BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of Black Fork Wind Energy, LLC for an Amendment to its Certificate Issued in Case No. 10-2865-EL-BGN	**)** **)** **)** **)**	**Case No. 17-1148-EL-BGA**

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

I. INTRODUCTION

The Board should deny the rehearing application of Intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington (collectively, "Intervenors"). The Board acted lawfully and reasonably in limiting the scope of intervention to only the proposed turbine model change – the only physical change to the facility proposed by the amendment application. The Board also acted lawfully and reasonably by refusing to allow Intervenors to raise for the third time the irrelevant legal argument regarding the scope and application of the Am.Sub.H.B. 483 wind turbine setbacks and for the second time, the scope and application of R.C. 4906.06 as to certificate extensions. By raising only failed legal arguments on rehearing, it is clear that Intervenors are not interested in debating the impacts of this project, but rather seek to continue to delay this project through litigation. The Board should deny the application for rehearing.

II. ARGUMENT

A. The Board Properly Limited Intervenors' Scope of Intervention

Intervenors had the burden to show that they have good cause to intervene in this proceeding. Ohio Adm.Code 4906-2-12(B) ("The board * * * shall grant petitions for leave to intervene only upon a showing of good cause.") Yet, Intervenors made no attempt in their

petition to explain how the new turbine models or the certificate extension would impact them other than making the statement that they were trying to avoid "additional adverse impacts on their land, residences, roads, communities, and lives." Given the Intervenors' stated interest, the Board properly limited the scope of intervention to the change in turbine model.

As discussed by the Board in its Order, the only change to the proposed facility in the amendment application was a capacity increase from 2.0 megawatts to 2.2 megawatts for the already-approved Vestas V110 turbine model, which will improve electricity production at the project. *In re Black Fork Wind Energy, LLC*, Case No. 17-1148-EL-BGA (Dec. 7, 2017). All other physical aspects of the approved project remain the same -- all approved turbine sites remain unchanged, as well as the location of the project's collector substation, access roads and collection lines. *Id.* The Board approved the new turbine model for use with the project, and tellingly, the Intervenors do not oppose that approval on rehearing.

Instead, Intervenors argue on rehearing that the Board should have expanded the scope of intervention to include Intervenors' assertion that they "have an interest in ensuring the proper application of setback requirements[.]" Petition to Intervene at 7. But a desire to re-litigate legal issues that the Board has already decided in Black Fork's favor in the past is not a sufficient interest that allows for intervention on those issues in this proceeding. *See In re Application of Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA, Order on Certificate (Aug. 27,2015) at 3; *In re Application of Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA, Second Entry on Rehearing (Aug. 17, 2017) at 5-6, ¶18. The re-litigation of already-decided issues also implicates the purposes underlying the doctrine of collateral estoppel, and should not be allowed here. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) ("[c]ollateral estoppel, like the related doctrine of res judicata, has the dual purpose of

protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.").

Faced with a repeat of legal arguments in a petition to intervene with scant specificity, the Board appropriately exercised its express power to limit intervention given that the Intervenors had "no real and substantial interest with respect to the remaining issues." Ohio Adm.Code 4906-2-12(D)(1)(a). Because the change in the facility was limited only to a change in capacity, the Board did not act unreasonably or unlawfully in limiting the scope of intervention. Intervenors' first assignment of error should be denied.

B. The Board Correctly Determined that Applying the Setback Requirements Adopted in Am.Sub.H.B. 483 is Inappropriate

Intervenors also argue that the setback requirements of Am.Sub.H.B. 483 must apply to the application, because the application is an "amendment" of the previously issued certificate. As an initial point, Intervenors' argument is outside the scope of their intervention and not a permissible issue for them to raise on rehearing. *See In re Application of 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN, Entry on Rehearing at *5-6 (Aug. 27, 2015) (only accepting application for rehearing for limited purpose of hearing assignment of error on intervention). Moreover, there remain significant constitutional issues regarding the propriety of applying Am.Sub.H.B. 483 to Black Fork's certificate.[1]

[1] The new setback requirements were established by Am.Sub.H.B. 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"); s*ee 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 Am.Sub.H.B. 483 are not applicable to the Black Fork Wind Energy project or to this proceeding.

Indeed, this is the third time the Intervenors have raised this argument before the Board. After Am.Sub.H.B. 483 took effect, Intervenors objected to Black Fork's first 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 and the Intervenors did not take any appeal from that decision. *In re Black Fork*, Case No. 14-1591-EL-BGA, Order at 7 (Aug. 27, 2015). Intervenors then made the same argument regarding the Board's approval of a two-year extension of the certificate in 2016 – an argument the Board again rejected and which the Intervenors have now appealed to the Supreme Court of Ohio. *See In re Black Fork*, Case No. 10-2865-EL-BGN, Entry on Rehearing at ¶ 29 (Feb. 2, 2017).

The Board need not allow Intervenors to litigate this issue again before the Board 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 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)).

As to the substance of Intervenors' legal argument, the Board has repeatedly taken the position that R.C. 4906.06 and R.C. 4906.201 are silent as to the definition of an "amendment to an existing certificate" that would trigger the enhanced setbacks, and has used its discretion and expertise to determine what qualifies as an amendment. *See e.g. In re Black Fork*, Case No. 10-2865-EL-BGN, Entry on Rehearing at ¶ 29 (Feb. 2, 2017); *In re Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA, Second Entry on Rehearing (Aug. 17, 2017) at 7-8, ¶21-22.

Extensions of a certificate do not constitute an amendment of a facility and as such, the new setback law is not implicated. *Id.*

The lack of any specific interests and the attempt to revisit prior Board rulings shows that Intervenors' sole interest in this proceeding is to continue their ongoing opposition to the project. The Board acted lawfully and reasonably by not applying a different setback to the facility, and Intervenors' second assignment of error should be rejected.

C. The Extension of the Certificate does not Violate R.C. 4906.06(A)

In their last assignment of error, Intervenors argue that the Board acted unreasonably and unlawfully because, allegedly, Black Fork failed to show good cause for the extension of the certificate. Intervenors state that the Board's grant of an extension of time to commence continuous construction "completely obliterates" Application for Rehearing at 12; R.C. 4906.06(A) (stating application shall be filed not more than five years prior to the planned date of commencement of construction but that five-year period may be waived by the board for good cause shown). Like the setback argument above, this argument is outside the allowable scope of rehearing for the Intervenors, and the Board should not consider it. Nevertheless, the argument fails because as the Board is aware and R.C. 4906.06(A) makes clear, that section relates to the filing of the initial application in regards to the planned date of commencement of construction. *See* R.C. 4906.06(A).

Regardless of Intervenors' confusion over R.C. 4906.06(A), good cause exists for the certificate extension. As stated in the amendment application at pages 8-10, since submitting that extension request in September, 2014, Black Fork has diligently pursued continued development of the project. Efforts include:[2]

[2] *In re Black Fork Wind Energy, LLC*, Case No. 17-1148-EL-BGA, Application at 8-9 (June 6, 2017).

- Renewing lease agreements supporting site control for all 91 approved wind turbine locations;
- Signing new lease and facilities easement agreements;
- Continuing to meet with local officials including the Crawford County Commissioners and the Richland County Commissioners;
- Ordering and commencing manufacturing of a 138-kV transformer for the Project substation, thereby qualifying the Project for the full Production Tax Credit;
- Commencing preliminary design engineering of the Interconnection Facilities under the executed Generator Interconnection Agreement with AEP Transmission and PJM Interconnection LLC; and
- Responding to several renewable energy requests for proposals issued by regional electric utilities and commercial and industrial corporations.

But although Black Fork would like to commence construction as soon as possible, steps remain to bring the project to the point that physical construction can commence.[3] For example, certain conditions under the certificate require redesign of certain aspects of the Project that in turn may require additional amendments to the certificate. Per Condition 12, the collection line system must be redesigned connecting turbines 30 and 44 to turbine 57, considering among other factors better utilization of disturbed areas of this project.[4] Per Condition 30, Black Fork must re-design the underground electric collection lines proposed between turbine sites 16 and 90, to avoid impacts to the woodlot located between these turbines.[5] If amendments are required to comply with these conditions, the project could incur further delays.[6]

It is also well known that Black Fork faces continued litigation from Intervenors with a new appeal pending at the Supreme Court of Ohio (Case No. 2017-0412) on the Board's extension of the certificate and seeking imposition of the most recent legislative setbacks.

[3] *Id.* at 9.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 9.

Additional uncertainty faces renewable project development in Ohio as a result of pending legislation on Ohio's renewable portfolio requirements.[7] The pending litigation could lead to continued delays and future delays could occur if litigation takes place over any future change.[8] Given the information in the application and with the current certificate set to expire in less than two-years, the Board appropriately found good cause exists to support the requested extension.[9]

The Board's decision is also supported by two cases cited by the Intervenors. In *Lima Energy*, the Board granted an extension for a Certificate originally issued May 20, 2002 to September 1, 2014, even after reiterating the "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." *In re Application of Lima Energy Co.*, Case Nos. 00-513-EL-BGN; 04-1011-EL-BGA (July 30, 2012) at 7, ¶8. And in *Norton Energy*, the Board granted two separate extensions for a Certificate originally issued May 21, 2001, resulting in its expiration May 21, 2011. *In re Application of Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN (Sept. 30, 2013) at 1, ¶¶2-3. Both of these cases support Black Fork's three-year extension of its certificate.

Good cause exists for the certificate extension and the Board did not act unreasonably or unlawfully in extending the certificate to January 23, 2020. Intervenors' third assignment of error, if considered, should be denied.

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[7] *Id.* at 10

[8] *Id.* at 10.

[9] *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).

III. CONCLUSION

The Board acted lawfully and reasonably when limiting the scope of the Intervenors' participation in this proceeding. Intervenors wanted to ensure the amendment presented no additional adverse impacts and they were given the opportunity to be heard on the one physical change to the facility – the new turbine model. Intervenors' legal arguments raised in the petition and on rehearing are irrelevant to this proceeding and the Board properly excluded those arguments from this proceeding given prior decisions between the same parties on the same arguments. Intervenors' application for rehearing should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Black Fork Wind Energy LLC