**BEFORE THE OHIO POWER SITING BOARD**

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

**BLACK FORK WIND ENERGY LLC'S MEMORANDUM CONTRA TO THE APPLICATION FOR REHEARING OF INTERVENORS GARY J. BIGLIN, KAREL A. DAVIS, BRETT A. HEFFNER, MARGARET RIETSCHLIN, JOHN WARRINGTON, ALAN PRICE AND CATHERINE PRICE**

## I. INTRODUCTION

Intervenors'[1] claims are without merit, have no basis in law, rule or regulation, and for the reasons set forth below should be denied. The Ohio Power Siting Board ("Board") reasonably and lawfully determined that there was good cause to extend the Certificate of Environmental Compatibility and Public Need (the "Certificate") issued to Black Fork Wind Energy, LLC ("Black Fork") in Case No. 10-2865-EL-BGN to construct a wind-powered electric generation facility (the "facility") in Crawford and Richland Counties, Ohio.

For decades, the Board has held that certificates for major utility facilities may be extended by motion for good cause. The Board has done so by construing the undefined term "amendment" in the full context of Revised Code Chapter 4906 and reasonably determined that amendment applications are required only for proposed changes to *how* the facility will be constructed and operated, not *when*. Intervenors' argument – that a certificate extension is an "amendment" – is wholly unsupported by any citation to a statute, a rule, a decision or even a dictionary definition. The Board should affirm its reasonable interpretation that "revisions to the time frames do not equate to an amendment to the certificate." *See In re Application of Buckeye Wind LLC,* 08-666-EL-BGN (*Buckeye Wind*), Entry on Rehearing at 6 ¶ 15 (Aug. 27, 2015).

[1] "Intervenors" are Gary J. Biglin, Margaret Rietschlin, John Warrington, Karel A. Davis, Brett A. Heffner, Alan Price and Catherine Price.

Intervenors' second and third arguments fail because they also assume that an amendment application was required. Intervenors' second argument is that absent a full Staff investigation of the criteria in R.C. 4906.06(A), there was no good cause to extend the Certificate. But because an amendment was not required, neither was a full investigation. The Board did find that extensive litigation delays and the temporary downturn in energy prices demonstrated good cause to extend the Certificate term. The Board, too, was monitoring the project as it does for all major utility facilities and was investigating a contemporaneous application to amend the Certificate to add eligible turbine models to the facility. There simply was no statutory requirement or practical need for a Staff investigation of the motion for extension.

Intervenors' third argument – that revised statutory setbacks have become applicable to certificate amendments after September 15, 2014 – also fails because extending the Certificate deadline was not an amendment under Chapter 4906. Moreover, in a contemporaneous proceeding between the same parties regarding the same Certificate, the Intervenors made the same argument and lost when the Board held that adding eligible turbine models for the facility is not an amendment subject to the revised setback within the meaning of R.C. 4906.201(B)(2). Intervenors are collaterally estopped from attempting to relitigate that issue.

Intervenors' application for rehearing should be denied.

## II. PERTINENT BACKGROUND

### A. A stipulated Certificate was issued with broad support

On March 10, 2011, Black Fork applied for a certificate of environmental compatibility to construct a wind-powered generation facility in Richland and Crawford Counties, Ohio. The facility is a significant undertaking, with an estimated cost between $290 million and $400 million and located on approximately 14,800 acres of private land leased from 150 participating

landowners. *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN (*Black Fork I*) Opinion, Order and Certificate at 3 & 15 (Jan. 23, 2012). The application was broadly supported as reflected in a stipulation filed by Black Fork, Board Staff, and the Ohio Farm Bureau Federation (with over 2,900 local member families[2]). A handful of intervenors – including Intervenors here – opposed the stipulation. After both a public hearing and three day evidentiary hearing, the Board granted the stipulation and issued the Certificate on January 23, 2012. Intervenors sought rehearing, which was denied. And Intervenors appealed to the Ohio Supreme Court, which affirmed this Board's decision on December 18, 2013.

**B. An application to amend the Certificate was filed, investigated and granted**

On September 12, 2014, Black Fork sought leave to amend the Certificate to add two eligible turbine models. In re Application of Black Fork Wind Energy LLC, Case No. 14-1591-EL-BGA Order on Certificate (Aug. 27, 2015). Intervenors opposed that request on a number of grounds, including that revised setbacks in R.C. 4906.201(B)(2) should be applied to the facility. Id. at 6-7. The Board conducted an investigation and granted the amendment application on August 27, 2015. Id. The Board specifically rejected Intervenors' argument that revised setbacks should apply, holding that the application did not seek to relocate turbines and did not increase impacts and was not an amendment within the meaning of R.C. 4906.201(B)(2). Id. Intervenors did not seek rehearing or appeal to the Ohio Supreme Court.

**C. The motion to extend the Certificate was filed and granted for good cause**

When Black Fork sought an amendment to add turbine models, it also moved for an extension of the Certificate. The motion demonstrated Black Fork's commitment to the facility, including significant lease payments to participating landowners and investment in the PJM interconnect, but identified two primary obstacles to construction and financing. First, there had

[2] *See Black Fork I*, Entry at ¶ 3 (May 3, 2011).

been more than two years of litigation over the Certificate and, second, there had been a downturn in the energy markets. Intervenors opposed the motion for a myriad of reasons which the Board has now carefully considered and rejected. Intervenors largely abandon these arguments in their application for rehearing. Instead, they offer new objections premised upon the meritless assumption that certificate deadlines may be extended only upon an amendment application and full Staff investigation.

## III. ARGUMENT

Intervenors acknowledge that if Black Fork commences construction of the facility by January 23, 2017, it may proceed to construct and operate the facility as approved. But, say Intervenors, if Black Fork needs any extension of the deadline to construct the exact same facility – whether by one year or one day – then it would require an application to amend the Certificate, a full Staff re-investigation of all statutory criteria under R.C. 4906.06(A), and new setbacks.

Intervenors point to no authority that would require such an irrational and unjust outcome. They offer no definition of the term "amendment" as used in R.C. 4906.06 and nothing in the Revised Code expressly defines an "amendment" within the meaning of R.C. 4906.06. In related Section 4906.07, however, the statute plainly suggests that an amendment is required only when there is a proposed change in the facility. That is how the Board has reasonably interpreted the statute for decades and why it reasonably and lawfully granted the motion and extended the Certificate.

### A. Standard of Review

The principal issue presented is whether the Board may hear requests to extend certificates on motion without need of an amendment application. The question requires interpretation of an undefined term used in a specialized statute administered by the Board.

"Words and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Id.* Thus, "long-standing administrative interpretations [of statutes] are entitled to special weight." *Cleveland v. Pub. Util. Comm.*, 67 Ohio St.2d 446, 451 (1981). Deference is given to the Board's statutory interpretations under Chapter 4906 based on its substantial expertise in specialized matters within the scope of its administrative responsibility. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St. 3d 530, 2004-Ohio-6767. Interpreting a statute, the Board should, "unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice or great inconvenience, as none of these can be presumed to have been within the legislative intent." *Moore v. Given*, 39 Ohio St. 661 (1884).

### B. The Board lawfully and reasonably determined that an extension of the certificate expiration date was not an amendment of the Certificate

Intervenors extended discussion of the requirements of an amendment application is a diversion. The question is not what is required of an amendment application but whether an amendment application is even required. The Board has interpreted the statutory requirements for amendments as encompassing changes to *how* a facility will be constructed and operated, not *when. Buckeye Wind,* Entry on Rehearing at 6 ¶ 15 (Aug. 27, 2015).

In response to the Board's long-standing interpretation, Intervenors offer only the false claim that "any change in the terms and conditions that are part of the Certificate is, by statutory definition, an amendment of the Certificate." Intervenors' App'n for Rehearing at 10. Intervenors cite no "statutory definition" of "an amendment" in Chapter 4906 or anywhere. Indeed, they offer no definition at all of an "amendment" – not from a statute, a rule, a decision or even a dictionary.

### 1. The Board reasonably requires an amendment application only for a proposed change to *how* a facility will be built or operated, not *when*

The General Assembly did not define what constitutes an amendment requiring an application or even define "amendment" at all. Read in context, however, the statutory scheme shows that not all changes constitute an amendment, or require an application to amend. The General Assembly's breakdown of which amendment applications require a hearing and which do not provides that:

> 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 alternatives set forth in the application.

R.C. 4906.07(B) (emphasis added).

The plain language of the statute shows that the General Assembly intended that an "amendment" involves a "proposed change in the facility." When a "proposed change in the facility" makes a substantial locational change or materially increases an environmental impact, a hearing will be required. *Id.* But when "the proposed change in the facility" will have other, lesser or no impacts, no hearing is needed. In either case, whether a hearing is required or not, the common thread of any "amendment" is a "proposed change in the facility." *Id.*

An extension of the expiration date does *not* change the facility. Rather, a change in time frame "relates to *when* [an applicant] should commence the construction of the project, not *how* it will construct, operate, or maintain the project." *Buckeye Wind*, Entry on Rehearing at 6 ¶ 15 (Aug. 27, 2015) (emphasis added). Accordingly, the Board has held that "revisions to the time frames do not equate to an amendment to the certificate." *Id.*

Intervenors make the misleading claim that the Board's interpretation of an "amendment" would require an application and investigation only if the proposed amendment would require a hearing under R.C. 4906.07(B). Intervenors' App'n for Rehearing at 15. Here again, Intervenors cite nothing. And here again, they cannot, since the Board has said nothing of the sort. The Board has made clear that whether a request is an amendment for purposes of R.C. 4906.06 depends on whether it proposes a change to *how* a facility is constructed, operated or maintained; "revisions to the time frames do not equate to an amendment to the certificate." *Buckeye Wind*, Entry on Rehearing at 6 ¶ 15 (Aug. 27, 2015). The Board's interpretation is just, efficient, lawful and reasonable.

**2. The Board's long-standing administrative practice of extending a certificate's term by motion should not be overturned**

For decades, the Board has considered extensions of certificate expiration dates by motion, and as not constituting an amendment of the certificate.[3] The Board's long-standing interpretation of its enabling statutes is entitled to considerable weight and should not be overturned. *See* R.C. 1.42; *Cleveland v. Pub. Util. Comm.*, 67 Ohio St.2d at 451.

[3] *See, e.g., In re Application of Summit Energy Storage, Inc.*, Case No. 89-1302-EL-BGN, Entry (Jun. 3, 1996) (granting a motion to extend a certificate by two years); *Id.*, Entry (Nov. 23, 1998) (granting a further extension, on motion, for an additional 40 months); *In re Application of Lawrence County Energy Center*, Case No. 01-369-EL-BGN, Entry (Nov. 20, 2006) (granting a motion to extend a certificate for 30 months); *In re Application of Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN, Entry (Mar. 20, 2006) (granting a motion to extend a certificate by $2^1/_2$ years); *Id.*, Entry (Jun. 2, 2008) (granting a second motion for extension for an additional 30 months); *In re Lima Energy Co.*, Case No. 00-513-EL-BGN, Entry (Jul. 30, 2012) (granting a motion to extend a certificate by 30 months); *In re Application of FDS Coke Plant, LLC*, Case No. 07-703-EL-BGN, Entry (Sep. 30, 2013) (granting a motion to extend the 5-year term of a certificate by 12 months); *In re Application of American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN, Entry (Aug. 25, 2014) (granting a motion to extend a certificate by 18 months); *In re Paulding Wind Farm LLC*, Case No. 09-980-EL-BGN, Entry (Nov. 24, 2014) (granting motion to extend a certificate by 30 months); *In re Application of JW Great Lakes Wind, LLC*, Case No. 09-277-EL-BGN, Entry (Mar. 9, 2015) (granting a motion to extend a certificate by 36 months).

### 3. Extending the five-year term does not contravene any statutory directive

Intervenors' contention that "the 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" is simply not true. Intervenors' App'n for Rehearing at 10. No section of the Revised Code has any such requirement, and none of the sections cited by Intervenors are even relevant. *See* id. (citing R.C. 4906.04 (providing that a major utility facility may not be constructed without a certificate), 4906.06(E) (regarding notice and form of an amendment application) and O.A.C. 4906-3-11(B) (regarding submission and review of amendment applications)).[4] Rather, the five-year term was imposed by the Board here as a matter of practice, as it is in all major facility cases. It is not required by statute.

## C. The Board lawfully and reasonably found good cause to extend the Certificate expiration date

There is no merit to Intervenors' second argument that the requested extension was not supported by good cause. The grounds supporting the motion were more than adequate to support the Board's Order extending the term of the certificate. The Certificate application was under the cloud of litigation for more than 2½ years – first before the Board and then in the Ohio Supreme Court. At the same time, the energy market in Ohio was temporarily but dramatically affected by an influx of natural gas and a broader economic downturn. Despite delays, Black Fork remained committed to developing the facility, incurring substantial cost to develop its PJM

[4] Perhaps Intervenors intended to cite R.C. 4906.06(A). If so, their claim that a 5-year term is statutory would still be false. R.C. 4906.06(A) provides that an *application for a certificate* "shall be *filed* not * * * more than five years prior to the *planned date* of commencement of construction." Nothing in that section requires a five-year term be written into the certificate. Instead, the five-year period in R.C. 4906.06(A) relates to the planned date to commence construction at the time the application is filed. When Black Fork filed its application in March 2011, it planned to commence construction in March 2012, fully satisfying the statutory requirement under 4906.06(A). *Black Fork I*, Application at 16 (Mar. 10, 2011).

interconnect[5] and continuing to make lease payments to approximately 150 participating landowners – none of whom object to the extension.

These facts are not disputed by Intervenors. Nor are they novel or unusual problems facing developers of major utility facilities. In a number of cases, the Board has applied its expertise and industry understanding and granted motions to extend certificates for similar reasons.[6] The Board's decision to extend the term of the certificate is supported by good cause and consistent with prior Board decisions.

Intervenors' argument against the Board's finding of good cause boils down to its allegation that a Staff investigation was required. Such an investigation was neither required nor necessary. Because the extension was properly sought by motion, and not amendment, there was no requirement that the Staff conduct a full investigation. Neither was an investigation necessary. The Board was aware of circumstances and potential impacts of the facility when the extension was requested. At the same time the Board was considering the motion for extension, the Staff was investigating Black Fork's application to amend the Certificate to add eligible turbines. And, as a matter of practice, "the Board tracks the progress of the projects. Based on this tracking process, if there is a need for an amendment, the Board would require an applicant

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[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 which has been remitted to PJM.

[6] *See, e.g., In re Application of Summit Energy Storage, Inc.*, Case No. 89-1302-EL-BGN, Entry at 1, ¶ 3 (Jun. 3, 1996) (certificate extended because purchase power agreement contract negotiations with utilities were ongoing); *Id*., Entry at 1, ¶ 4 (Nov. 23, 1998) (certificate further extended due to a "climate of uncertainty surrounding major utilities"); *In re Application of Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN, Entry at 1, ¶ 3 (Jun. 2, 2008) (certificate extended because it was still in the process of securing financing); *In re Lima Energy Co*., Case No. 00-513-EL-BGN, Entry (Jul. 30, 2012) (extension granted because of the withdrawal of financial support of the technology to be used in the project); *In re Application of American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN, Entry at 1, ¶ 3 (Aug. 25, 2014) (extension granted due to unexpected increases in capital costs); *In re Paulding Wind Farm LLC*, Case 09-980-EL-BGN, Entry (Nov. 24, 2014) (extension granted to due market changes and suppressed electricity prices); *In re Application of JW Great Lakes Wind, LLC*, Case No. 09-277-EL-BGN, Entry at 2, ¶ 4 (Mar. 9, 2015) (extension granted because of market changes and suppressed electricity prices).

to file an appropriate application." *Buckeye Wind*, Entry on Rehearing at 6 ¶ 23 (Aug. 27, 2015). Here, the Board specifically found that the extension "request does not encompass any change that potentially affects either the environmental impact of the facility or that potentially affects the facility's location." *Black Fork I*, Order ¶ 11 (Mar. 24, 2016).

Intervenors' argument that changes in the energy market require reexamination of the public interest and need is little more than a gambit to relitigate the Certificate. While several serial Intervenors opposed the extension, it was *not opposed* by the Board Staff, the Ohio Farm Bureau Federation, the 150 participating landowners, or the county commissioners of Crawford and Richland Counties. And, while the General Assembly did freeze *increases* in Ohio's renewable energy mandates, it did not eliminate the mandates, which remain in the Revised Code with anticipated increases beginning in 2017 and thereafter. R.C. 4928.64(B)(2).

Finally, there is no merit to Intervenors' argument that unspecified, speculative changes in technology require a full Staff investigation of the extension request. Intervenors are simply speculating that there is relevant new technology, that any such technology can or should be used in the facility, or that the myriad substantive conditions of the Certificate do not adequately allow for mitigation of any facility impacts.[7]

Intervenors' application for rehearing raises only a red herring and, if granted, would upset decades of just, efficient, lawful and reasonable decisions interpreting an undefined term in a specialized statutory scheme administered by the Board. Intervenors' application for rehearing should be denied.

[7] *See, e.g.*, Order at 347-80 (Jan. 23, 2012 ), including Conditions 3, 7, 8, 10, 11, 13, 18, 25, 38, 41, 46, 49, 50, 51, 54-55, 67 and 74.

### D. Extending the Black Fork Certificate does not require application of revised setbacks under R.C. 4906.201(B)(2)

Intervenors final argument is that the Certificate extension should have been an amendment that triggered application of new setbacks effective September 15, 2014, three years after the filing of the application. There are serious constitutional issues with Intervenors' argument.[8] But constitutional issues notwithstanding, Intervenors make no factual or legal showing that the Board erred in extending the Certificate without applying the revised setbacks.

Because the extension of time is not an amendment within the meaning of R.C. 4906.06, there was no basis to apply or analyze the new setbacks relative to the facility. Indeed, the Board already has rejected Intervenors' attempt to apply the revised setbacks to a change in the turbine model. As Intervenors note, they objected to Black Fork's application to amend the Certificate to add eligible turbine models by, among other things, claiming that the revised setbacks should apply. The Board rejected that argument. *In re Black Fork*, Case No. 14-1591-EL-BGA, Order at 7 (Aug. 27, 2015).

Intervenors did not seek rehearing of the Board's Order. Nor did they take an appeal to the Ohio Supreme Court. Because the application of R.C. 4906.201(B)(2) to the Black Fork facility has been "actually and necessarily litigated and determined" in a prior administrative proceeding, "the doctrine of collateral estoppel may be used to bar litigation of issues" in this proceeding. *See In re Malloy*, Case No. 11-1947-EL-CSS, Entry (July 6, 2011) (citing *New*

[8] The new setback requirements were established by Amended Substitute House Bill 483 ("HB 483"), codified at Section 4906.201 of the Revised Code. They do not apply retrospectively, and moreover, the Board does not have the authority to apply the new setbacks retroactively. R.C. 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.

*Winchester Gardens, Ltd. v. Franklin Cty. Brd. Of Revision, 80 Ohio St. 3d 36 (1997)* and *Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St. 2d 133 (1980)* (syllabus)).

Because the extension of the Certificate does not change the facility and does not relocate turbines or provide new or additional environmental impacts, it is not an amendment within R.C. 4906.06 or R.C. 4906.201(B)(2). Intervenors have made no showing that it was unreasonable or unlawful for the Board to extend the certificate.

## IV. CONCLUSION

The Board's Order extending Black Fork's Certificate is supported by good cause and Board precedent. Intervenors' attempt to upset decades of just, efficient, lawful and reasonable decisions by the Board is not supported by any statutory dictate or term. To the contrary, both common sense and the statutory context support the Board's long-standing determination that changes in timing only are not amendments within the meaning of R.C. 4906.06. Likewise, the Board's finding that litigation and market declines provide good cause to extend the Certificate is supported by the record and numerous prior decisions. And, because the Certificate extension is not an amendment, the Board reasonably declined to apply the revised setbacks effective in September 2014 to the facility. For these reasons and those more fully stated above, the Board should deny Intervenors' application for rehearing.

Respectfully submitted,

s/ William A. Sieck
Michael J. Settineri (0073369)
Gretchen L. Petrucci (0046608)
William A. Sieck (0071813)
Andrew P. Guran (0090649)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5462

(614) 719-5146
mjsettineri@vorys.com
glpetrucci@vorys.com
wasieck@vorys.com
apguran@vorys.com
Attorneys for Black Fork Wind Energy, LLC

## CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of the public version of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served by regular U.S. Mail, postage prepaid, upon the persons below this 2nd day of May, 2016.

s/ William A. Sieck
William A. Sieck

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| Debra Bauer and Bradley Bauer<br>7298 Remlinger Road<br>Crestline, Ohio 44827-9775 | | John F. Stock<br>Mark D. Tucker<br>Benesch, Friedlander, Coplan & Arnoff LLP<br>41 South High Street, 26th Floor<br>Columbus, Ohio 43215 |
| | | |
| Carol and Loren Gledhill<br>7256 Remlinger Road<br>Crestline, Ohio 44827-9775 | | Orla Collier III<br>Benesch, Friedlander, Coplan & Arnoff LLP<br>41 South High Street, 26th Floor<br>Columbus, Ohio 43215 |
| | | |
| Grover Reynolds<br>7179 Remlinger Road<br>Crestline, Ohio 44827-9775 | | John Jones<br>Assistant Attorneys General<br>Public Utilities Section<br>180 E. Broad Street, 6th Floor<br>Columbus, OH 43215 |
| | | |
| Mary Studer<br>6716 Remlinger Road<br>Crestline, Ohio 44827-9775 | | Chad A. Endsley<br>Ohio Farm Bureau Federation<br>280 North High Street<br>PO Box 182383<br>Columbus, Ohio 43218 |
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Summary: Memorandum Memorandum contra of Black Fork Wind Energy LLC to the application for rehearing by Gary Biglin, Karel Davis, Brett Heffner, Margaret Rietschlin, John Warrington, Alan Price and Catherine Price electronically filed by Mr. William A Sieck on behalf of Black Fork Wind Energy LLC