

## THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF  
BLACK FORK WIND ENERGY, LLC  
REGARDING ITS CERTIFICATE OF  
ENVIRONMENTAL COMPATIBILITY AND  
PUBLIC NEED ISSUED IN CASE NO. 10-2865-  
EL-BGN.

CASE NO. 17-1148-EL-BGA

### SECOND ENTRY ON REHEARING

Entered in the Journal on June 21, 2018

#### I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington.

#### II. PROCEDURAL HISTORY

{¶ 2} Black Fork Wind Energy, LLC (Black Fork or Applicant) is a person as defined in R.C. 4906.01.

{¶ 3} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 4} R.C. 4906.06(E) provides that an application seeking to modify a certificate shall be in such form and contain such information as the Board prescribes.

{¶ 5} On January 23, 2012, the Board granted the application of Black Fork for a certificate to construct a wind-powered electric generation facility located in Crawford and Richland counties, Ohio. *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN (*Black Fork Certificate Case*), Opinion, Order, and Certificate (Jan. 23, 2012). The Board granted Black Fork's application pursuant to a stipulation filed by Applicant, the Ohio Farm Bureau

Federation (OFBF), and the Board Staff (Staff), subject to 80 conditions set forth in the stipulation. Black Fork was approved to construct a major utility facility in the form of a wind-powered electric generation facility with up to 91 wind turbines with a combined generation capacity of up to 200 megawatts (MW). The project area is located in Crawford and Richland counties, Ohio.

{¶ 6} On May 24, 2012, certain intervenors appealed the Board's decision to the Supreme Court of Ohio (Court). The Court affirmed the Board's decision on December 18, 2013.

{¶ 7} On September 12, 2014, in Case No. 14-1591-EL-BGA, Black Fork filed an application seeking to utilize two additional turbine models, the Vestas V110 (2.0 MW) turbine and the GE 2.3-107 (2.3 MW) turbine for this project. The Board approved that application on August 27, 2015, over the objections of certain intervening parties. *See, In re Application of Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA (14-1591), Order on Certificate (Aug. 27, 2015).

{¶ 8} Additionally, on March 24, 2016, in the *Black Fork Certificate Case* the Board approved Black Fork's September 12, 2014 motion to extend the term of the certificate from January 23, 2017 to January 23, 2019. Certain intervening parties appealed the Board's approval of the motion to extend the term of the certificate to the Court. That appeal is currently pending.

{¶ 9} On June 6, 2017, Black Fork filed an application in the above-captioned case for approval to use the 2.2 MW version of the Vestas V110 wind turbine. Additionally, Applicant seeks to extend its certificate first issued in the *Black Fork Certificate Case* to January 23, 2020.

{¶ 10} By Order on Certificate (Order) issued December 7, 2017, the Board granted the application filed by Black Fork seeking a capacity increase to use the Vestas V110 turbine model with a 2.2 megawatt capacity and an extension of its certificate to January 23, 2020.

Additionally, the December 7, 2017 Order granted intervention in this matter to Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington.

{¶ 11} R.C. 4906.12 provides, in pertinent part, that R.C. 4903.10 shall apply to any proceeding or order of the Board in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 12} R.C. 4903.10 permits any party who has entered an appearance in a Commission proceeding to apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

{¶ 13} Further, Ohio Adm.Code 4906-2-32 states that any party or any affected person, firm, or corporation may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner and form and circumstances set forth in R.C. 4903.10.

{¶ 14} On December 27, 2017, intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington filed an application for rehearing of the Board's Order.

{¶ 15} On January 8, 2018, Black Fork filed a memorandum contra intervenors' application for rehearing.

{¶ 16} On January 24, 2018, the administrative law judge (ALJ) found, pursuant to Ohio Adm.Code 4906-2-32(E), that to the extent intervenors' application for rehearing has been filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32, which is a matter for the Board's determination, rehearing should be granted for the limited purpose of affording the Board additional time to consider the issues raised in intervenors' application for rehearing.

### III. DISCUSSION

{¶ 17} In their first assignment of error, intervenors submit that the Board's December 7, 2017 Order is unreasonable and unlawful to the extent it impermissibly restricts the scope of their intervention particularly as it precludes intervenors from addressing setback requirements and the extension of the term of the certificate. Citing to *Moore v. City of Middletown*, 133 Ohio St.3d 55, 63-66, 2012-Ohio-3897 at ¶¶ 33-43, intervenors assert a protectable interest in the proper application of the pertinent setback requirements. Moreover, as adjacent and nearby property owners, intervenors also claim 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.

{¶ 18} In its memorandum contra, Black Fork asserts that, given the intervenors' stated interests, the Board properly limited intervenors' scope of intervention. Black Fork submits that the burden to establish good cause to intervene rested with the intervenors but that the intervenors failed to explain how a capacity increase to an already-approved turbine model or the certificate extension would impact them other than stating that they were trying to avoid additional adverse impacts on their land, residences, roads, communities, and lives. Black Fork claims that, through their intervention, intervenors are attempting to improperly expand the scope of this proceeding into matters previously determined by the Board. The Board has already decided this issue in Applicant's favor in the past according to Black Fork. See, *Black Fork Wind*, Order on Certificate (Aug. 27, 2015); *In re Application of Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA (*Greenwich*), Second Entry on Rehearing (Aug. 17, 2017). Black Fork asserts that re-litigation of already-decided issues also implicates the doctrine of collateral estoppel and should not be allowed here.

{¶ 19} Intervenors' first assignment of error is denied. As noted in the Board's December 7, 2017 Order, the only change to the proposed facility was a capacity increase to the already-approved Vestas V110 turbine model. No dimensions of the Vestas V110 turbine model changed from what was previously-approved and all other physical aspects

of the project remain the same including approved turbine sites, the location of the collector substation, access roads, and collection lines. Intervenor's reliance on *Moore* is unavailing as that case involved zoning matters and arguments concerning constitutional issues. In the present case, there is no issue concerning zoning and the Board does not resolve constitutional issues. Further, as the Board has previously determined, a desire to re-litigate legal issues that the Board has already decided in a prior certification proceeding in the past is not a sufficient interest that allows for intervention and further consideration on those issues in the pending proceeding. See, *Black Fork Wind*, Order on Certificate (Aug. 27, 2015); *Greenwich*, Second Entry on Rehearing (Aug. 17, 2017). Additionally, the re-litigation of already-decided issues also implicates the purposes underlying the doctrine of collateral estoppel and should not be entertained in this matter. Under the circumstances presented, the Board acted reasonably in limiting the scope of intervention. Rehearing on this assignment of error is denied.

{¶ 20} Intervenor's second assignment of error alleges that the Board's December 7, 2017 Order is unreasonable and unlawful to the extent it precluded intervenors from addressing the issues of setback requirements applicable to an application for a capacity increase pursuant to R.C. 4906.20 and 4906.201. Intervenor's assert that, despite the fact that the applicable setback was their primary contention in their petition to intervene, the Board completely ignored this issue in the December 7, 2017 Order. Additionally, intervenors assert that the current versions of R.C. 4906.20 and 4906.201 (as amended in Am.Sub.H.B. 483, effective September 15, 2014) compel the Board to subject any amendment to an existing certificate to the latest setback requirements (i.e., 1,125 feet from the property line of the nearest adjacent property). Since September 15, 2014, intervenors claim the Board has permitted Black Fork to amend its certificate twice by adding two new turbine models for use on this wind farm project and permitting the extension of the certificate. Intervenor's claim that the Board must, therefore, reconsider its December 7, 2017 Order and compel adherence to the now applicable setbacks.

{¶ 21} As an initial matter, Black Fork argues that intervenors' second assignment of error is outside the scope of their intervention and is not, therefore, a permissible issue for them to raise on rehearing. Moreover, Black Fork claims that there are significant constitutional issues involved in applying the Am.Sub.H.B. 483 setback standards to Black Fork's certificate. Black Fork asserts that this is the third time the intervenors have raised this setback argument before the Board and since the Board has twice rejected this argument the Board need not consider it again. Finally, Black Fork notes that the Board has repeatedly taken the position that R.C. 4906.20 and 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, In re Black Fork*, Case No 10-2865-EL-BGN, Entry on Rehearing (Feb. 2, 2017); *Greenwich*, Second Entry on Rehearing (Aug. 17, 2017).

{¶ 22} Intervenors' second assignment of error is denied. The Board properly granted intervenors limited intervention in this matter to address the sole issue of the capacity increase to an already-approved Vestas V110 turbine model. As noted in *Greenwich, supra*, R.C. 4906.20 and 4906.201 are silent as to the definition of an "amendment to an existing certificate" that triggers enhanced setbacks. Therefore, the Board has used its discretion and expertise to determine what qualifies, just as it must create parameters around the concepts of "change" and "alteration," also found in R.C. 4906.20. In this case, the Board reasonably determined that a mere capacity increase to an already-approved turbine model is adequately covered by the existing conditions of the certificate in the *Black Fork Certificate Case* and does not affect our conclusion that the project satisfies the criteria set forth in R.C. Chapter 4906. Thus, application of the Am.Sub.H.B. 483 setbacks is not warranted.

{¶ 23} Not every proposed change to a major utility facility requires an amendment to an existing certificate regardless of how the application is captioned. Rather, the Board determines from the substance of the pleading whether the change(s) being proposed

necessitate “[a]ny amendment [being] made to an existing certificate” by the Board.<sup>1</sup> The Board begins its review by looking at whether the proposal introduces new impact(s) that cannot be adequately addressed by the conditions of the existing certificate to satisfy the criteria of R.C. 4906.10(A). If a proposal introduces a new impact that the Board determines does not satisfy the statutory criteria without the Board approving a change in the original certificate condition(s), then the proposal is an “amendment” that requires the new setbacks apply under Am.Sub.H.B. 483. However, where the existing certificate conditions are adequate to address/mitigate any impacts of the proposed change, then the Board can approve the change without amending the existing certificate. The Board found exactly such a situation in this case. The change in capacity does not alter any existing conditions and, therefore, the Board could approve the change without amending the existing certificate. It did so and the intervenors second assignment of error is, therefore, denied.

{¶ 24} In their final assignment of error, intervenors assert that the order is unreasonable and unlawful as Black Fork failed to show good cause for a one-year extension of the certificate. While acknowledging that the five-year commencement of construction time frame set forth in R.C. 4906.06(A) may be waived for good cause shown, intervenors note that the Board has indicated that there are important policy considerations to factor into doing so. *See, In re Application of Lima Energy Co.*, Case Nos. 00-513-EL-BGN and 04-1011-EL-BGA (*Lima Energy*), Entry (July 30, 2012). Intervenors submit that the passage of nearly six years has greatly affected the assumptions underlying the Board’s 2012 issuance of the certificate and, thus, the Board’s failure to address this issue mandates rehearing.

{¶ 25} Black Fork responds that, like the setback issue above, arguments surrounding the extension of the certificate are outside the allowable scope of rehearing and the Board

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<sup>1</sup> In a line of analogous utility cases involving the Public Utilities Commission of Ohio (Commission), the Supreme Court of Ohio has stated that the Commission has broad discretion in the conduct of its proceedings. *See, Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 734 N.E.2d 775 (2000); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214 (1987).

should not consider it. Nevertheless, Black Fork posits, good cause exists for the certificate extension. In support, Black Fork notes that it has diligently pursued continued development of the project. Moreover, Black Fork asserts that it faces continued litigation from intervenors with a new appeal pending at the Court (Case No. 2017-0412) on the Board's previous extension of the certificate and seeking imposition of the Am.Sub.H.B. 483 setbacks. As a result, Black Fork opines that good cause exists for the certificate extension and, therefore, intervenors third assignment of error should be denied.

{¶ 26} Intervenors' third assignment of error is denied. Intervenors acknowledge that the five-year time frame in order to commence construction of a project set forth in R.C. 4906.06(A) may be waived for good cause shown. Although the Board's December 7, 2017 Order did not list specifically the arguments Black Fork made in support of its request that the Board found to justify the extension, it is clear from the decision that the Board considered the entirety of Black Fork's request and also that similar extensions have been granted to other wind facility projects. In totality, the Board found such circumstances established good cause for a one-year extension of the certificate. Moreover, the intervenors reliance on the *Lima Energy* decision does not warrant a different conclusion. In fact, after considering all of the arguments made in the *Lima Energy* proceeding, the Board granted the requested extension. In ruling on the one-year request for extension in the December 7, 2017 Order, the Board found persuasive the steps taken by Black Fork that support a finding that the Applicant has pursued a continued development of the wind farm and that any delays are due, in part, to continued litigation concerning this project. Finally, the six-year passage of time since issuance of the original certificate does not require a different outcome. Since issuance of the certificate on January 23, 2012, Black Fork pursued approval to utilize two additional turbine models in 14-1591. The Board had occasion in ruling on the request in 14-1591 on August 27, 2015, to more recently consider whether the 80 conditions adopted in the *Black Fork Certification Case* still satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest, and does not violate any important regulatory principle or practice. Rehearing on this assignment of error is, therefore, denied.



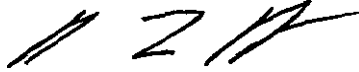
## IV. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That the application for rehearing filed on December 27, 2017, be denied. It is, further,

{¶ 29} ORDERED, That a copy of this Second Entry on Rehearing be served upon all interested persons of record in this matter.

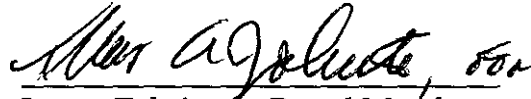
## THE OHIO POWER SITING BOARD



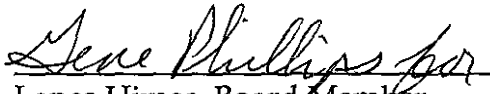
Asim Z. Haque, Chairman  
Public Utilities Commission of Ohio



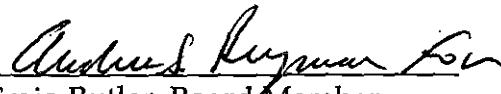
David Goodman, Board Member  
and Director of the Ohio  
Development Services Agency



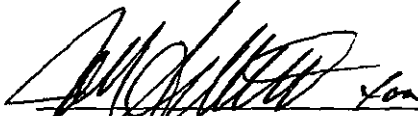
James Zehringer, Board Member  
and Director of the Ohio  
Department of Natural Resources



Lance Himes, Board Member  
and Director of the Ohio  
Department of Health



Craig Butler, Board Member  
and Director of the Ohio  
Environmental Protection Agency

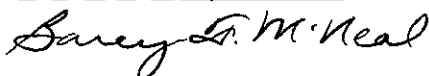


David Daniels, Board Member  
and Director of the Ohio  
Department of Agriculture

Gregory Murphy, Board Member  
and Public Member

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Barcy F. McNeal  
Secretary