the same manner as if they were applications for a certificate.*") (emphasis added); former O.A.C. 4906-5-10(B) (rescinded effective Dec. 15, 2015) ("Applications for amendments to certificates shall be submitted in the same manner as if they were applications for a certificate. . . ."). The statute and the Board's rules do not provide that only certain certificate amendments, *i.e.*, those for which a hearing is required under R.C. 4906.07(B), must be submitted by application. The Board has impermissibly interpreted the statutory provision dealing with whether a hearing is required on an application to amend as license to dispense with the statutory and regulatory requirement that amendments to existing certificates be sought by the filing of an application. This is contrary to the plain wording of the statute.[7]

"In construing a statute, a court's paramount concern is the legislative intent." *State, ex rel. Moss v. Ohio State Highway Patrol Retirement Sys.* (2002), 97 Ohio St.3d 198, 201, 2002-Ohio-5806 at ¶21. "A court must look to the language and purpose of the statute in order to determine legislative intent." *State v. Cook* (1998), 83 Ohio St.3d 404, 416, 1998-Ohio-291, *cert.*

[7]In the past, the Board has also relied upon Former O.A.C. 4906-1-05 (rescinded effective Dec. 15, 2015) ("For good cause shown, the board or the administrative law judge may extend or waive any time limit prescribed or allowed by Chapters 4906-1 to 4906-17 of the Administrative Code, *except where precluded by statute*. Any request for the extension or waiver of a time limit shall be made by motion.") (emphasis added). See, e.g., *In re Application of Buckeye Wind, LLC,* Nos. 08-666-EL-BGN & 13-360-EL-BGN, slip op. at 5-6, ¶15 (Aug. 27, 2015), *appeal pending*, No. 15-1715 (Ohio S.Ct.). As emphasized above, the rule allowing extensions by motion did not apply "where precluded by statute." As noted herein, R.C. 4906.06(E)'s requirement that a request to amend an existing certificate be submitted by application precludes application of the former rule.

Furthermore, former O.A.C. 4906-1-05 was replaced by O.A.C. 4906-2-07 (effective Dec. 11, 2015), which now only applies to "continuances of public hearings and extensions of time to file pleadings or other papers. . . ." O.A.C. 4906-2-07(A) (effective Dec. 11, 2015). Neither the Applicant—in seeking the extension of its Certificate by motion—nor the Board—in granting the motion—relied upon the now-rescinded former rule. In any event, because those rules are procedural in nature, the rescission of the Former O.A.C. 4906-1-05 and adoption of new O.A.C. 4906-2-07 applied to any proceedings conducted after December 11, 2015. *State ex rel. Holdridge v. Industrial Comm'n,* 11 Ohio St.2d 175 (1967) ("Laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.") (syllabus).

denied (1999), 525 U.S. 1182. See also *In re Adoption of Baby Boy Brooks*, (Franklin App.), 136 Ohio App.3d 824, 828 ("[T]he court must first look to the plain language of the statute itself to determine the legislative intent.") (citation omitted), *appeal denied* (2000), 89 Ohio St.3d 1433. When construing a statute, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. See also *State, ex rel. Solomon v. Board of Trustees* (1995), 72 Ohio St.3d 62, 65, 1995-Ohio-172 ("Words used in a statute must be taken in their usual, normal or customary meaning.") (citation omitted). The Board cannot "read words into or out of that statute but must accept the enactment of the General Assembly as it stands." *State v. Stevens* (1954), 161 Ohio St. 432, 435. See also *State, ex rel. Solomon,* 72 Ohio St.3d at 65.[8]

The Board has stated that it has long interpreted (apparently with respect to a total of seven (7) facilities) the provisions of R.C. Chapter 4906 to allow the terms of existing certificates to be amended by motion rather than by application—but none of these past seven (7) instances of a "motion amendment" of a certificate time-limit was subjected to judicial review. The eighth instance in which the Board granted a motion amendment for a certificate time-limit, with respect to the Buckeye Wind, LLC facility in Champaign County, is being challenged in an appeal currently pending in the Ohio Supreme Court. See, e.g., *In re Application of Buckeye Wind, LLC,* Nos. 08-666-EL-BGN & 13-360-EL-BGN, slip op. at 5-6, ¶15 (Aug. 27, 2015), *appealing pending,* No. 15-1715 (Ohio S.Ct.). Although "[i]t is a fundamental tenet of administrative law that an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable," *Clark v. Great Lakes Constr. Co.,* 99 Ohio S.t3d 320, 321, 2003-Ohio-3802 at ¶10, and that "[a] court must give due deference to

[8]Administrative rules "are subject to the canons of statutory construction, including the canon that words be given their plain and ordinary meaning." *State ex rel. R. Bauer & Sons Roofing & Siding, Inc. v. Industrial Comm'n,* 84 Ohio St.3d 62, 66, 1998-Ohio-310 (citations omitted).

the agency's reasonable interpretation of the legislative scheme," *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad,* 92 Ohio St.3d 282, 287, 2001-Ohio-190 (citation omitted), such deference is not without its limits. Indeed, it is well established that deference to an administrative interpretation is not warranted where such an interpretation "is unreasonable and fails to apply the plain language of" the statute. *State ex rel. Brinda v. Lorain County Bd. of Elections,* 115 Ohio st.3d 299, 304, 2007-Ohio-5228 at ¶30.

In this case, accepting the Board's interpretation of the R.C. 4906.06(E) requires one to ignore the plain words of the statute that require certificate holders to file an application to amend their certificates. The Board's interpretation, in effect, creates an exception to the application requirement that is not found in either the statute or administrative rules themselves. Indeed, accepting the Board's "historical" interpretation would require the insertion of words into the existing text of the statute so that it would read: "An application for an amendment of a certificate *for which a hearing is required pursuant to division (B) of section 4906.07 of the Revised Code* shall be in such form and contain such information as the board prescribes." The same words would have to be inserted into the text of the Board's equally-clear regulations. To legitimize the Board's interpretation of its own rule, O.A.C. 4906-3-11(B) would have to be amended to read that "[a]pplications for amendments to certificates *for which a hearing is required pursuant to division (B) of section 4906.07 of the Revised Code* shall be submitted in the same manner as if they were applications for a certificate." Because neither the statute nor the Board's regulations contain these words, the Board's interpretation is not entitled to deference and is, instead, an impermissible reading of the plain language of that statute and those regulations.

Moreover, there is absolutely no statutory authority for the Board to completely dispense with the requirement that it conduct an investigation of an application to amend an existing

certificate. Indeed, the Board's failure to do so is a complete abdication of its statutory duty. R.C. 4906.07 requires that the Board's chairperson "*shall* cause each application filed with the board to be investigated," that a report of that investigation be made available to the Board, the applicant, and any person requesting a copy, and that such report be made so available at least fifteen days prior to any hearing on the application. R.C. 4906.07(C) (emphasis added). "It is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with commands of that statute is mandatory." *Ohio Dep't of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 1992-Ohio-17.

The Board's regulations are equally clear in this regard. As noted above, O.A.C. 4906-3-11(B)(1) (effective Dec. 15, 2015) provides that "[s]taff *shall* review applications for amendments to certificates pursuant to rule 4906-3-06 of the Administrative Code and make appropriate recommendations to the board and the administrative law judge." (emphasis added). See also Former O.A.C. 4906-5-10(B)(1) (rescinded effective Dec. 15, 2015). And O.A.C. 4906-3-6(B)(1) (effective Dec. 15, 2015), in equally definite terms, provides that "[s]taff shall conduct an investigation of each accepted, complete application and submit a written report as provided by division (C) of section 4906.07 of the Revised Code . . . ." (emphasis added).

Nowhere in the governing statutes or the Board's rules is there authority for the Board to dispense with the requirement that it conduct an investigation of an application to amend an existing certificate simply because a full board hearing is not required on the application. The Board's holding otherwise renders its March 24, 2016 Entry unreasonable and unlawful.

D. THE ENTRY IS UNLAWFUL AND UNREASONABLE BECAUSE BLACK FORK HAS FAILED TO SHOW GOOD CAUSE FOR AN EXTENSION OF THE CERTIFICATE BY MOTION OR OTHERWISE.

Because the Board failed to conduct any investigation of the request to amend Condition No. 70 of Black Fork's Certificate, and because the Board's staff failed to generate the required

report of its investigation, there has been no showing of good cause justifying the extension. As noted above, the General Assembly has required the Board to investigate all applications, including applications for amendments to existing certificates, and to make determinations with respect to each of the factors listed in R.C. 4906.10(A). The Board has completely failed to satisfy these obligations in this case.

Indeed, even a cursory examination of those factors in light of the representations made by Black Fork in its Motion demonstrate that the passage of time has greatly affected the assumptions underlying the Board's 2012 issuance of the Certificate. For instance, with regard to the determination that "the facility will serve the public interest, convenience, and necessity," R.C. 4906.10(A)(6), Black Fork readily acknowledges in its Motion that "[t]he wholesale electricity market in Ohio *dramatically changed* with the advent of increasing supplies of natural gas from the Marcellus and Utica shale plays." Motion at 3 (footnote omitted) (emphasis added). Black Fork further acknowledges that "there has been a [*sic*] overall, lower demand for electricity due to the general economic downturn." *Id.* These "two factors resulted in lower prices that undercut Black Fork's ability to enter into an economic power purchase agreement . . . at a price sufficient to support the construction and financing of the project." *Id.* These acknowledgements demonstrate that the project will no longer "serve the public interest, convenience, and necessity," or at the very least, call that 2012 determination into question, compelling the Board—as statutorily required—to investigate whether the project still satisfies R.C. 4906.10(A)(6).[9]

[9] In this regard, it must also be observed that the General Assembly enacted a two-freeze on Ohio's renewable energy mandates, see R.C. 4928.64(B)(2) (as amended by Substitute Senate Bill 310, effective September 12, 2014), and, according to news reports, is currently considering an additional three-year freeze on those mandates. See "Lawmakers Eye Three-Year Extension to Renewable Energy Mandate Freeze," *Gongwer Ohio Report*, Vol. 85, No. 71 (April 13, 2016). These developments also significantly impact whether Black Fork's project continues to "serve the public interest, convenience, and necessity," R.C. 4906.10(A)(6), and yet the Board, by granting Black Fork's requested extension by motion, has failed to conduct any factual inquiry into this issue.

Similarly, Black Fork has acknowledged that it also filed with the Board "*an amendment application* seeking to add additional turbine models to the project . . . ." Motion at 4 (emphasis added). That amendment, allowing Black Fork to use two models of turbines that are new to the market, was granted by Board on August 27, 2015. *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA (Aug. 27, 2015). Although the Board allowed the use of the specified two new turbine models, the proceedings in that case establish that new technology is constantly being developed that may lessen the probable environmental impact of the proposed facility, see R.C. 4906.10(A)(2) ("[t]he nature of the probable environmental impact"), or affect whether the facility represents the minimum environmental impact in light of available technology. See R.C. 4906.10(A)(3) ("That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations"). Because the mandated statutory procedures required <u>some</u> investigation into all of the factors of R.C. 4906.10(A) and the preparation and submission of a report containing recommended findings thereon—particularly findings as to whether the Board's prior determinations have been undermined or altered by the passage of time and changing circumstances (*e.g.*, the "*dramatic change*" alluded to by Black Fork as a purported basis for the extension)—the Board's Entry granting an extension cannot be found to be supported by good cause. By foregoing the mandated application/investigation/report procedure for amendments, the Board is left without <u>any</u> basis upon which it can make the required independent determination as to whether there is good cause for the extension. The Board's March 24, 2016 Entry is, therefore, both unreasonable and unlawful.

E. THE CERTIFICATE-AMENDMENT-BY-MOTION GRANTED BY THE BOARD'S ENTRY IS UNLAWFUL AND UNREASONABLE BECAUSE IT ILLEGALLY EFFECTS BLACK FORK'S EVASION OF THE NOW-APPLICABLE SETBACK REQUIREMENTS OF R.C. 4906.20 AND 4906.201.

Perhaps the most significant defect in the Board's March 24, 2016 Entry is that, by granting Black Fork an extension of its 5-year Certificate term without requiring the statutorily-mandated Certificate amendment, the Board has illegally effected Black Fork's evasion of the now-applicable setback requirements of R.C. 4906.20 and 4906.201. The new statutory setback requirements expressly apply to all certificate amendments after September 15, 2014—including the amendment of Black Fork's 5-year Certificate term.

When first enacted as part of Amended Substitute House Bill Number 562, effective June 24, 2004, R.C. 4906.20 required the Board to adopt regulations governing the certification of "economically significant wind farms"—wind farms with a single interconnection to the electrical grid and capable of generating an aggregate of between five and fifty megawatts of electricity, see R.C. 4906.13(A). Those regulations were to include minimum setbacks as provided in the statute:

> The rules also shall prescribe a minimum setback for a wind turbine of an economically significant wind farm. That minimum shall be equal to *a horizontal distance, from the turbine's base to the property line of the wind farm property, equal to one and one-tenth times the total height of the turbine structure* as measured from its base to the tip of its highest blade and 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.

R.C. 4906.20(B)(2) (as enacted in Am.Sub.H.B. 562, effective June 24, 2008) (emphasis added).

R.C. 4906.20 was amended in Amended Substitute House Bill 59, effective September 29, 2013, to increase the setback requirements:

> That minimum shall be equal to a horizontal distance, from the turbine's base to the property line of the wind farm property, equal to one and one-tenth times the

> total height of the turbine structure as measured from its base to the tip of its highest blade and be *at least one thousand one hundred twenty-five 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.

R.C. 4906.20(B)(2) (as amended in Am.Sub.H.B. 59, effective Sep. 29, 2013) (emphasis added). In addition, Amended Substitute House Bill 59 enacted new section R.C. 4906.201, which extended the setback requirements to wind farms generating fifty megawatts or more, such as the wind farm certified by the Board in this case:

> An electric generating plant that consists of wind turbines and associated facilities with a single interconnection to the electrical grid that is designed for, or capable of, operation at an aggregate capacity of fifty megawatts or more is subject to the minimum setback requirements established in rules adopted by the power siting board under division (B)(2) of section 4906.20 of the Revised Code.

R.C. 4906.201(A) (as enacted in Am.Sub.H.B. 59, effective Sep. 29, 2013).

R.C. 4906.20 was amended once again by Amended Substitute House Bill 483, effective September 15, 2014. That section changed the setback requirements from the nearest habitable residence to the nearest adjacent property line:

> That minimum shall be equal to a horizontal distance, from the turbine's base to the property line of the wind farm property, equal to one and one-tenth times the total height of the turbine structure as measured from its base to the tip of its highest blade and be at least one thousand one hundred twenty-five feet in horizontal distance from the tip of the turbine's nearest blade at ninety degrees *to property line of the nearest adjacent property* at the time of the certification application.

R.C. 4906.20(B)(2)(a) (as amended in Am.Sub.H.B. 483, effective Sep. 15, 2014) (emphasis added).

R.C. 4906.201 also was amended to expressly provide that Amended Substitute House Bill 483's new setback requirements apply to any amendments to existing certificates made after September 15, 2014 (the act's effective date):

> *Any amendment made to an existing certificate after the effective date of the amendment of this section by H.B. 483 of the 130th general assembly, shall be subject to the setback provision of this section as amended by that act*. The amendments to this section by that act shall not be construed to limit or abridge any rights or remedies in equity or under the common law.

R.C. 4906.201(B)(2) (as amended in Am.Sub.H.B. 483, effective Sep. 15, 2014) (emphasis added).[10] Accordingly, any amendment to Black Fork's Certificate made after September 15, 2014 was subject to the new setback requirements of the act and each wind turbine was required to be setback at least 1,125 feet <u>from the property line of the nearest adjacent property</u>.

In granting Black Fork's original Certificate, the Board noted as follows:

> Based on the largest turbine model, the statutory minimum setback requirements equate to 543 feet from the nonparticipating property line and 914 feet from residences on nonparticipating property. *In establishing minimum property line setbacks of 563 feet and residence setbacks of 1,250 feet, the applicant has designed the wind farm to exceed all statutory requirements*.

In re Application of Black Fork Wind Energy, LCC, No. 10-2865-EL-BGN, slip op. at 6, ¶4 (Jan. 23, 2012). Although the setback requirements approved by the Board in the original Certificate may have satisfied the statutory requirements in 2012 when the Certificate was granted, those setbacks do not meet the statutory requirements now in effect—statutory requirements that apply to <u>all</u> certificate amendments after September 15, 2014.

Because the Board impermissibly allowed Black Fork to extend the material 5-year time limitation of its Certificate without properly applying for that amendment, it enabled Black Fork to illegally evade the new setback requirements that the Ohio General Assembly has expressly mandated are applicable to Black Fork's amended Certificate. Moreover, although the Board indicated in its decision granting the original Certificate that the project satisfied the setback

[10]The Board has yet to amend its regulations to reflect the set-back requirements in either Amended Substitute House Bill 59 or Amended Substitute House Bill 483. See O.A.C. 4906-17-08(C)(1)(c)(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.").

requirements then in effect, its failure to conduct an investigation on Black Fork's Motion, or any factual inquiry into the project as it now stands, precluded the Board from making any determination that the project, as amended, is in compliance with the now-applicable setback requirements. For these reasons, the Board's March 24 Entry is both unreasonable and unlawful.[11]

[11] In *In re Application of Black Fork Wind Energy, LLC,* No. 14-1591-EL-BGA (Aug. 27, 2015)the Board inexplicably allowed Black Fork to amend its original Certificate to permit two new turbine models without applying Amended Substitute House Bill 483's new setback requirements—or for that matter the setback requirements enacted a year earlier in Amended Substitute House Bill 59. The Board so ruled despite HB 483's command that its setbacks be applied to "*[a]ny amendment made to an existing certificate after the effective date,*" September 15, 2014, of the bill's amendments to R.C. 4906.201. R.C. 4906.201(B)(2). Notwithstanding the fact that Black Fork properly initiated Case No. 14-1591 by filing a document titled "Application to Amend the Black Fork Wind Energy Project Certificate" (the "Application")—in which Black Fork specifically indicated that, "[t]hrough this *application*, hereinafter referred to as *the 'Amendment,*' the Applicant is proposing to amend the certificate . . . ," Application at 2 (emphasis added)—the Board, *sua sponte*, concluded that the Application did not, in fact, seek a certificate amendment. The Board unilaterally decided that the requested certificate amendment was not an "amendment" despite the fact that (1) the plain language of Black Fork's Application requested a certificate amendment; (2) the Board created a new case on its docket for the Application, as required for certificate amendments; (3) Black Fork provided the statutorily-required notice for an amendment application; (4) Board staff performed the statutorily-required investigation for a certificate amendment; and (5) Board staff issued the statutorily-required written report for a certificate amendment. Incredibly, the Board's decision expressly acknowledges that it refused to treat the requested amendment as a certificate amendment for the very purpose of shielding the amendment from the new setback requirements that apply to it as a matter of controlling statutory law:

> Upon our deliberation of the specific request proposed by Black Fork in this application, as well as the recommendations set forth in the Staff Report, the Board finds that, based on the facts of this case, including the fact that this application does not relocate any turbines or provide any new or additional environmental impacts beyond the previously approved turbine models, *this application does not constitute an amendment under R.C. 4906.201(B)(2). Therefore, the Board concludes that the conditions required by our Order in the Black Fork Certification Case, including the setback requirements that adhere to the provisions in R.C. 4906.20(B)(2) that were applied to the turbines prior to September 29, 2013, continue to apply to the turbines for this project*.

In re Application of Black Fork Wind Energy, LLC, No. 14-1591-EL-BGA, slip op. at 7 (Aug. 27, 2015) (emphasis added).

III. CONCLUSION

For the foregoing reasons, Intervenors respectfully urge the Board to grant their Application for Rehearing and to deny Black Fork's motion for an extension of its certificate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Rehearing was served, via regular U.S. mail, postage prepaid, and email this 22nd day of April, 2016, upon all parties listed in the attached Exhibit A.

/s/ John F. Stock
John F. Stock

Exhibit A

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Summary: Application for Rehearing of Intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, John Warrington, Alan Price, Catherine Price electronically filed by John F Stock on behalf of Gary J. Biglin and Karel A. Davis and Brett A. Heffner and Margaret Rietschlin and John Warrington and Alan Price and Catherine Price