

**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)	

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

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, Alan and Catherine Price, Margaret Rietschlin, and John Warrington (together, the “Intervenors”) hereby apply for rehearing of the Board’s December 7, 2017 Order on Certificate (“Order”) in this matter granting Black Fork Wind Energy, LCC’s (“Black Fork”) application to amend its January 23, 2012 Certificate of Environmental Compatibility and Public Need (“Certificate”), see *In re Application of Black Fork Wind Energy, LCC*, No. 10-2865-EL-BGN (Jan. 23, 2012), *aff’d*, 138 Ohio St.3d 43, 2013-Ohio-5478, by increasing the capacity for the Vestas V110 2.2 turbine models for the project and granting a one-year extension of the Certificate beyond the two-year extension previously granted—to January 23, 2020.¹ The specific grounds for this Application for Rehearing are as follows:

(1) The Order is unreasonable and unlawful to the extent it impermissibly restricts the scope of Intervenors’ intervention, and in particular, to the extent it purports to preclude

¹The prior two-year extension was granted by the Board upon Black Fork’s motion. See *In re Application of Black Fork Wind Energy, LCC*, No. 10-2865-EL-BGN (March 24, 2016). An appeal of that order, and of the order denying rehearing, see *In re Application of Black Fork Wind Energy, LCC*, No. 10-2865-EL-BGN (Feb. 2, 2017), is now pending before the Ohio Supreme Court, Case No. 17-412.

Intervenors from addressing the issues of the setback requirements applicable to the amendment of Black Fork's Certificate and the extension of the term of the Certificate.

(2) The Order is unreasonable and unlawful because it illegally effects Black Fork's evasion of the now-applicable setback requirements of R.C. 4906.20 and R.C. 4906.201.

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

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

Respectfully submitted,

/s/ John F. Stock

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MEMORANDUM IN SUPPORT

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, 2011.² 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, and on August 27, 2015, the Board approved the application for amendment. *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA (Aug. 27, 2015).³ Also on September 12, 2014, Black Fork filed a “Motion for Extension of Certificate” in Case No. 10-2865-EL-BGN, requesting the Board to extend the term of its Certificate, *i.e.*, the time within which it

²On 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).

³In the same order, the Board granted the motions to intervene of, *inter alia*, Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, and John Warrington. *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 3 (Aug. 27, 2015).

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 those orders is currently pending before the Ohio Supreme Court, Case No. 17-0412.

On June 6, 2017, Black Fork filed the present “Application to *Amend* the Black Fork Wind Energy, LLC Certificate Issued January 23, 2012 in Case No. 10-2865-EL-BGN” (“Application to Amend”) (emphasis added) to permit the use of a higher-capacity turbine, and to extend the Certificate’s term by another year, until January 23, 2020.⁴ The Intervenor’s—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—sought the Board’s permission to intervene in this new proceeding.

On December 7, 2017, the Board issued an “Order on Certificate” in which it ruled that Black Fork’s “application be approved.” *In re Application of Black Fork Wind Energy, LLC*, No. 17-1148-EL-BGA, slip op. at 9, ¶39 (Dec. 7, 2017) (“Order”). Curiously, even though Black Fork properly styled its application as an “Application to Amend,” the words “amend” and “amendment” appear nowhere in the Board’s Order.

In the same Order, the Board granted Intervenor’s Petition to Intervene, but only “to the extent they address Black Fork’s request for a capacity increase to the Vestas V110 turbine

⁴In 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 to Amend at 7.

model for this project. * * * The motions to intervene should be denied, to the extent the Intervenor request intervention for the purpose of addressing *irrelevant matters outside of this qualification* and the identified scope of this application.” *In re Application of Black Fork Wind Energy, LLC*, No. 17-1148-EL-BGA, slip op. at 4, ¶17 (Dec. 7, 2017) (emphasis added). The Board failed to address—or even mention—Intervenor’s assertion that the amendment of Black Fork’s Certificate requires the application of the “new” setback requirements. See R.C. 4906.201(B)(2) (as amended in Am.Sub.H.B. 483, effective Sep. 15, 2014) (“*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.”) (emphasis added). See also R.C. 4906.20(B)(2)(b)(ii).

It is from the Board’s December 7, 2017 Order that Intervenor now seek rehearing.

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.”⁵ 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(B) (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 [Board] may abrogate or modify the same; otherwise such order shall be affirmed.” R.C. 4903.10(B) (emphasis added).

Intervenors contend that the Board’s Order 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 ORDER IS UNREASONABLE AND UNLAWFUL TO THE EXTENT IT PURPORTS TO PRECLUDE INTERVENORS FROM ADDRESSING THE ISSUES OF THE SETBACK REQUIREMENTS APPLICABLE TO THE AMENDMENT OF BLACK FORK’S CERTIFICATE AND THE EXTENSION OF THE TERM OF THE CERTIFICATE.

As the Board recognized by granting their Petition to Intervene, 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 amendments proposed by Black Fork do not have additional adverse impacts

⁵A “party” includes “[a]ny person granted leave to intervene” O.A.C. 4906-2-11(A)(3). See also R.C. 4906.08(B).

on their land, residences, roads, communities, and lives. Foremost among their interests is 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) so as to protect their right to enjoy, use and dispose of their property.

Despite the issue of the applicable setback being Intervenors’ primary contention in their Petition to Intervene, the Board completely ignored the issue in its Order. As adjacent and nearby property owners, Intervenors clearly have a protectable interest in the proper application of the pertinent setback requirements. See *Moore v. City of Middletown*, 133 Ohio St.3d 55, 63-66, 2012-Ohio-3897 at ¶¶33-43 (adjacent property owners have standing to challenge zoning actions that may affect their rights to enjoy, use, and dispose of their property). 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”). Any reading of the Board’s Order preventing Intervenors from addressing this issue is, therefore, unreasonable and unlawful.

Moreover, as adjacent and nearby property owners, Intervenors also have an interest in ensuring that the time within which Black Fork must commence construction of the project is reasonable so as to not unduly burden their property for an extended period of time. As noted above, the original application in this case was filed in March 2011. By its December 7, 2017 Order, the Board has now allowed Black Fork to delay the commencement of construction to January 23, 2020, nearly nine years after the filing of the original application. Any reading of

the Board's Order preventing Intervenors from also addressing this issue is, therefore, unreasonable and unlawful.

C. THE ORDER IS UNREASONABLE AND UNLAWFUL BECAUSE IT ILLEGALLY EFFECTS BLACK FORK'S EVASION OF THE NOW-APPLICABLE SETBACK REQUIREMENTS OF R.C. 4906.20 AND R.C. 4906.201.

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 the 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). See also R.C. 4906.20(B)(2)(b)(ii). 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.⁶

⁶As made clear by the Staff Report of Investigation filed with the Board in this case on November 13, 2017, the project complies with the setback requirements in effect at the time the original Certificate was issued, but not the setback requirements of Am.Sub.H.B. 483, the existence of which staff completely ignores:

Applicable to the Original Certificate, 750 feet in horizontal distance from the tip of the turbine's nearest blade at 90 degrees to the exterior of the nearest, habitable residential structure is the minimum distance a turbine is authorized to be located in proximity to a habitable structure on an adjacent property, without property owner approval. Likewise, applicable to the Original Certificate, without property owner approval, the minimum property line setback is 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.

* * *

The Applicant states that it has applied a 1,250 feet self-imposed setback from residential structures and that all turbine locations as currently certificated comply with this self-imposed residential structure setback. Staff notes, consistent with the Original Certificate, if the location of a wind turbine does not meet the required setback, it may not be constructed unless the Applicant secures appropriate executed waiver(s) of the minimum setback requirement.

The Board has previously amended Black Fork's Certificate to add two new turbine models for use on the project. *In re Application of Black Fork Wind Energy, LLC*, No. 14-1591-EL-BGA, slip op. at 7 (Aug. 27, 2015). And, upon Black Fork's "motion," the Board has 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).⁷ As part of its current application for an amendment, Black Fork sought and was given the right to again substitute new turbine models and granted an additional one-year extension until January 23, 2020 to commence construction.

All of these Board actions are "amendments" to Black Fork's original certificate, and all occurred after September 15, 2014, requiring application of Am.Sub.H.B. 483's setback requirements. Yet the Board has steadfastly refused to apply those setback requirements. Indeed, as noted above, despite the setback requirements being discussed at length by the Intervenor, the Board completely ignored the issue in its Order, failing to even mention the word "setback". The Board must, therefore, reconsider its Order and compel adherence to the now applicable setbacks. See *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 458, 2012-Ohio-878 at ¶37 (Board does not have "a free pass to avoid dealing with controversial or complex issues or to resolve issues without public participation or judicial review"). See also

Staff Report of Investigation at 3-4. The Board does not include a description of this portion of the Staff Report of Investigation in the "Summary of Staff Report" included in the Order. See *In re Application of Black Fork Wind Energy, LLC*, No. 17-1148-EL-BGA, slip op. at 5-6, ¶¶20-21 (Dec. 7, 2017). Indeed, like the words "amend" and "amendment," the word "setback" appears nowhere in the Board's Order.

⁷As noted above, an appeal of the Board's decision extending the Certificate, and the subsequent decision denying rehearing, is now pending before the Ohio Supreme Court, Case No. 17-0412.

In the Matter of the Application of 6011 Greenwich Windpark, LLC, No. 13-990-EL-BGN, slip op. at 14, ¶36 (Aug. 27, 2015) (Board lacks authority to unilaterally waive setback requirements).

D. THE ORDER IS UNREASONABLE AND UNLAWFUL BECAUSE BLACK FORK HAS FAILED TO SHOW GOOD CAUSE FOR AN EXTENSION OF THE CERTIFICATE.

As noted, Black Fork sought and was granted an additional one-year extension, until January 23, 2020, to commence a continuous course of 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).

In this case, the Board “finds that Black Fork has established good cause for a one-year extension of the certificate in this matter,” *In re Application of Black Fork Wind Energy, LLC*, No. 17-1148-EL-BGA, slip op. at 8, ¶28 (Dec. 7, 2017), but the Board fails to indicate what constitutes Black Fork’s “good cause” other than to state that it is “cognizant of similar

extensions granted to other wind facility projects” *Id.* In its application for amendment, Black Fork suggests that “good cause” exists because “uncertainty faces renewable project development in Ohio as a result of pending legislation on Ohio’s renewable portfolio requirements,” and “pending litigation will likely lead to continued delays to the Project and future delays could occur if litigation takes place over any future amendment to the Project.” Application for Amendment at 10.

The passage of nearly six years 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 acknowledged in its application for amendment that “the Project [has been] delayed due to changes in the energy market in Ohio, including the increased production of natural gas from the Utica and Marcellus shale plays.” Application for Amendment at 8. And, as noted above, it has acknowledged the “uncertainty” facing the development of renewable energy projects in Ohio; and in past proceedings before this Board, it conceded that lower energy prices may be insufficient “to support the construction and financing of the project.” Motion for Extension of Certificate at 3, Case No. 10-2865-EL-BGN (filed Sep. 12, 2014). These acknowledgements of substantial market changes demonstrate that the project will no longer “serve the public interest, convenience, and necessity,” or at the very least, call that determination into question. The Board’s complete failure to address this issue, therefore, mandates rehearing.

III. CONCLUSION

For the foregoing reasons, Intervenor respectfully request the Board to grant this Application for Rehearing.

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 Application for Rehearing was served, via regular U.S. mail, postage prepaid, and email this 27th day of December, 2017, upon all parties listed in the attached Exhibit A.

/s/ John F. Stock
John F. Stock

EXHIBIT A

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