

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of)	
Hardin Wind LLC for a Certificate)	Case No. 13-1177-EL-BGN
of Environmental Compatibility)	
and Public Need)	

MEMORANDUM CONTRA TO THE PETITION TO INTERVENE
BY LOCAL RESIDENTS

I. INTRODUCTION

Hardin Wind LLC (“Hardin Wind”) withdrew its February 15, 2019 Notice of Modification on March 8, 2019. While Michael O’Brien and Tina O’Brien have withdrawn their Petition to Intervene, Beverly J. Marquart, Luke and Joy McCarren, Brandon and Cathy Brant, Craig and Lanita Sue Sickles, Abigail and Dennis Roell, Deborah Reames, Anthony and Melissa Griffith, and Ryan and Deirdra Stanford (the “Petitioners”) have not withdrawn their Petition to Intervene. As that Petition remains pending and has not been withdrawn, Hardin Wind objects to the Petition because: (1) there is nothing pending before the Board that warrants an untimely intervention in this proceeding; (2) the Petitioners have failed to show any real interest in the previously proposed modification to the underground collection system; and (3) the Petition as it stands represents a collateral attack on the Board’s opinion and order approving the rule on the modification process, issued in Case No. 16-1109-GE-BRO.

II. ARGUMENT

Hardin Wind’s February 15, 2019 Notice of Modification to the Board gave notice of design changes to the project’s buried electrical collection line system which would optimize the design and reduce temporary disturbance corridors through the project area during construction. The optimized design presented in the modification would result in approximately 4.5 miles less underground collection line and would reduce temporary disturbances by approximately 13.8

acres.¹ It would also have resulted in shifts away from non-participating residential homes (although the collection lines will be underground after construction).

On March 6, 2019, the Petitioners submitted their Petition to Intervene and objections to the notice of modification. Significantly, the Petitioners do not mention nor object to the improvements in the project's collection line system or the fact that disturbances would be reduced. Instead, Petitioners claim that the modification would constitute an amendment to the certificate and that as an amendment, would trigger application of the new setback requirements in R.C. 4906.201. Notably, Petitioners do not explain how a turbine setback can apply to a collection line modification given that, as written, R.C. 4906.201(B) subjects only the amendment to the setback, not the project or certificate.²

The Petition to Intervene should be denied to the extent the Administrative Law Judge or Board rules on the Petition. First, the modification has been withdrawn and there is nothing pending before the Board at this time that would permit an intervention in this proceeding. Petitions to intervene in this case were due no later than January 2, 2014. While the Petitioners claim to be landowners within the project area, none intervened in this proceeding by the January 2, 2014 deadline. Moreover, the certificate in this proceeding was issued on March 17, 2014 and has been a final, non-appealable order of the Board for years. As no application or modification is currently pending before the Board, the Petition to Intervene is untimely.

Second, even if the modification were still pending in this docket (which it is not), Petitioners have failed to show any interest that warrants intervention in this proceeding on the modification. Petitioners make no mention about the collection line modifications in their

¹ The original 172 turbine layout required an additional 36.8 miles of underground collection lines than the current 105 turbine layout and also would have resulted in an additional 111.6 acres of temporary disturbance.

² R.C. 4906.201(B) states in part that “[a]ny **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.”

Petition to Intervene. Instead, Petitioners only make the procedural argument that the modification constitutes an amendment to the certificate and use that as an opportunity to claim that the new setbacks apply to this project. Petitioners' failure to provide any objection or comment on the collection line improvements is contrary to their claim at page 6 of the Petition that they have a "real and substantial interest in this matter." Petitioners have not shown a valid interest that warrants their intervention in this proceeding regardless whether the modification was pending or withdrawn.

Third, Petitioners' objections are a collateral attack on the Board's final and non-appealable order on its rules, specifically the adoption of Ohio Adm.Code 4906-4-09(A)(5). Petitioners argue at page 12 of the Petition that the Board's modification process adopted through its rules is invalid and contrary to R.C. 4906.06(E). That argument, however, should have been raised in the Board's proceeding on its rules in Case No. 16-1109-GE-BRO. Petitioners could have participated in that rule making but did not. *See, e.g., Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 23 (citing R.C. § 4903.13); *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898 (prohibiting collateral attacks on decisions after time to appeal has passed). They should not be allowed to intervene in a final non-appealable certificate proceeding in order to raise arguments that could have and should have been raised in the rule proceeding. The Petition to Intervene should not be granted.

III. CONCLUSION

Hardin Wind proposed an improvement to its collection line system that would have reduced impacts. Petitioners did not object to the improvements but have attempted to use the modification filing as a means to try and challenge the sufficiency of the Board's new

modification rule and apply different turbine setbacks to the project. The withdrawal of the modification, by itself, ends any potential opportunity to intervene in this case. But regardless of that withdrawal, Petitioners failed to show any interest sufficient to intervene in this proceeding. If considered, the Petition to Intervene should be denied.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra to Petition to Intervene electronically filed by Mr. Michael J. Settineri on behalf of Hardin Wind LLC