

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
SENECA WIND, LLC FOR A CERTIFICATE
TO SITE WIND-POWERED ELECTRIC
GENERATION FACILITIES IN SENECA
COUNTY, OHIO.

CASE NO. 18-488-EL-BGN

ENTRY

Entered in the Journal on March 27, 2019

{¶ 1} Seneca Wind, LLC (Seneca Wind or Applicant) is a person, as defined in R.C. 4906.01.

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

{¶ 3} On July 16, 2018, as amended and supplemented on July 20, 2018, September 14, 2018, December 3, 2018, December 10, 2018, and January 2, 2019, Seneca Wind filed an application with the Board for a certificate of environmental compatibility and public need to construct, own, and operate a wind generation facility (project). As proposed, the project will have a total nameplate capacity of 212 megawatts and consist of up to 77 wind turbine generators, access roads, electrical collector cables, laydown yards, an operations and maintenance facility, meteorological towers, a substation, and a 138-kilovolt (kV) electric generation transmission line to connect to AEP Ohio Transmission Company's existing Melmore Substation.¹ The project site includes approximately 56,900 acres of leased land in Seneca County, consisting primarily of existing farmland.

{¶ 4} Pursuant to Ohio Adm.Code 4906-3-06, within 60 days after receipt of an application for a major utility facility, the Chairman of the Board shall notify an applicant

¹ The substation and 138-kV transmission line will be the subject of a separate filing with the Board.

of the acceptance or rejection of the application as complete. Accordingly, the Chairman's letter was to be filed by September 14, 2018.

{¶ 5} On September 14, 2018, Seneca Wind filed a motion to extend the time for the Board to determine whether the application is complete, until October 15, 2018, and a request for an expedited ruling on the motion. By Entry issued September 18, 2018, Seneca Wind's motion for an extension was granted.

{¶ 6} By letter filed on October 15, 2018, the Board notified Seneca Wind that its application was sufficiently complete to permit Staff to commence its review and investigation of the application. Further, in the letter, the Board directed Seneca Wind, pursuant to Ohio Adm.Code 4906-3-07, to serve appropriate government officials and public agencies with copies of the complete, certified application and to file proof of service with the Board. The letter also directed Seneca Wind, pursuant to R.C. 4906.06(F) and Ohio Adm.Code 4906-3-12, to submit the requisite application fee.

{¶ 7} On October 22, 2018, Seneca Wind filed its certificate of service of its accepted and complete application, in accordance with the requirements of Ohio Adm.Code 4906-3-07. On October 23, 2018, Applicant also submitted the application fee to the Board, pursuant to Ohio Adm.Code 4906-3-12.

{¶ 8} R.C. 4906.07(A) provides that, upon receipt of an application complying with R.C. 4906.06, the Board must promptly fix a date for a public hearing not less than 60 nor more than 90 days after such receipt, and shall conclude the proceeding as expeditiously as practicable.

{¶ 9} By Entry issued December 7, 2018, the effective date of the filing of the Seneca Wind application was established as December 10, 2018, and the administrative law judge (ALJ) established a procedural schedule.

{¶ 10} On December 16, 2018, Seneca Wind published notice of the proposed project and filed proof of the publication in this docket on December 18, 2018.

{¶ 11} On January 29, 2019, Seneca Wind and Staff (Movants) filed a joint motion to toll the procedural schedule. Movants requested that a new procedural schedule be established and proposed a revised schedule.

{¶ 12} By Entry issued February 1, 2019, the ALJ granted Movants' motion to suspend the procedural schedule, and subsequent Entries issued on February 7, 2019, and February 8, 2019, reestablished and clarified dates for the public and adjudicatory hearings.

{¶ 13} Notices of intervention were timely filed by Eden Township, Venice Township, Reed Township, and Scipio Township. In accordance with Ohio Adm.Code 4906-2-12(A)(1), Eden, Venice, Reed, and Scipio townships will be considered interveners in this matter.

{¶ 14} Pursuant to Ohio Adm.Code 4906-2-12, an ALJ may grant a timely request for intervention upon a showing of good cause, which the Board has historically held is shown when the person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties. *In re Black Fork Wind LLC*, Case No. 09-546-EL-BGN, Entry (Mar. 2, 2010). Further, R.C. 4903.08(A) and Ohio Adm.Code 4906-2-12(B) provide that, in deciding whether to permit timely intervention, the following factors may be considered: the nature and extent of the prospective intervenor's interest; the extent to which the prospective intervenor's interest is represented by existing parties; the prospective intervenor's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; the legal position advanced by the prospective intervenor and its probable relation to the merits of the case; and whether the intervention by the prospective intervenor will unduly delay the proceeding or unjustly prejudice an existing party. Pursuant to Ohio Adm.Code 4906-2-12(C), the ALJ may grant an untimely filed petition to intervene only upon a showing of extraordinary circumstances and good cause, in addition

to the petitioner agreeing to be bound by matters previously decided in the proceeding and providing a statement of good cause for failing to timely file its petition.

A. *Local Residents' Motion to Intervene*

{¶ 15} On November 13, 2018, the following Seneca County residents filed a timely motion to intervene in this proceeding: Christopher and Jena Lyn Aichholz, Anthony and Tamra Andrews, Nate Blaser, Justin and Tori Brenner, Colton and Haley Carrick, Don and Wendy Carrick, Dave Clark, Tim Cornett, Jim Dillingham, Charles and Jodi Gaietto, Steve Gitcheff, David and Joann Graham, Charles and Kimberly Groth, John and Terri Hampshire, Debra and Duane Hay, Joseph and Diane Hudok, Bob and Sandy Kennard, Randy Kuhn, Mark and Donna Lambert, Brandon and Danette Martin, Michael and Christal McCoy, Jeff and Marnie Miller, Nate and Steph Miller, Richard and Gail Miller, Tom and Beth Nahm, Jeffrey and Evelyn Phillips, Jason and Shanna Price, Eric Reis, Gregory and Janeen Smith, Tom and Shelley Smith, Chris and Kristie Theis, Mike and Carol Theis, Don and Kim Thompson, Jacob and Ashley Tidaback, Robert and Judith Watson, Rod and Nancy Watson, and Bonnie Wright (collectively, Local Residents). Local Residents contend that they have a real and substantial interest in this proceeding and that their interests are not already adequately represented by existing parties in this proceeding. They submit that their intervention will contribute to a just and expeditious resolution of issues raised in this proceeding and that their intervention will neither delay this proceeding nor prejudice parties.

{¶ 16} Additionally, Local Residents seek to intervene in this proceeding in order to protect their personal interests that they allege will be detrimentally affected if Seneca Wind is permitted to construct its proposed project in close proximity to their homes. Specifically, the vast majority of Local Residents represent that they own and live in homes within the project area, and are long-time residents of Seneca County. Local Residents aver that their homes will be subjected to excessive noise and shadow flicker caused by Seneca Wind's wind turbines. In addition, Local Residents assert that birds, bats, and bald eagles will be harmed and killed as a result of the wind turbines. Local Residents claim that the

groundwater they consume may be contaminated by Seneca Wind's proposed project, and further assert that Seneca Wind's excavation at the project site may destroy or damage cultural artifacts buried in Seneca County. Moreover, Local Residents claim that Seneca Wind's project will contribute to global warming. Lastly, Local Residents opine that the proposed project will negatively impact the local viewshed and diminish the value of their homes.

{¶ 17} Local Residents opine that they would be the only parties to this proceeding who actually reside in Seneca County and the only parties who would be required to live every day of their lives surrounded by Applicant's 650-foot wind turbines. Absent intervention, Local Residents claim that they will have no effective means to protect their vital interests in this proceeding.

{¶ 18} On November 28, 2018, Seneca Wind filed its response to Local Residents' motion to intervene. In its response, Seneca Wind states that, while the Local Residents raised a number of arguments regarding their opposition to the proposed project, it does not oppose intervention of the Local Residents.

{¶ 19} No memoranda contra were filed in response to Local Residents' motion to intervene.

{¶ 20} The ALJ notes that the Board has previously found that living in the county of a proposed project is not enough on its own to warrant intervention. *In re South Field Energy LLC*, Case No. 15-1716-EL-BGN, Opinion, Order, and Certificate (Sept. 22, 2016) (where the Board stated that the general concerns as citizens and ratepayers are better represented by the intervening local governments representing their citizens). While the Board's standard is generally construed in favor of intervention, a more defined nexus must be present. *In re Icebreaker Windpower Inc.*, Case No. 16-1871-EL-BGN, Entry (May 23, 2018). The Board has granted petitions to intervene when the petitioner can demonstrate that an individual, direct interest is at stake in the outcome of a proceeding. *In re Black Fork Wind LLC*, Case No. 09-

546-EL-BGN, Entry (Mar. 2, 2010) (where the Board granted intervention to individuals with property that abuts directly with the proposed project site).

{¶ 21} In this case, this nexus has been established by Christopher and Jena Lyn Aichholz, Anthony and Tamra Andrews, Nate Blaser, Justin and Tori Brenner, Colton and Haley Carrick, Don and Wendy Carrick, Dave Clark, Tim Cornett, Jim Dillingham, Charles and Jodi Gaietto, Steve Gitcheff, David and Joann Graham, Charles and Kimberly Groth, John and Terri Hampshire, Debra and Duane Hay, Joseph and Diane Hudok, Bob and Sandy Kennard, Mark and Donna Lambert, Brandon and Danette Martin, Michael and Christal McCoy, Nate and Steph Miller, Richard and Gail Miller, Tom and Beth Nahm, Jeffrey and Evelyn Phillips, Jason and Shanna Price, Eric Reis, Gregory and Janeen Smith, Tom and Shelley Smith, Chris and Kristie Theis, Mike and Carol Theis, Don and Kim Thompson, Jacob and Ashley Tidaback, Robert and Judith Watson, Rod and Nancy Watson, and Bonnie Wright, all of whom reside inside the project area.

{¶ 22} Additionally, this nexus has been established by Randy Kuhn and Jeff and Marnie Miller stemming from the fact that their property abuts the project area. Therefore, the motions to intervene shall be granted for these individuals.

B. Ohio Farm Bureau Federation's Motion to Intervene

{¶ 23} On November 13, 2018, the Ohio Farm Bureau Federation (OFBF) filed a timely motion to intervene in this proceeding. OFBF states that it has a real and substantial interest in this matter that is not represented by existing parties. Further, OFBF states that its involvement will contribute to a just and expeditious resolution of the issues involved in this proceeding and will not unduly delay the proceedings or unjustly prejudice an existing party.

{¶ 24} In support of its motion, OFBF avers that it is a non-profit organization representing agricultural interests at the state and local levels with member families in every county, including hundreds of families in Seneca and Sandusky counties. OFBF represents

that its members support a diversified energy portfolio, including renewable energy sources such as wind energy development. OFBF notes that farmers engaged in wind leasing agreements want to make sure that construction activities on their property adhere to procedures ensuring soil and water conservation and air quality, as well as ensuring appropriate consideration of drainage infrastructure on agricultural land. No memoranda contra were filed in response to OFBF's petition to intervene.

C. *Seneca East Local School District*

{¶ 25} On November 15, 2018, Seneca East Local School District filed a timely petition for leave to intervene as a party in this proceeding. Seneca East Local School District represents that the proposed facility will be located, at least in part, within its territory. No memoranda contra were filed in response to Seneca East Local School District's petition to intervene.

D. *Steve Shuff's Petition to Intervene*

{¶ 26} Also on November 15, 2018, Steve Shuff (Mr. Shuff) filed a timely petition, on behalf of himself, for leave to intervene as a party in this proceeding. In support of his motion, Mr. Shuff represents that he has a real and substantial interest in the proceeding. Specifically, Mr. Shuff states that his personal residence is within the proposed project area, and he has a financial interest in the Ironwood Steakhouse located within or directly abutting the proposed project area. Mr. Shuff avers that he intends to produce, as a witness, a wildlife expert to address the environmental impact of the proposed project. Mr. Shuff opines that he meets the intervention standards required by Ohio Adm.Code 4906-2-12(A)(2) and 4906-2-12(B)(1) and that his interests are not already adequately represented by existing parties. Furthermore, Mr. Shuff avers that he will contribute to a just and expeditious resolution of the issues involved and will not unduly delay the proceeding or unjustly prejudice an existing party. No memoranda contra were filed in response to Mr. Shuff's petition to intervene.

{¶ 27} Subsequently, on January 24, 2019, Mr. Shuff filed a response to Seneca Wind's first set of interrogatories and requests for production of documents. In his response, Mr. Shuff states that he is not currently a party and declines to respond to any discovery requests until he is a party to this proceeding. The ALJ notes that, under Ohio Adm.Code 4906-2-14(H), the term "party" includes any person who has filed a notice or petition to intervene which is pending at the time a discovery request or motion is to be served or filed. Therefore, all persons awaiting a decision on a motion to intervene, including Mr. Shuff, are subject to discovery for the purposes of this proceeding.

E. Black Swamp Bird Observatory's Petition to Intervene

{¶ 28} On November 15, 2018, the Black Swamp Bird Observatory (BSBO) filed a timely petition for leave to intervene as a party to this proceeding. BSBO avers that it satisfies the intervention requirements prescribed in Ohio Adm.Code 4906-2-12(B). In support of its petition, BSBO states that it is an Ohio non-profit corporation formed for the specific purpose of fostering the "appreciation, enjoyment and conservation of birds and their habitats through research, education, and outreach" and has a unique interest in birds, bats, and their habitats that no other party can adequately protect. BSBO states that 40-50 of their 2,000 members reside in Seneca County and are active birdwatchers and conservationists. Furthermore, BSBO opines that there is an active migratory pathway located through Seneca County and alleges that this pathway is one of the preeminent and most important migration routes for birds in North America. BSBO states that it will provide the Board with scientific information about nocturnal migration, bats, diurnal raptor migration, and the bald eagle population, among other issues. BSBO further opines that its scientific expertise will be beneficial in this proceeding and granting BSBO's petition will not unduly delay the proceeding or cause unjust prejudice to Applicant. No memoranda contra were filed in response to BSBO's petition to intervene.

F. Seneca County Commissioners' Notice of Intervention

{¶ 29} On November 27, 2018, the Seneca County Board of Commissioners (Seneca County) filed an untimely notice to intervene as a party to this proceeding. In its notice, Seneca County acknowledged that it did not meet the deadline to file a notice of intervention; however, Seneca County supplemented its notice with minutes from its November 20, 2018 board meeting explaining that it made efforts to work with other Seneca County townships to achieve consensus on intervention. Ultimately, a resolution was put forth regarding Seneca County's intervention in this proceeding during a November 13, 2018 board meeting, but failed to garner the necessary votes to pass. The minutes further reveal that the issue of Seneca County's intervention was voted on again at the November 20, 2018 meeting, and consequently passed with a two-thirds vote. Seneca County requests that the Board accept its untimely notice of intervention based on the fact that it invested additional time in an attempt to receive input and achieve consensus among interested stakeholders.

{¶ 30} Seneca County avers that the proposed facility is to be located at least in part in Seneca County, Ohio, and that it intends to intervene in this proceeding on the grounds that it has an absolute right to intervene and extensive interest in the proceedings as the elected representatives of the citizens of Seneca County. Further, Seneca County states that the county's interest is not and cannot be represented by another party and that its intervention would not unduly delay the proceeding or unjustly prejudice an existing party.

{¶ 31} Ohio Adm.Code 4906-2-12(C) provides that the Board or the ALJ may, in extraordinary circumstances and for good cause shown, grant a petition for leave to intervene in subsequent phases of the proceeding, filed by a person who failed to file a timely notice of intervention or petition for leave to intervene. Any petition untimely filed under Ohio Adm.Code 4906-2-12(C) must contain a statement of good cause for failing to timely file the notice or petition and shall be granted only upon a finding that extraordinary circumstances justify the granting of the petition and the intervenor agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding

{¶ 32} R.C. 4906.08 provides, in pertinent part: (A) The parties to a certification proceeding shall include*** (2) Each person entitled to receive service of a copy of the application under division (B) of section 4906.06 of the Revised Code, if the person has filed with the power siting board a notice of intervention as a party, within thirty days after the date it was served with a copy of the application.

{¶ 33} The ALJ notes that the Seneca County Commissioners are some of those persons entitled to receive service of a copy of the application under division (B) of R.C. 4906.06. Moreover, Applicant's October 22, 2018 proof of service indicates that each of the Seneca County Commissioners were served a copy of the application on October 16, 2018. Seneca County had 30 days after the date of the service of the application – that is, until November 15, 2018 – to file their notice of intervention. The November 20, 2018 board meeting minutes reflect that the Seneca County Commissioners met with other township trustees on October 22, 2018, and the community on November 7, 2018, to discuss intervention. Further, a regularly scheduled board meeting took place on November 13, 2018, but the proposed resolution regarding intervention in this proceeding was tabled, and the tabled resolution failed to garner the necessary votes to pass on November 20, 2018. Seneca Wind will not be prejudiced, nor will the proceedings be unduly delayed, by Seneca County's intervention in this case, given the fact that, while its notice of intervention was filed on November 27, 2018, the current procedural schedule was not issued until February 7, 2019, and all parties will have adequate time to prepare for the evidentiary hearing scheduled in May. No memoranda contra were filed in response to Seneca County's notice to intervene.

{¶ 34} In granting this petition, the Board maintains the authority to evaluate petitions to intervene filed in proceedings before it, pursuant to the guidelines set forth in R.C. 4903.08 and Ohio Adm.Code 4906-2-12, and the ALJ notes that any requests in future proceedings will be determined on a case-by-case basis, consistent with these guidelines and Board precedent. As such, the ALJ finds that Seneca County has shown good cause and the existence of extraordinary circumstances; thus, their motion to intervene should be granted.

However, the ALJ notes that Seneca County will be bound by matters previously decided in the proceeding, as set forth in Ohio Adm.Code 4906-2-12(C).

{¶ 35} The ALJ finds that the unopposed petitions to intervene filed by OFBF, Seneca East Local School District, Steve Shuff, and BSBO demonstrate good cause for intervention and, therefore, should be granted. Further, in accordance with Ohio Adm.Code 4906-2-12(A)(1), Eden, Venice, Reed, and Scipio townships will be considered interveners in this matter. The ALJ finds that the untimely notice of intervention filed by Seneca County demonstrates good cause for its untimely filing, and therefore, should be accepted.

{¶ 36} It is, therefore,

{¶ 37} ORDERED, That the motions for intervention be granted for Local Residents, the OFBF, Seneca East Local School District, Steve Shuff, and BSBO. It is, further,

{¶ 38} ORDERED, That the notices of intervention filed by Eden, Venice, Reed, and Scipio townships be accepted as timely, and the untimely notice by Seneca County also be accepted for good cause shown. It is, further,

{¶ 39} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/Lauren L. Augostini

By: Lauren L. Augostini
Administrative Law Judge

JRJ/hac

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3/27/2019 2:46:49 PM

in

Case No(s). 18-0488-EL-BGN

Summary: Administrative Law Judge Entry granting motions to intervene, accepting notices of intervention as timely, and accepting untimely notice of intervention for good cause shown electronically filed by Heather A Chilcote on behalf of Lauren L. Augostini, Administrative Law Judge, Power Siting Board