

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Black Fork Wind Energy, LCC to)	
Amend Its Certificate Issued in)	Case No. 17-1148-EL-BGA
Case No. 10-2865-EL-BGN)	

**PETITION TO INTERVENE OF GARY J. BIGLIN, KAREL A. DAVIS, BRETT A.
HEFFNER, ALAN PRICE, CATHERINE PRICE, MARGARET RIETSCHLIN, AND
JOHN WARRINGTON,**

Pursuant to R.C. 4906.08(A)(3) and O.A.C. 4906-2-12, Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington hereby petition the Ohio Power Siting Board for an order granting their intervention as parties in this proceeding.

This Petition to Intervene is supported by the Memorandum In Support set forth below.

Respectfully submitted,

/s/ John F. Stock

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MEMORANDUM IN SUPPORT OF
PETITION TO INTERVENE

I. INTRODUCTION

Black Fork Wind Energy, LLC (“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, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington (together, the “Intervenors”). *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 granting the requested certificate (the “Certificate”). *In re Application of Black Fork Wind Energy, LCC*, No. 10-2865-EL-BGN (Jan. 23, 2012). The Certificate required Black Fork to commence “a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.” *Id.* at 50, ¶70. On December 18, 2013, the Ohio 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, Black Fork filed an application to amend its Certificate to add two new turbine models for use on the project. That application was given a new case number, No. 14-1591-EL-BGA. On August 27, 2015, the Board granted the motions to intervene of, *inter alia*, Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, and John Warrington, and approved the application for amendment. *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA (Aug. 27, 2015).

Also on September 12, 2014, Black Fork filed a document in Case No. 10-2865-EL-BGN titled “Motion for Extension of Certificate” (“Motion”), requesting the Board to extend the term of its Certificate, *i.e.*, the time within which it must commence a continuous course of construction, from January 23, 2017 to January 23, 2019. The Board granted that motion, *In re Application of Black Fork Wind Energy, LCC*, No. 10-2865-EL-BGN (March 24, 2016), and subsequently denied the Intervenor’s Application for Rehearing. *In re Application of Black Fork Wind Energy, LCC*, No. 10-2865-EL-BGN (Feb. 2, 2017). An appeal of that decision is currently pending before the Ohio Supreme Court, Case No. 17-0412.

Black Fork has now filed the present application for an amendment to the Certificate to permit the use a higher capacity turbine, and to extend the Certificate’s term by another year until January 23, 2020.¹ The Intervenor—all of whom sought and were granted intervention in the original proceeding, Case No. 10-2865-EL-BGN, and five of whom sought and were granted intervention in the prior amendment proceeding, Case No. 14-1591-EL-BGA—now ask the Board’s permission to intervene in this new proceeding.

II. ARGUMENT

A. Intervenor’s Protected Interests

Intervenor Gary J. Bilgin is a non-participating landowner and family farmer in Richland County’s Sharon Township. His farm abuts property leased for the Project on three sides. Bilgin sought intervention with regard to both the original application (No. 10-2865-EL-BGN) and Black Fork’s first application to amend its certificate (No. 14-1591-EL-BGA). He was granted intervention in both cases. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-

¹In its application, Black Fork “recognizes the Board’s well-established practice of granting extensions by motion, however, given the pending litigation over the prior extension grant, the Applicant is requesting the Certificate extension through this application.” Application for Amendment at 7.

BGN, slip op. at 3-4, ¶11 (Aug. 30, 2011); *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 3 (Aug. 27, 2015). With regard to Bilgin, the Administrative Law Judge (“ALJ”) stated:

The nature and extent of Mr. Biglin's interest in this case is individual and direct. It is amply demonstrated by the facts that: he has been offered contract claims with regard to this project by Element Power; that the applicant has leased property on three sides of his farm; and that the application refers to a phase of the project that could entirely encompass his property. On this basis, the ALJ finds that Mr. Biglin meets the requirements for intervention and his motion to intervene shall be granted.

In re Application of Black Fork Wind Energy, LLC, No. 10-2865-EL-BGN, slip op. at 3-4, ¶11 (Aug. 30, 2011).

Intervenor Karel A. Davis is a non-participating landowner in Richland County’s Plymouth Township, within the boundaries of the proposed project. Davis sought intervention with regard to both the original application and Black Fork’s first application to amend its certificate. She was granted intervention in both cases. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 4, ¶12 (Aug. 30, 2011); *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 3 (Aug. 27, 2015). With regard to Davis, the ALJ stated:

[S]he and her husband live within the boundaries of the proposed project, and that, as an intervenor, she wishes to represent the interests of “many non-contract land owners within the project area.” Based on the fact that she resides within the boundaries of the proposed project, which the company has failed to address in its response to Ms. Davis’ motion to intervene, the ALJ finds that Ms. Davis should be permitted to intervene on her own behalf; accordingly, her motion to intervene shall be granted.

In re Application of Black Fork Wind Energy, LLC, No. 10-2865-EL-BGN, slip op. at 4, ¶12 (Aug. 30, 2011).

Intervenor Brett A. Heffner is a non-participating landowner in Richland County, near the proposed project. Heffner sought intervention with regard to both the original application and Black Fork's first application to amend its certificate. He was granted intervention in both cases. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 3, ¶9 (Aug. 30, 2011); *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 3 (Aug. 27, 2015). With regard to Heffner, the ALJ stated that "Mr. Heffner's motion to intervene meets the requirements for intervention set forth in Section 4906.08(A)(2), Revised Code, and Rule 4906-7-04(A)(1), O.A.C [now, O.A.C. §4906-2-12]." *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 3, ¶9 (Aug. 30, 2011).

Intervenors Alan and Catherine Price are a non-participating residents and landowners in Crawford County's Vernon Township, near the proposed project. The Prices sought intervention with regard to the original application, and their motion was granted. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 2-3, ¶7 (Aug. 30, 2011).² With regard to the Prices, the ALJ stated that their motions "m[et] the requirements for intervention set forth in Section 4906.08, Revised Code, and Rule 4906-7-04(A)(2), O.A.C. [now, O.A.C. §4906-2-12]." *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 2, ¶7 (Aug. 30, 2011).

Intervenor Margaret Rietschlin is a non-participating resident and landowner in Crawford County's Vernon Township, near the proposed project. She is President of Rietschlin Construction, Inc., a family-owned construction company that is operated from facilities on her property near the proposed project. Rietschlin sought intervention with regard to both the original application and Black Fork's first application to amend its certificate. She was granted

²The Prices did not seek intervention in the prior amendment proceeding, Case No. 14-1591-EL-BGA.

intervention in both cases. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 2-3, ¶9 (Aug. 30, 2011); *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 3 (Aug. 27, 2015). With regard to Rietschlin, the ALJ stated that her motion “m[et] the requirements for intervention set forth in Section 4906.08, Revised Code, and Rule 4906-7-04(A)(2), O.AC. [now, O.A.C. §4906-2-12].” *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 2, ¶7 (Aug. 30, 2011).

Intervenor John Warrington is a non-participating resident and landowner in Crawford County’s Vernon Township, near the proposed project. His residence is located near the proposed placement of at least one turbine, and his property abuts property leased for the project to the north and west. Warrington sought intervention with regard to both the original application and Black Fork’s first application to amend its certificate. He was granted intervention in both cases. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 2-3, ¶9 (Aug. 30, 2011); *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 3 (Aug. 27, 2015). With regard to Warrington, the ALJ stated that his motion “m[et] the requirements for intervention set forth in Section 4906.08, Revised Code, and Rule 4906-7-04(A)(2), O.AC. [now, O.A.C. §4906-2-12].” *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN, slip op. at 2, ¶7 (Aug. 30, 2011).

B. Intervention Standard

The Intervenors further submit that they meet all requirements for intervention in these proceedings as set forth in R.C. 4903.08(A) and O.A.C. 4906-2-12(B)(1). The Board may consider the following when determining petitions to intervene:

- (a) The nature and extent of the person’s interest;
- (b) The extent to which the person’s interest is represented by existing parties;

- (c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and
- (d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

O.A.C. 4906-2-12(B)(1). See also *In the Matter of the Application of Clean Energy Future—Lordstown, LLC*, No. 14-2322-EL-BGN, slip op. at 2, ¶5 (Ohio Power Siting Bd. July 28, 2015) (setting forth factors the Board considers in resolving motions to intervene); *In the Matter of the Application of Columbus Southern Power Co.*, No. 01-2153-EL-BTX, slip op. at 3, ¶8 (Ohio Power Siting Bd. Jan. 29, 2004) (same). The Ohio Supreme Court has interpreted this rule as providing that “[a]ll interested parties may intervene in [Board] proceedings upon a showing of good cause.” *State, ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St.3d 705, 708 (1995) (citation omitted).

C. Intervenors Are Entitled To Intervene

1. Intervenors Have Real And Substantial Interests In This Matter

Each of the Intervenors has a real and substantial interest in this matter. All reside within the project area, and most own and reside on property that abuts the actual project site. They have a real and substantial interest in ensuring that the proposed amendment—the substitution of a turbine with increased capacity over those specified in the project Certificate, *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN (Jan. 23, 2012), and the amendment to the Certificate, *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA (Aug. 27, 2015)—does not have additional adverse impacts on their land, residences, roads, communities, and lives.

Intervenors also have an interest in ensuring the proper application of setback requirements made applicable to this project through Amended Substitute House Bill

(“Am.Sub.H.B.”) 483 (effective September 15, 2014). When first enacted as part of Am.Sub.H.B. 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).

As noted in the Certificate, the Board, by rule, applied these setback requirements to all wind projects within its jurisdiction. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN (Jan. 23, 2012) (citing former O.A.C. §4906-17-08(C)(1)(c)). These were the setback requirements in effect when the Board issued the original Certificate to Black Fork on January 23, 2012.

R.C. 4906.20 was amended in Am.Sub.H.B. 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, Am.Sub.H.B. 59 enacted new section R.C. 4906.201, which extended the setback requirements to wind farms generating fifty megawatts or more, such as the Black Fork wind farm certified by the Board:

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 Am.Sub.H.B. 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). 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 *from the property line of the nearest adjacent property*.

The Board has previously impermissibly amended Black Fork’s Certificate after September 15, 2014, without requiring adherence to Am.Sub.H.B. 483’s setback requirements. *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 7 (Aug. 27, 2015). It has also allowed the “amendment” of the material 5-year time limitation of its Certificate—without properly requiring an application for an amendment—by extending the term of the original certificate by two years. *In re Application of Black Fork Wind Energy, LLC*, No. 10-2865-EL-BGN (March 24, 2016). As part of its current application for an amendment, Black Fork seeks an additional one-year extension until January 23, 2020 to commence construction. This additional extension completely obliterates the statutory command that “[t]he application shall be filed not more than five years prior to the planned date of commencement of construction.” R.C. 4906.06(A). Although, for good cause shown, “[t]he five-year period may be waived by the board,” *Id.*, the Board has indicated that the time periods it routinely includes as conditions in the certificates serve important policy objectives:

[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).

As noted above, the Board has previously allowed each of the Intervenor in this case to intervene in the prior proceedings dealing with project. Those intervention rulings are entirely consistent with Board precedent. The Board has granted numerous petitions to intervene filed by property owners whose property would be affected by a proposed project. See, e.g., *In the Matter of the Application of Buckeye Wind LLC*, No. 13-360-EL-BGA, slip op. at 5-6, ¶¶12-14 (Ohio Power Siting Bd. Nov. 21, 2013) (granting motion of proposed intervenors who claimed that the wind project would have “potential impacts” on “their residences, land, roads, and community”). See also *In the Matter of the Application of Champaign Wind, LLC*, No. 12-160-EL-BGN, slip op. 3-6, ¶¶19-23, 25 (Ohio Power Siting Bd. Aug. 2, 2012) (granting motion to intervene of “property owners who own real estate and reside within the footprint of the” wind turbine project and who “have a direct and substantial interest in [the] matter, in light of the potential visual, aesthetic, safety, and nuisance impacts of the wind project on their residences, land, and community”); *In the Matter of the Application of American Transmission Systems, Inc.*, No. 12-1636-EL-BTX, slip op. at 1-2, ¶¶3-6 (Ohio Power Siting Bd. May 21, 2014) (granting motions to intervene of property owner along the possible alternate route of a proposed transmission line).

2. Intervenor’s Interests Are Not Already Adequately Represented

To Intervenor’s knowledge, no other non-participating residents and property owners have to date sought to intervene in these proceedings. The interests of such persons—and

specifically, the interests of the individual Intervenor—is not, therefore, adequately represented in these proceedings.

3. *Intervenor Will Contribute To A Just And Expeditious Resolution Of Issues*

Intervenor will contribute to a just and expeditious resolution of the issues in these proceedings. Intervenor has a unique, independent perspective on the issues outlined above to offer the Board. Their participation is crucial to an informed, balanced, and fair disposition of the interests of *all* parties who will be affected by the Board's disposition of these proceedings.

4. *Intervenor's Participation Will Neither Delay These Proceedings Nor Prejudice Parties*

Just as they have in prior proceedings dealing with this project, Intervenor will neither unduly delay these proceedings nor unjustly prejudice any party. The Intervenor will abide by all Board deadlines in these cases and present their information in a clear and succinct manner. No date has been set for any hearing nor has any specific deadline been established by the Board in these proceedings. This petition to intervene is timely and will not unduly prejudice any existing party.

III. CONCLUSION

For the foregoing reasons, Intervenor requests the Board to grant this Petition To Intervene.

Respectfully submitted,

/s/ John F. Stock

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion To Intervene was served, via regular U.S. mail, postage prepaid, and email this 7th day of July, 2017, upon all parties listed in the attached Exhibit A.

/s/ John F. Stock _____
John F. Stock

EXHIBIT A

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Case No(s). 17-1148-EL-BGA

Summary: Petition TO INTERVENE OF GARY J. BIGLIN, KAREL A. DAVIS, BRETT A. HEFFNER, ALAN PRICE, CATHERINE PRICE, MARGARET RIETSCHLIN, AND JOHN WARRINGTON electronically filed by John F Stock on behalf of Gary J. Biglin and Davis, Karel A. and Heffner, Brett A. and Price, Alan and Price, Catherine and Warrington, John and Rietschlin, Margaret