

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
FIRELANDS WIND, LLC FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED TO
CONSTRUCT A WIND-POWERED
ELECTRIC GENERATION FACILITY IN
HURON AND ERIE COUNTIES, OHIO.

CASE NO. 18-1607-EL-BGN

ORDER ON REHEARING

Entered in the Journal on November 18, 2021

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by Local Residents and the Black Swamp Bird Observatory.

II. PROCEDURAL HISTORY

{¶ 2} All proceedings before the Board are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

{¶ 3} Firelands Wind, LLC (Firelands or Company) is a corporation and person under R.C. 4906.01(A).

{¶ 4} 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 Board.

{¶ 5} The proposed electric generation facility is a major utility facility, as defined in R.C. 4906.01(B).

{¶ 6} On October 26, 2018, Firelands, a wholly owned subsidiary of Apex Clean Energy Holdings, Inc., filed a pre-application notification letter with the Board regarding its proposed 298.2 megawatt (MW) wind-powered electric generating facility in Huron, Erie, and Seneca counties, Ohio.

{¶ 7} On November 15, 2018, Firelands held a public information meeting at the Bronson-Norwalk Conservation League, in Norwalk, Ohio to discuss the proposed project with interested persons and property owners.

{¶ 8} On January 31, 2019, Firelands filed its application with the Board for a certificate of environmental compatibility and public need to construct and operate a wind-powered electric generation facility in Huron and Erie counties, Ohio (Project). Firelands explained that the information presented in the pre-application notification letter was revised to reflect that the project would be located in Huron and Erie counties only and that no facilities are now proposed for Seneca County. Specifically, Firelands stated that the project will be located within approximately 32,000 acres of leased land in Groton and Oxford townships in Erie County, and Lyme, Norwich, Richmond, Ridgefield, and Sherman townships in Huron County. Further, the application indicated that the project consists of up to 87 turbine generators, each with a nameplate capacity rating of 4.2 to 4.5 MW, which results in the project generating up to 297.66 MW, rather than the 298.2 MW listed in the pre-application notification letter.

{¶ 9} On March 7, 2019, the Board ordered Firelands to hold another public information meeting in accordance with Ohio Adm.Code 4906-3-03(B) based on “substantial changes” that were made to the application after the informational meeting on November 15, 2018. The noted changes included: (1) the elimination of turbines in Seneca County; (2) the alteration of associated facilities so as to maintain a nearly equivalent generating capacity; and, (3) the greater detail regarding the number of acres under lease and the specific townships affected.

{¶ 10} On April 3, 2019, Firelands held the second public information meeting at the VFW in Bellevue, Ohio.

{¶ 11} On June 25, 2019, the administrative law judge (ALJ) granted a motion to intervene filed on May 17, 2019, by residents who lived or owned property in proximity to the project area (Local Residents¹).

{¶ 12} Additional notices of intervention were filed by Huron County (September 23, 2019), Norwich Township (October 4, 2019), Richmond Township (October 4, 2019), and Erie County (October 16, 2019).

{¶ 13} On January 24, 2020, attorney Jack Van Kley filed a notice of appearance on behalf of 22 members who were participating as Local Residents in the case. On February 21, 2020, former counsel for Local Residents filed a notice of withdrawal of counsel.

{¶ 14} On February 6, 2020, petitions for leave to intervene and memoranda in support of petitions were filed separately by (1) the Black Swamp Bird Observatory (BSBO) and, (2) Tom Yingling and Kevin Erf (collectively "Local Farmers").

{¶ 15} By Entries dated October 24, 2019, December 23, 2019, and March 5, 2020, Huron County, Norwich Township, Richmond Township, Erie County, City of Willard, Local Farmers, and BSBO were granted intervention.

{¶ 16} On September 11, 2020, the Joint Stipulation and Recommendation (Joint Stipulation) was filed, as signed by Firelands, Staff, City of Willard, Huron County, Norwich Township, Richmond Township, and Local Farmers. Local Residents, BSBO, and Erie County did not sign the Joint Stipulation.

{¶ 17} The adjudicatory hearing was held as scheduled using remote hearing technology between October 5-16, 2020.

¹ Numerous local residents joined as parties throughout the case. Prior to the hearings in the case, some of the local residents either declined to participate or formally withdrew from the case. Ultimately, attorney Jack Van Kley began serving as counsel to many, but not all, of the local resident intervenors pursuant to his notice of appearance on January 24, 2020. As no local residents participated in the case other than through attorney Van Kley, "Local Residents" shall refer to all participating local residents.

{¶ 18} By Opinion, Order, and Certificate dated June 24, 2021, (June 24 Order) the Board approved and modified the Joint Stipulation and issued a certificate of environmental compatibility and public need to Firelands for the construction, operation, and maintenance of a wind-powered electric generation facility in Huron and Erie Counties. As is common in certification proceedings, the June 24 Order set forth conditions that must be satisfied in relation to the project, including pre-construction conditions.

{¶ 19} R.C. 4906.12 provides that R.C. 4903.02 to 4903.10 and R.C. 4903.20 to 4903.23 apply to any proceeding or order of the Board, as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 20} Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner, form, and circumstance set forth in R.C. 4903.10. R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission. R.C. 4903.10(B) also required that applications for rehearing be in writing and must set forth specifically the ground or grounds on which the party seeking rehearing considers an order unreasonable or unlawful.

{¶ 21} On July 23, 2021, intervenors Local Residents and BSBO (Rehearing Applicants) filed an application for rehearing of the June 24 Order. On July 26, 2021, Rehearing Applicants filed a notice of errata in application for rehearing.

{¶ 22} On August 2, 2021, separate memoranda contra application for rehearing were filed by Firelands and Local Farmers.

{¶ 23} By Entry issued August 20, 2021, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the ALJ granted rehearing for the limited purpose of affording the Board additional time to consider the issues and arguments raised in the application for rehearing.

III. DISCUSSION

{¶ 24} In the June 24 Order, the Board authorized a certificate for the construction, operation, and maintenance of the proposed project as recommended in the Joint Stipulation, subject to modifications. The application for rehearing filed by the Local Residents and BSBO contests that decision, with Local Residents supporting the entirety of the rehearing application and BSBO supporting the facts and arguments pertaining to birds, bats, and the economics of the project.

{¶ 25} As there are no conflicting arguments among the Rehearing Applicants, the Board addresses the application for rehearing without distinguishing among the arguments of the parties to the joint filing. The Board has reviewed and considered all of the claims and arguments contained in the application for rehearing. Any claim or argument contained in the application for rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and is, unless otherwise specifically stated, denied.

A. *Summary of the application for rehearing*

{¶ 26} Rehearing Applicants raise six major opposition claims to the June 24 Order: (1) public opposition demonstrates that the project does not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6); (2) the order circumvented the Board's statutory and regulatory mandates as to creating a complete evidentiary record; (3) the evidentiary record is deficient as to findings relating to (a) the nature of the project's probable environmental impact, (b) the determination that the project represents the minimum adverse impact, and (c) the determination that the project will serve the public interest, convenience, and necessity; (4) the determination that the project's probable impact has not been evaluated and determined; (5) the order improperly delegates the Board's authority for certification decisions to Staff of other governmental entities; and (6) the Joint Stipulation violates regulatory principles and is contrary to public interest.

{¶ 27} Rehearing Applicants' first claim contends that the Board wrongfully concluded, for purposes of applying R.C. 4906.10(A)(6), that the project serves the public interest, convenience, and necessity because the Board failed to properly consider public opposition to the project. In support of this claim, Rehearing Applicants claim that the actions of several local governmental entities in not joining the Joint Stipulation should be interpreted as their opposition to the project. Further, Rehearing Applicants claim that the Board's consideration of the testimony at the local public hearing and public comments in the case failed to account for the strength of public opposition.

{¶ 28} Firelands counters the first claimed error citing to several key facts. First, Firelands claims that it is unreasonable to assume that the absence of local governmental acquiescence in the Joint Stipulation should be interpreted as opposition to the project. Further, Firelands argues that it is unreasonable to attempt to gauge public reaction to the project based solely on public comments, comment cards, and informal petitions.

{¶ 29} Rehearing Applicants' second claim contends that, in adopting the Joint Stipulation, the Board unlawfully circumvented its obligation to consider the case pursuant to a complete evidentiary hearing. In support of this argument, Rehearing Applicants reference the Board's certification conditions, which require that Firelands perform and submit a combination of five studies or plans, as well as additional karst geological information, between the project's certification and the commencement of its operation. Rehearing Applicants claim that the certificate conditions in the June 24 Order are improper because the studies and plans at issue must be (1) submitted to the public for review and comment, and (2) subject to a further, formal, adjudication process.

{¶ 30} Firelands counters claimed errors relating to the Board's decision to certificate the project subject to conditions requiring that additional studies and plans be submitted and approved by Staff prior to the construction and operation of the facility. Firelands emphasizes that, as to each of the issues raised by Rehearing Applicants, both the evidentiary record and the Joint Stipulation considered disputes of law and fact in a manner

that has been previously endorsed by the Supreme Court of Ohio. *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869; *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142 (*Champaign Wind*). Further, Firelands notes that Staff retains authority over implementing these matters, consistent with Ohio Adm.Code 4906-7. Accordingly, Firelands maintains that the June 24 Order is free from procedural and factual defects.

{¶ 31} In their third argument, Rehearing Applicants claim that the evidentiary record is deficient as to findings relating to (a) the nature of the project's probable environmental impact, (b) the determination that the project represents the minimum adverse impact, and (c) the determination that the project will serve the public interest, convenience, and necessity. Rehearing Applicant's arguments as to these issues are extensive, encompassing 131 pages of briefing. In assessing these arguments, the Board will separately consider claimed errors regarding (1) the general impact of the certification, and (2) wildlife-specific (bat and bird, primarily) issues.

{¶ 32} As to matters in their third argument that do not expressly involve bat and bird impacts, Rehearing Applicants claim that the turbine locations will create unreasonable noise disturbances, contending that (1) the Board's reliance on Firelands' noise studies was in error both in terms of where monitoring occurred and the study's inclusion of ambient noise levels, and (2) establishing the maximum nighttime noise level at up to 49.1 dBA creates unreasonable environmental health impacts. Additionally, Rehearing Applicants claim that the project's installation of turbines on Karst unreasonably jeopardizes the quantity and quality of the community's water supply, as well as increasing the risk of flooding hazards in the project area. Further, they claim that the project's minimum setback requirement should be increased to 1640 feet away, as opposed to the certificated maximum of between 1355-1384 feet, in order to protect the public from blade shear circumstances. They further allege abuse in the June 24 Order as to reliance on the certificate condition requiring that the project maintain shadow flicker of no more than 30 hours per year, claiming that this condition cannot be deferred for compliance confirmation by Staff in

response to the project's final design and testing protocols. They further claim that the project must be denied certification because the electricity produced by the project is deficient in terms of efficiency and reliability. They also claim that the Board's order should be amended to clarify Firelands' responsibility as to potential impacts to television reception and real-time kinematic GPS locator systems. Further, they claim that the wind turbines will be a visual blight on the community, negatively impact emergency air evacuations, and negatively impact property values.

{¶ 33} As to matters in their third argument that expressly impact bats and birds, Rehearing Applicants claim deficiencies in both the studies that the Board relied upon and the mitigation measures that the Board required in approving the project. Relative to the bat studies, Rehearing Applicants maintain their claim that (1) the Board erred in weighing the evidence (including the surveys and the expert testimony) as it relates to the project's expected impact on bat populations, and (2) mitigation measures adopted by the Board pursuant to the technical assistance letter (TAL) from the United States Fish and Wildlife Service (USFWS) are insufficient in addressing the project's impact to bats. Rehearing Applicants claim survey deficiencies as to both the types of surveys that were conducted (and not conducted), as well as the quality of the surveys. In support of these claims of survey inadequacy, they challenge the Board's decision to rely upon the technical advice of USFWS, Ohio Department of Natural Resources (ODNR), and Staff. In order to remedy these claimed errors, they seek a number of new, more comprehensive, and updated surveys prior to the project's approval. Further, as to their claim of faulty eagle surveys, they seek a condition that would establish a 2.5-mile buffer between all turbines and existing or future eagle nests in and around the project area. They further claim that the certificate was improper because it requires Firelands to submit its turbine curtailment plan to reduce bird and bat mortalities at least 60 days prior to commencing turbine operation, instead of requiring the express approval of the plan as part of the certification decision.

{¶ 34} Firelands counters claimed errors by emphasizing that each of the issues raised in the application for rehearing was addressed in the June 24 Order. Consistent with

the manner in which we describe Rehearing Applicants' claimed errors, we bifurcate the Company's positions with respect to (1) the general impact of the certification, and (2) wildlife-specific (bat and bird, primarily) issues.

{¶ 35} As to matters that do not expressly relate to bat and bird impacts, Firelands contests each of the claimed errors from the application for rehearing. Relative to the project's noise impacts, Firelands notes that the Board reasonably relied upon expert testimony as to the manner of assessing sound impacts, as well as in response to claims of overall adverse health impacts in relation to windpower projects. Further, the Company emphasizes that the project remains subject to Staff enforcement of operational noise limitations consistent with Stipulation Condition 33 and Ohio Adm.Code 4906-4-07. Relative to potential impacts to water supplies and flooding due to karst features in the project area, Firelands stresses that the June 24 Order imposed restrictions in addition to those recommended in the Joint Stipulation in response to the Board's concerns about the karst construction impacts of the project. Firelands claims that the Board's multi-faceted approach of prohibiting construction in areas where karst is anticipated at a moderate to high level and requiring Staff's pre-construction approval of detailed geotechnical engineering plans provides a high degree of safeguards as to the complexities of constructing the project near known karst topography. As to the project's minimum setbacks, Firelands claims that the Board reasonably relied upon the record evidence, which included turbine manufacturer information and Staff testimony, in requiring setbacks that are closer than those described in a manufacturer safety manual that was admitted into evidence. As to the project's shadow flicker impacts, Firelands emphasizes that the June 24 Order subjects the project to Staff's review and approval of a final shadow flicker report prior to commencing construction of the project. As a result, the Company maintains that the Board reasonably found that the preliminary design study sufficiently supported the Board's advancement of the project while the final design and operational expectations are being developed. As to claims that the electricity produced by the project is deficient in terms of efficiency and reliability, Firelands stresses that the Board reasonably relied on

expert testimony in the case, which supplemented third-party reliability standards that are endorsed by the North American Electric Reliability Corporation (NERC) and PJM Interconnection, Inc. As for claims that the June 24 Order is deficient in safeguarding the public against disruptions in television and GPS-enabled farming equipment, Firelands continues to maintain that the June 24 Order is clear as to the Company's obligation to remedy any impacts from the project. As to claims of blight from the project, Firelands argues that the June 24 Order reasonably restricts the project in terms of the number and quality of permissible turbines, which is consistent with the requirements in R.C. 4906.10(A)(3). As to claims that the project will impair aviation, Firelands cites to the reviews of the Federal Aviation Administration and the Ohio Department of Transportation in support of the Board's June 24 Order. And as to claims that the project will cause socioeconomic harm with respect to property values and commercial activity, Firelands claims that Rehearing Applicants offer nothing to support their positions beyond what the Board previously considered when it issued the June 24 Order.

{¶ 36} As to matters involving bats and birds, Firelands rebuts the rehearing application by arguing that the June 24 Order properly considered the weight of the record evidence in the case, and that the Board's decision to certificate the project subject to significant ongoing demands on the Company as to compliance oversight by Staff, ODNR, and USFWS is reasonable and soundly within the Board's legal authority.

{¶ 37} In their fourth argument, Rehearing Applicants claim that the Board erred in finding that the probable impact of the project has been evaluated and determined due to inadequate consideration of the alleged economic damage that the project will impose on local residents and businesses.

{¶ 38} In response to the fourth alleged error, Firelands argues that the Board properly considered and rejected the claimed economic harm associated with the project. According to the Company, Rehearing Applicants fail to raise any fact or law arguments that are not addressed in the June 24 Order.

{¶ 39} In their fifth and sixth arguments, Rehearing Applicants claim that the Board erred in certificating the project subject to Staff's review of additional plans and studies that Firelands is to provide prior to the project becoming operational. In lieu of Staff's review and consideration of the additional studies and plans, Rehearing Applicants claim that the Board must consider the propriety of each of the supplemental items pursuant to a further evidentiary hearing. Accordingly, Rehearing Applicants assert that the June 24 Order violates important regulatory principles and is contrary to public interest due to (1) a deficient evidentiary record, (2) improper delegation of Board authority to Staff, (3) the project does not constitute the minimum environmental impact, and (4) the project does not serve the public interest, convenience, and necessity.

{¶ 40} Firelands' response to the fifth and sixth alleged errors is encompassed in its response to the second alleged error, as described in Paragraph 30.

B. Board conclusion

{¶ 41} The Board rejects the arguments raised in the rehearing application and affirms the June 24 Order. Initially, we note that Rehearing Applicants essentially restate the arguments raised in their post-hearing briefs, which were considered and rejected in the June 24 Order. We continue to reject the claimed errors of fact and law as they relate to the decision to certificate this project. Accordingly, the joint application for rehearing is denied.

{¶ 42} Initially, we reject Rehearing Applicants' first alleged error, which focuses on arguments that we did not properly consider the public interest, convenience, and necessity of the project, as required by R.C. 4906.10(A)(6). In our decision, we relied upon many factors in finding that the project is consistent with this standard, including (1) affirmative local government support, (2) absence of local government opposition, (3) favorable economic impacts to local governments and schools, (4) favorable economic impacts to the local farming community, (5) participation in favor of the project by local farmers and those who testified at the local public hearing, and (6) expert testimony as to expected impacts to local property values. June 24 Order at ¶¶ 58-65. We continue to maintain that these

considerations support the conclusion that the project is consistent with public interest, convenience, and necessity considerations. Moreover, we reject Rehearing Applicants' claims that the decisions of certain local governmental entities to either not participate in the case or not join in the Joint Stipulation should be construed as opposition to the project. Given the broad opportunities for local governments to participate in these cases, we do not find it reasonable to assume that decisions not to participate or not to join in a case stipulation should reasonably be interpreted as opposition to a project.

{¶ 43} We also reject Rehearing Applicants' second, fifth, and sixth claimed errors, which address the certification of this project subject to Firelands' obligation to provide additional information prior to the project becoming operational. Initially, we reject the notion that approving the project subject to additional filing requirements is tantamount to not adjudicating the issues in the case. The June 24 Order was explicit as to what additional information must be filed prior to the project becoming operational, as well as the coordinated review and approval process that must occur in response to the supplemental filings. It is well-established that the Board's siting authority is "a dynamic process that does not end with the issuance of a construction certificate" and that "* * * proper facility siting is subject to modification as the process continues – proposals are tested and matched to the defined conditions." *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878 at ¶16, 17. Accordingly, we decline to accept Rehearing Applicants' claims that Staff's continuing involvement in the case, including reviewing and approving specific additional information prior to the project becoming operational, constitutes an improper delegation of the Board's authority. We maintain that the June 24 Order set forth specific findings and conditions with respect to the project's construction and operational requirements. The decision to require Firelands to file additional information, which is subject to Staff's review, cannot be construed as a lack of any required finding by the Board. Further, we emphasize that the June 24 Order is consistent with prior Board decisions in which we have issued certificates subject to continued Staff review. See, e.g., *Champaign*

Wind, Case No. 12-160, Opinion, Order and Certificate (May 28, 2013); *In re the Application of Icebreaker Windpower Inc.*, Case No. 16-1871-EL-BGN (May 21, 2020).

{¶ 44} We also reject Rehearing Applicants' third claimed errors with respect to the project's impact on noise, water supply and quality, flooding, setbacks, shadow flicker, and electricity efficiency and reliability, as well as their claims that the June 24 Order fails to properly consider potential impacts to television reception, kinematic GPS locator systems, visual blight, emergency air evacuations, and property value impacts. In reviewing each of the claimed errors, we conclude that all of these issues were affirmatively considered by the Board. As to each issue, we carefully weighed the evidence in the case and determined that the project is capable of safe construction and operation in spite of the opposition evidence that was presented in the case. June 24 Order at ¶82 (setbacks), ¶83-85 (karst and grouting impacts on water supply, quality, and flooding), ¶87 (noise), ¶88 (shadow flicker), ¶¶89-90 (communications), ¶146 (blight), ¶160 (emergency air evacuations), ¶169 (efficiency and reliability), and ¶¶64-65 (property value impacts). Accordingly, we reject Rehearing Applicants' claimed errors as to each of these issues.

{¶ 45} Similarly, we reject Rehearing Applicants' third claimed errors as to matters that expressly impact bats and birds. As we determined based on 29 site-specific bat and bird surveys, and the coordinated expertise of ODNR, USFWS, and Staff, the project is not expected to unreasonably impact bats and birds. June 24 Order ¶¶139-148. Moreover, consistent with our prior decisions in this area, we continue to rely upon the combined experience of Staff, ODNR, and USFWS as to overseeing the bird and bat impacts associated with terrestrial wind energy projects. As a result, we reject claims that the June 24 Order is deficient in regard to (1) the weight the Board gave to competing expert testimony, including the credibility of prior surveys, and (2) mitigation measures imposed by the Board as to impacts to bats and birds, including eagles and state and federal threatened and endangered species.

{¶ 46} We also reject Rehearing Applicants' fourth claimed errors with respect to the project's probable socioeconomic impact to local residents and businesses. The June 24 Order is clear in describing our acceptance of the expert testimony of witnesses MaRous and Tauzer, who testified against the economic harm arguments raised by Rehearing Applicants. June 24 Order at ¶¶58-65. Accordingly, we affirm our prior determination in this area.

{¶ 47} In summary, the Board finds that the application for rehearing is without merit. As to each of the claimed errors, we affirm the determinations from the June 24 Order, which thoroughly examined and addressed the arguments raised by the project's opponents. We reject claims that our prior consideration of this matter was inadequate or otherwise inconsistent with the weight of the evidentiary record in this case.

IV. ORDER

{¶ 48} It is, therefore,

{¶ 49} ORDERED, That the application for rehearing filed by Local Residents and BSBO be denied. It is, further,

{¶ 50} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:

Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Jack Christopher, Designee for Lydia Mihalik, Director
Ohio Department of Development

Brittney Colvin, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

W. Gene Phillips, Designee for Bruce T. Vanderhoff, M.D., Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

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Case No(s). 18-1607-EL-BGN

Summary: Opinion & Order on Rehearing denying the application for rehearing filed by Local Residents and the Black Swamp Bird Observatory. electronically filed by Ms. Mary E. Fischer on behalf of Ohio Power Siting Board