

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Black )  
Fork Wind Energy, L.L.C. for a Certificate )  
to Site a Wind-Powered Electric Generating ) Case No. 10-2865-EL-BGN  
Facility in Crawford and Richland )  
Counties, Ohio. )

ENTRY ON REHEARING

The Ohio Power Siting Board finds:

- (1) On March 10, 2011, Black Fork Wind Energy, LLC (Black Fork or the Applicant) filed an application for a certificate of environmental compatibility and public need (certificate) to construct a wind-powered electric generating facility in Crawford and Richland counties, Ohio.
- (2) On January 23, 2012, Ohio Power Siting Board (Board) issued its opinion, order, and certificate (order) approving and adopting the Stipulation, as amended, entered into by the Applicant, the Board's Staff, the Ohio Farm Bureau Federation (OFBF), and the Board of Crawford County Commissioners, which provided that a certificate should be issued, subject to the 80 conditions set forth in the Stipulation.
- (3) Section 4906.12, Revised Code, states, in relevant part, that Sections 4903.02 to 4903.16 and 4903.20 to 4903.23, Revised Code, apply to a proceeding or order of the Board as if the Board were the Public Utilities Commission of Ohio (Commission).
- (4) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a Commission proceeding may 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.
- (5) Rule 4906-7-17(D), Ohio Administrative Code (O.A.C.), 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 and form and circumstances set forth in Section 4903.10, Revised Code.

- (6) On February 17, 2012, intervenors Alan Price, Catherine Price, and Gary Biglin filed applications for rehearing of the order. On February 21, 2012, intervenors Brett Heffner and John Warrington filed applications for rehearing of the order. Mr. Heffner's rehearing application included a request that an audio recording he alleges was made of the teleconference which occurred on September 9, 2011, be entered into the evidentiary record in this case. On February 22, 2012, intervenors Carol Gledhill and Loren Gledhill separately filed applications for rehearing of the order that, in terms of all the arguments they raise, mirror each other, as well as the rehearing application of Gary Biglin.
- (7) On February 27, 2012, Black Fork filed memoranda contra the rehearing applications of Alan Price, Catherine Price, and Gary Biglin. On March 2, 2012, Black Fork filed memoranda contra the rehearing applications of Brett Heffner and John Warrington. Also on March 2, 2012, Black Fork filed a motion to strike portions of Mr. Heffner's rehearing application, accompanied by a memorandum contra Mr. Heffner's request to have the audio recording admitted into the evidentiary record. On March 5, 2012, Black Fork filed memoranda contra the rehearing applications of Carol Gledhill and Loren Gledhill. On March 9, 2012, Mr. Heffner filed a pleading which, in essence, served both as a reply to the memorandum contra that Black Fork filed in response to Mr. Heffner's request to have the audio recording admitted into evidence, and also as a memorandum contra Black Fork's motion to strike portions of Mr. Heffner's rehearing application. On March 12, 2012, Black Fork filed a reply to Mr. Heffner's memorandum contra Black Fork's motion to strike portions of Mr. Heffner's rehearing application.<sup>1</sup>
- (8) On February 28, 2012, the administrative law judge (ALJ) issued, pursuant to Rule 4906-7-17(I), O.A.C., an entry ordering that the applications for rehearing filed by Alan Price, Catherine Price, Gary Biglin, Brett Heffner, John Warrington, Carol Gledhill, and Loren Gledhill should be granted for the purpose of affording the Board more time to consider the issues raised in those rehearing applications.

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<sup>1</sup> On March 9, 2012, Mr. Biglin filed a reply to Black Fork's memorandum contra, entitled "In Reference to the Memorandum Contra of Black Fork Wind Energy, LLC to The Application for Rehearing by Gary J. Biglin." Because there is no provision in either the statute or the Board's rules to file replies to memoranda contra applications for rehearing, Mr. Biglin's March 9, 2012, filing cannot be considered.

Rehearing Arguments Raised By Alan Price

- (9) Mr. Price raises seven grounds for rehearing. As the first of his grounds for rehearing, Mr. Price alleges that, before their offices were asked to work on a road agreement, those township and county employees who signed leases with Black Fork or Element Power should have been replaced. Additionally, Mr. Price alleges that it was unethical for the Applicant to tell lease signers who had questions about their lease to go to attorney Jim Prye because Mr. Price claims that Black Fork both paid Mr. Prye for such work and also paid Mr. and Mrs. Prye for using their title company for work.

In its memorandum contra, Black Fork asserts that Mr. Price has not provided a legal basis for concluding that any of the conduct he alleges to have occurred is illegal or unethical and that the Board has no jurisdiction over the allegations of unethical behavior cited to by Mr. Price.

- (10) Upon review, we find that no basis exists of record to substantiate either that the factual allegations made on rehearing by Mr. Price actually occurred in the manner alleged, or that the conduct alleged, even if it did occur, was illegal. Most importantly, there has been no showing made of record that any illegal or unethical behavior by anyone factored, or should have factored, into the Board's decision, or that the Board is the appropriate tribunal to address purported unethical behavior of township and county employees. Accordingly, Mr. Price's first assignment of error should be denied.
- (11) In his second rehearing argument, Mr. Price alleges that the Applicant, the Commission, and the Board are "doing their best to bully" elected county officials "into signing agreements that they do not have enough time or resources to fully investigate."

In its memorandum contra, Black Fork asserts that there is no basis in law or in fact to support Mr. Price's claims that county officials are being "bullied" in this way.

- (12) Upon review, we find this second argument of Mr. Price is without merit. No basis exists in the record evidence to substantiate the allegations of "bullying" made on rehearing by Mr. Price, nor did Mr. Price present evidence of any such conduct at the hearing. In addition, both Crawford County and Richland County were parties to this case and there was no evidence that anyone employed by

these counties was in any way unduly influenced by any party or the Board or that any such conduct occurred. Accordingly, Mr. Price's second assignment of error should be denied.

- (13) Mr. Price's third assignment of error on rehearing posits that the Applicant is being allowed to build a wind farm without having to post any kind of bond before starting construction.

In its memorandum contra, Black Fork states that this assertion is simply incorrect.

- (14) Upon review, we note that Condition 66(h) of the Stipulation, summarized at pages 48-49 of the order, clearly imposes an obligation on the Applicant to provide, prior to construction, a financial assurance instrument such as a surety bond, for purposes of demonstrating that adequate funds have been posted for the scheduled construction. Because this condition of the Stipulation imposes a bonding obligation on the Applicant prior to construction, Mr. Price's rehearing argument to the contrary is without merit, does not justify rehearing of the order, and should be denied.

- (15) In his fourth assignment of error, Mr. Price claims that the Applicant's study of background noise for the wind farm project was flawed. Mr. Price claims that four of the eight monitors used in the background noise study were located near heavy traffic and that two monitors were not within the project area.

In its memorandum contra, Black Fork notes that Mr. Price did not cite to any evidence that the monitors were placed in high traffic areas or that the monitoring sites were not adequate to provide a valid sampling of background noise levels. Additionally, Black Fork points out that its witness, Kenneth Kaliski, testified at length regarding the location of the monitors used for his background noise study and explained that the results of one monitor that recorded at a very high equivalent continuous noise level (LEQ) were not considered when determining the average nighttime sound level for the project.

- (16) The Board finds that Mr. Price's rehearing claim that the project's background noise study was flawed is simply not supported by the record and, as such, is without merit. Black Fork witness Kaliski provided expert testimony which supports a finding that the monitoring sites used in his noise study were satisfactory to

provide a valid sampling of noise levels in the project area. Mr. Price failed to cite to any evidence of record that would negate or even challenge Mr. Kaliski's expert opinion on this topic. Accordingly, Mr. Price's fourth assignment of error should be denied.

- (17) In his fifth assignment of error, Mr. Price claims that the application was not made available to him until the first day of the evidentiary hearing. Mr. Price also disputes the hearing testimony of the Applicant witness Hawkins, who indicated that a copy of the application was sent to the Crestline Public Library in September 2011. Mr. Price further asserts, without including any supporting documentation, that the Crestline Library "never received it until December 2011."

In its memorandum contra, Black Fork claims that it followed the Board's rules on whether and how libraries are to be furnished with the copies of the application, and that those rules do not require, under the facts of this case, that a copy of the application be furnished to the Crestline Public Library.

- (18) Upon review, we find no merit to Mr. Price's fifth assignment of error. We note that Rule 4906-5-06, O.A.C., governs service of an application for a wind-powered electric generating facility. This rule requires that the Applicant place either a copy of the application or notice of its availability "in the main public library of each political subdivision as referenced in Section 4906.06(B), Revised Code." That statutory provision, as applicable, also requires service of the application on the chief executive officer of each municipal corporation and county "in the area in which any portion of the proposed facility is to be located." We agree that, as pointed out by Black Fork in its memorandum contra, no part of the facility involved in this case is proposed to be located within the village of Crestline. The Board's rules, thus, do not require service of the application, or notice of its availability, on the Crestline Public Library. Moreover, in that copies of the application were served on the libraries serving the county seats of both Crawford and Richland counties where the project is to be located, as well as on three other libraries located within those two counties, the record reflects Black Fork's compliance with the Board's rules regarding service to libraries in the project area (Black Fork Ex. 2, June 17, 2011, Certificate of Service). Moreover, from the time the application was filed with the Board and throughout

the duration of this case, the application was available on the Board's website. Moreover, there is no requirement that the Applicant serve persons who intervene in the case subsequent to the filing of the application with a copy of the application. Accordingly, Mr. Price's fifth assignment of error should be denied.

- (19) In his sixth ground for rehearing, Mr. Price accuses the Board of failing to explain the difference between the terms "the applicant, the facility owner, and the facility operator" as those terms are used in the Board's decision.

Black Fork disagrees with Mr. Price's assertion.

- (20) This claim is without merit. A thorough explanation of the Board's interpretation of the manner in which these terms are used in the Stipulation and in the order is provided by the Board at page 70 of the order. Accordingly, Mr. Price's sixth assignment of error should be denied.
- (21) As his seventh ground for rehearing, Mr. Price questions how the Board could have approved the application when, in his view, many questions asked of witnesses during the evidentiary hearing were left either unanswered or not answered completely.
- (22) We find Mr. Price's final rehearing argument is without merit. First, Mr. Price has not cited to a single instance where a question was left unanswered at the hearing. More importantly, Mr. Price neither identifies any way in which the Board's decision was not supported by the record, nor does he explain how the record is so incomplete as to provide an improper and insufficient basis for the Board, in making its decision as reflected in the order, to fulfill all of its jurisdictional obligations in this case. Further, the Board notes that all parties had the opportunity to question witnesses at the hearing, either by subpoenaing them to testify or by cross-examining other parties' witnesses. Accordingly, the Board finds that Mr. Price's seventh assignment of error should be denied.

#### Rehearing Arguments Raised By Catherine Price

- (23) In her rehearing application, Ms. Price raises 12 arguments that, broadly, appear to critique either the application, the terms of the Stipulation, and/or the testimony of various hearing witnesses. In her first assignment of error, Ms. Price disputes whether the

application properly identifies the generation capacity of the turbine models under consideration.

In response, Black Fork asserts that the application properly identifies the generation capacity of each of the turbine models under consideration.

- (24) Ms. Price has raised no issue in her first assignment of error that warrants reconsideration, in that the record clearly sets forth the capacity ratings of the turbine models. Accordingly, her request for rehearing should be denied.
- (25) In her second assignment of error, Ms. Price submits that the study of historic properties undertaken in this case is incomplete, based on her belief that it failed to include Ms. Price's own residence, allegedly built in 1836.

In response, Black Fork points out that Ms. Price presented no evidence at hearing showing either that her residence qualifies for registration in any of the registries that Rule 4906-17-08(D), O.A.C., requires the Applicant to consult, or whether or how the project would have any impact on the cultural or historical significance, if any, of her residence.

- (26) A review of the record indicates that Ms. Price's second assignment of error should be denied as there is no evidence of record to support her allegation that the Board's conclusions were in error.
- (27) In her third assignment of error, Ms. Price contends that, because road use agreements have yet to be finalized, the status of certain planned changes to affected roads remains in play, thereby jeopardizing her right to travel on safe roads.

Black Fork responds that the conditions of the Stipulation addressed transportation and road use agreements, and require the Applicant to develop route plans, make road improvements outlined in the route plans, repair damage to bridges and roads caused by construction activity, and obtain all required county and township transportation permits.

- (28) The Board finds Ms. Price's third assignment of error to be without merit, as the record supports the finding that the Stipulation clearly provides for the necessary and appropriate road use agreements. Accordingly, this request for rehearing should be denied.

- (29) Ms. Price, in her fourth assignment of error, contends that the Applicant's study of water wells is incomplete, based on her belief that multiple wells were not included in it, including three wells that allegedly exist on Ms. Price's property.

In response, Black Fork points out that Ms. Price has cited no record support for her allegations questioning the reliability of Black Fork's water well study based on an alleged failure to include Ms. Price's own wells. Also, the Applicant notes that she ignored the hearing testimony of Black Fork witness Dohoney, which supports the Board's decision even in the event that Ms. Price's wells were not included in the study.

- (30) Upon review, the Board finds no merit in Ms. Price's fourth assignment of error. The record supports the Board's finding in this regard; therefore, this request for rehearing should be denied.
- (31) In her fifth assignment of error, Ms. Price contends both that no baseline study on television and cell phone signal strength was done and, also, that the Applicant's mitigation process, to be applied in the event that such signal strength is lost, has not been fully explained.

In response, Black Fork states that testimony exists indicating that wind turbines do not cause telephone and cell phone degradation and, in any event, two conditions of the Stipulation address Ms. Price's television and cell phone reception concerns.

- (32) Contrary to Ms. Price's fifth assertion on rehearing, the Board finds that the record does address and alleviate concerns about telephone and cell phone degradation. Accordingly, this request for rehearing should be denied.
- (33) In her sixth assignment of error, Ms. Price accuses the Applicant of not wanting to insure the funding for decommissioning, she questions whether such funding exists, who, if anyone, would provide it, if, for example, weather would damage the turbines beyond repair and she asks what would happen if the party responsible goes bankrupt before the decommissioning funds are in place.

In response, the Applicant states that the issues regarding financial assurance/bonding, were addressed by the Board at pages 48-49 of the order, inasmuch as the Board has adopted condition 66(h) to



the Stipulation, which requires the posting of decommissioning funds, a surety bond or assurance before the scheduled construction of each turbine.

- (34) Upon consideration the Board finds no merit in Ms. Price's sixth assignment of error, in that the issue of decommissioning was fully addressed and resolved in the Stipulation and on the record in this case. Therefore, this assignment of error should be denied.
- (35) In her seventh assignment of error, Ms. Price, critiques various parts of the testimony of Black Fork witness Kaliski, who testified concerning background noise studies he conducted, as well as issues relating to turbine operational noise.

Black Fork responds that Ms. Price's critique of the evidence relating to noise issues fails to present any grounds for concluding that the Board's analysis and conclusions on that topic, in the order, are unreasonable, unlawful, or unsupported by the record.

- (36) With regard to Ms. Price's seventh assignment of error, the Board agrees that the record supports the finding that the noise level is appropriate in this case. No evidence was presented on the record to the contrary. Accordingly, this assignment of error should be denied.
- (37) Ms. Price, in her eighth assignment of error, questions whether the turbine manufacturer, who the record shows is the party who will maintain the turbines, will answer to anyone if large parts must be trucked in for repairs.

In response, Black Fork notes that all of the duties and obligations pertaining to turbine maintenance that are imposed on the Applicant through conditions of the Stipulation are adequately explained and addressed in the order.

- (38) Upon review of Ms. Price's eighth assignment of error, the Board notes that it appears that Ms. Price would have the Board now consider and answer the question of whether any of these same duties and obligations imposed on the Applicant (for example, the duty to comply with all local county or township permitting requirements) should apply to other entities besides the Applicant, such as the turbine manufacturers. On this issue, the Board notes that our jurisdiction extends to the Applicant and the Applicant is and will be held accountable for any necessary maintenance on the

facility, whether or not the Applicant chooses to contract with another entity to provide such maintenance. With this in mind, the Board finds that it is not necessary to further address this issue and that this assignment of error should be denied.

- (39) In her ninth assignment of error, Ms. Price lists several criticisms of the testimony of Black Fork witness Mundt, an epidemiologist whose purpose in testifying was to indicate, based on Dr. Mundt's review of the relevant, published, peer-reviewed scientific literature, as well as the professional training and experience in applying epidemiological concepts and methods to diverse human health issues, whether she had found any consistent or well-substantiated causal connection between residential proximity to industrial wind turbines and health effects.

In response, Black Fork states that none of the criticisms that Ms. Price has raised on rehearing with regard to Dr. Mundt's testimony, pertain to the actual purpose served by her testimony. Nor do any of her criticisms present valid reasons for the Board to depart from its reliance on that testimony, based on its own judgment that Dr. Mundt's testimony competently served its intended purpose.

- (40) The Board finds that Ms. Price's ninth assignment of error is without merit. There was sufficient expert testimony presented in this matter that supports the Board's reliance on Dr. Mundt's testimony in this regard. No evidence was presented on the record to the contrary. Accordingly, this assignment of error should be denied.
- (41) In her tenth through twelfth assignments of error, Ms. Price raises the same concerns as Mr. Price regarding: whether and when a copy of the application was placed at the Crestline Public Library; how the Board has interpreted the terms "applicant", "facility owner", and "facility operator"; and whether, at the close of the hearing, too many questions of record were left unanswered for the Board, in making its decision, to have carried out its proper statutory jurisdiction.
- (42) The Board has already fully addressed these issues in Findings (18), (20), and (22) above, and her tenth through twelfth assignments of error should, therefore, be denied.

Rehearing Arguments Raised by Gary Biglin

- (43) In the first of his four rehearing arguments, Mr. Biglin contends that the Board's decision is unreasonable and unlawful because it fails to require the Applicant to maintain an adequate turbine setback distance from nonparticipating property lines and public roadways, thus violating Section 4906.10(A)(2), (3), and (6), Revised Code.

In its memorandum contra Mr. Biglin's rehearing application, Black Fork asserts that in issuing its order, the Board acted lawfully and reasonably in approving the turbine setbacks proposed for the project.

- (44) We find no merit in Mr. Biglin's first assignment of error. Mr. Biglin believes that, because Ohio's existing setback standards are based on the distance from the turbine base to the exterior of the nearest habitable residential structure of an adjacent property, they "show disregard for" and fail to "respect" the interests of Ohio property owners in being able to "enjoy every inch" of their property "without concern for the happiness and safety of themselves and their family." Mr. Biglin contends that it was error for the Board to apply a setback standard other than one based only "on distance from property lines and the public roadways." In essence, Mr. Biglin's argument is that the Board erred in applying the actual setback standards that are supported in Ohio law. We disagree. Setback distances have been determined by the Ohio General Assembly and the Board has complied with the distances as established. In fact, it would have been contrary to the statutory formula on the part of the Board had it approved setback distance less than setback distances established by the Ohio General Assembly. In this case, the Board approved a stipulation that provides setback distances that exceed the statutory requirements. Accordingly, Mr. Biglin's first assignment of error should be denied.
- (45) In his second rehearing argument, Mr. Biglin continues, in another way, to question the setback requirements the Board applied in this case and sets forth three reasons to support his claim. First, he contends that the Board's decision is unreasonable and unlawful because it applies setback requirements that "are inadequate to

ensure the rights of health, safety, and well being" to persons who are nonparticipating property owners and to persons using the public roadway. According to Mr. Biglin, the setback requirements imposed through the order, in this regard, violate such persons' constitutional rights under both the United States and the Ohio Constitution, as well as their statutory rights under Section 4939.02(A)(1), Revised Code. Second, Mr. Biglin avers that "the only way" to ensure the complete safety of persons on property adjacent to a wind farm and on public roadways in a wind project area is to impose a setback formula known as "the GE setback formula," which was referenced in the staff report. Third, Mr. Biglin asserts that the order deprives property owners of their constitutional rights to the protection of private property and to procedural due process.

In its memorandum contra, Black Fork maintains that the setbacks imposed under the order adequately protect property owners and users of the public highway and do not violate any of their constitutional or statutory rights.

- (46) Initially, the Board finds that Mr. Biglin has provided no evidentiary support for his second assignment of error; therefore, we find it to be without merit. The Board's decision to reject use of the GE setback formula is supported by the record. Black Fork witness Haley testified concerning the GE setback formula, indicating that it originated from a 2003 published risk analysis study on ice throw from wind turbines, referred to as the Seifert study. Mr. Haley's expert opinion is that the risk of ice throw on the Black Fork project does not warrant the application of the GE setback formula. His testimony supports a finding that, even the authors of the Siefert study have admitted the formula they studied was intended only for use as "rough guide" in making initial siting determinations. Moreover, as Black Fork points out in its memorandum contra, even Mr. Biglin admitted that the GE setback formula has enjoyed limited application, agreeing on cross-examination that GE, itself, only recommended application of the setback if an ice detector is not used on the turbine. For this project, Condition 44 of the Stipulation provides that ice detection systems will be used on all turbines that cause the turbines to automatically shutdown. The Board's decision to reject use of the GE setback formula is also supported by the Board's finding that no evidence was presented of record that warranted additional measures beyond the setback distances prescribed under the Board's rules.

With regard to Mr. Biglin's overall contention regarding the setback issue, the Board notes that, contrary to his assertion, nothing prohibits adjoining landowners from developing their properties or constructing residences after a wind farm has been constructed. Our decision in this case is fully supported by Ohio case law, which holds that established setbacks do not constitute unconstitutional takings if enacted as a result of a proper exercise of the police power and are reasonably necessary for the "preservation of the public health, safety and morals." See *Andres v. City of Perrysburg*, 47 Ohio App. 3d 51, 54 (Wood County, 1988), citing *Pritz v. Messer*, 112 Ohio St. 628 (1925). The setbacks imposed under the order were established by the General Assembly to safeguard the public from potential harm, including, noise, shadow flicker, blade throw or ice throw, which may result from construction of the wind turbines. Such action is within the police power to protect the public health, safety, and morals, and, therefore, does not constitute an unconstitutional taking of private property. Thus, we find that Mr. Biglin's constitutional arguments have no merit and do not justify a grant of rehearing on the order. Accordingly, Mr. Biglin's second assignment of error should be denied in its entirety.

- (47) In his third assignment of error, Mr. Biglin contends that the Board improperly delegated too much authority to the ALJs. He contends that the Board relied upon the ALJs to reach a final decision that was merely rubber-stamped by the Board. In this regard, Mr. Biglin argues that the Board failed to meet its statutory obligation to carefully weigh the issues and evidence and failed to reach an independent determination whether the project should be constructed as proposed.
- (48) The Ohio Supreme Court has held<sup>2</sup> that "drafting an order and deciding an order are not the same, and nothing in the Revised Code prohibits the Board from delegating the drafting of an order to an ALJ." Moreover, in the same decision, the Ohio Supreme Court "relied on a long-standing presumption of regularity, wherein, in the absence of evidence to the contrary, a public board is presumed to have properly performed its duties" (*Id.*). We find that Mr. Biglin's third argument on rehearing is without merit and should be denied.

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<sup>2</sup> *In re the Application of Am. Transm. Sys., Inc.* 125 Ohio St. 3d 333 (May 4, 2010).

- (49) In his fourth and final rehearing argument, Mr. Biglin offers four criticisms of the procedural process. First, he complains that there was a compressed schedule between the dates when intervention was granted and the initially scheduled dates for both the public hearing and the adjudicatory hearing. Mr. Biglin believes that, in other wind project cases, a window of about two weeks between the public and adjudicatory hearings is customary. Second, Mr. Biglin complains that he did not receive a copy of the application until October 11, 2011. Mr. Biglin's third criticism of the procedural process is that, during a September 9, 2011, prehearing procedural teleconference, the ALJs referred to a settlement conference as a settlement meeting and at other times as a stipulation meeting. Mr. Biglin claims this was very confusing. Mr. Biglin's fourth criticism is that John Pawley was the only Staff witness made available for cross-examination.
- (50) Upon consideration, the Board notes that, Rule 4906-7-07(A)(1)(8), O.A.C., provides that, for purposes of the Board's discovery rules, 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. Rule 4906-7-07(B)(1) O.A.C., also provides that discovery may begin immediately after an application is filed or a proceeding is commenced. Thus, because Black Fork filed its application on March 10, 2011, and Mr. Biglin had filed a motion to intervene on August 1, 2011, nothing prohibited Mr. Biglin from seeking any and all discovery of Black Fork once he filed for intervention. With respect to Mr. Biglin's claims regarding the time period between the hearings, we find no merit. Although the two hearings were initially scheduled to occur more closely together, in this case, there was actually a window of about four weeks between the date of the public hearing on September 15, 2011, and the October 11, 2011, date on which commenced the presentation of live hearing testimony in the adjudicatory hearing. Mr. Biglin also has not provided any explanation regarding how he was prejudiced by the schedule that was actually followed.

As for his issue regarding the application, a review of Mr. Biglin's testimony filed on September 19, 2011, indicates that he had access to the application as he made specific references to it. (September 19, 2011, Testimony of Gary J. Biglin, at 2-4). Moreover, under Section 4906.06, Revised Code, the Applicant was required to serve a copy of the application on the chief executive officer of each

municipal corporation and county, and the head of each public agency charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located; however, the Applicant was under no legal obligation to serve Mr. Biglin with a copy of the application, as Mr. Biglin intervened well after the date that the Applicant filed and served copies of the complete application. Even if Mr. Biglin did not have access to the application, which he clearly did have, he has made no showing of prejudice. The application was also available on the Board's website from the time the application was filed.

The Board also notes that Mr. Biglin fails to explain whether any confusion on his part lingered after September 12, 2011, the date on which an entry was issued that summarized the scheduling decisions that were made during the September 9, 2011, procedural teleconference. In any event, he has not shown how any confusion he still had, by that point, affected his ability to participate in the evidentiary hearing. Indeed, the record shows that Mr. Biglin fully participated in the evidentiary hearing, by presenting testimony and cross-examining witnesses.

Finally, we note that there is nothing unreasonable or unlawful about any party having a single witness testify to support its position. Once the Stipulation was entered, it was Staff's decision as to who it presented at hearing to testify in support of the Stipulation and the staff report. Clearly the Board did not commit error because the Staff chose Mr. Pawley to testify. Further, Mr. Biglin was never denied the opportunity to cross-examine any witness appearing at hearing. Therefore, Mr. Biglin's final argument fails to present reasonable grounds for granting rehearing of the order and should be denied.

#### Rehearing Applications Filed By Carol Gledhill And Loren Gledhill

- (51) As previously noted, on February 22, 2012, Carol Gledhill and Loren Gledhill separately filed applications for rehearing that, in terms of all the arguments they raise, essentially mirror each other and also the rehearing application of Gary Biglin. We find that, since their rehearing applications are, in all essential aspects, merely duplicative of the rehearing application of Gary Biglin, the Gledhills' applications for rehearing should be denied for all the same reasons, and in exactly the same manner, as we have denied,

within this entry on rehearing, the rehearing application of Gary Biglin.

Rehearing Arguments Raised By John Warrington

- (52) Mr. Warrington raises three arguments on rehearing. In his first and third assignments of error, Mr. Warrington contends that the Board lacks the ability to render an objective and nonbiased decision that would protect the public interest, well-being, and property of Ohio citizens. In Mr. Warrington's view, the Board "acts only as enablers of industrial wind installation in Ohio with complete disregard for testimony or criteria which disagrees with their industrial wind agenda." Mr. Warrington complains that: information that was stricken from his prefiled testimony, purporting to show that industrial wind projects have a negative impact on property values, should have been considered by the Board; his request to have a real estate expert testify via Skype, rather than to appear live at the hearing, should not have been denied; and the Board's decision in this case rests upon the expert opinion testimony from Black Fork witnesses that the 91 wind turbines proposed will have a neutral or, in fact, benign impact on real estate values. Furthermore, Mr. Warrington contends that the Board creates an evidentiary double standard that is a violation of due process. He claims that the Board has the ability, but refuses, to receive and review the voluminous credible data documenting the immense negative impact that an industrial wind installation will have upon a community. He accuses the Board of receiving all wind industry opinion as fact, while rejecting the credibility of virtually all opposing data.

In its memorandum contra, Black Fork points out that the opinion testimony of its expert witness, Mr. Stoner, was admitted based on his qualifications as an expert witness, under criteria established in Ohio's rules of evidence, rather than on any alleged inability of the Board to render an objective and nonbiased decision. Black Fork also points out that Mr. Warrington admitted that he, himself, was not qualified as an expert (Tr. 694-697).

- (53) We find that Mr. Warrington's first and third arguments on rehearing are without merit. It is not error nor improper for the Board to have expected and required Mr. Warrington, if he wished to present expert opinion testimony on real estate values in his own community, to produce a qualified expert to appear live and in



person at the adjudicatory hearing, to provide expert opinion testimony to that effect. Rather than do that, Mr. Warrington improperly sought to include in his own testimony verbatim phrases and conclusions that appear in the body of a consultant report on real estate valuations and sought the admission of various attachments, including an article on a study performed by a consulting firm and various other articles on real estate. Such improper evidence was properly excluded by the ALJs as there was no foundation or authentication presented at the hearing for the information; moreover, the authors of the report and studies were not presented for examination at the hearing. The Commission has broad discretion in the conduct of its hearings under Section 4901.13, Revised Code. *Weiss v. Public Utilities Commission* (Ohio 2000). The Board did not err either in allowing into evidence the expert opinion testimony of Black Fork's qualified expert witnesses, or in considering that specific evidence as part of its consideration of the whole evidentiary record, as reflected in the order. Accordingly, Mr. Warrington's first and third assignments of error should be denied.

- (54) In his second assignment of error, Mr. Warrington contends that the Board's approval of the project in this case amounts to an unconstitutional taking without compensation of the property of hundreds of Crawford and Richland county residents.
- (55) We have already fully addressed, and rejected, this argument in Finding (46) above. Therefore, as we found previously, the request for rehearing is without merit and should be denied.

Brett Heffner's Request For Admission Of Audio Recording Into Evidence; Consideration Of Rehearing Arguments That Reference That Audio Recording

- (56) Attached to Mr. Heffner's application for rehearing was a compact disc (CD) which he claims contains a recording that was made of a telephonic procedural conference held on September 9, 2011, conducted by the ALJs and participated in by several of the parties. Mr. Heffner requests that this CD be entered either as part of his memorandum in support of his application for rehearing, or, as necessary, separately into the evidence of record in this case. He further states that the conference was "recorded in its entirety from open to close, without edit and is a part of public records in Richland County, Ohio."

- (57) As to the admissibility of such recording, we find no merit. First, there is no basis on which to admit an exhibit outside of a hearing, after the close of the record of the case, and after the Board has issued an order. Mr. Heffner should have introduced, marked, and sought the admission of the recording as an exhibit at the hearing in the event he believed such a recording was relevant. Further, Mr. Heffner, or someone with knowledge of the recording, could have testified at hearing regarding the CD and its contents, where that person could have been cross-examined by all parties and the ALJs. Absent Mr. Heffner, or someone with knowledge about the recording, testifying at the hearing regarding the recording and chain of custody, there is no basis on which to make any finding regarding the contents of the CD or to demonstrate the veracity or efficacy of such a recording. We note that such recording was made without the knowledge of the ALJs, and it is unclear whether any other party had knowledge that such a recording was made. Notwithstanding any and all problems relating to verifying the CD's authenticity, and disregarding any concerns regarding whether there was a legal basis for making such a recording, Mr. Heffner's citations to voices on the CD do not demonstrate prejudice or show that the order was in any manner unlawful or unreasonable.
- (58) Accordingly, Mr. Heffner's request that the CD be admitted into the record is denied and all of the arguments in Mr. Heffner's application for rehearing that cite or reference the CD are denied. This decision renders moot three pleadings: (1) the March 2, 2012, pleading by which Black Fork sought to both oppose Mr. Heffner's request to have the audio recording admitted into the record and to strike those portions of Mr. Heffner's rehearing application which cite or reference that audio recording; (2) Mr. Heffner's March 9, 2012, pleading filed in response to Black Fork's March 2, 2012, pleading, and (3) Black Fork's reply filed March 12, 2012. We, therefore dismiss that pleading by Black Fork now, without need for further consideration.

#### Other Rehearing Arguments Raised By Brett Heffner

- (59) Mr. Heffner raises 18 assignments of error. The first argument made in Mr. Heffner's rehearing application is that "the focus of the adjudicatory hearing" was unreasonably and unlawfully shifted away from the application and the staff report, to the

Stipulation. Mr. Heffner claims that the Stipulation unreasonably and unlawfully affected the rights of parties that did not sign it.

Responding to this argument, Black Fork asserts that the focus of the evidentiary hearing was, appropriately, on both the application and the Stipulation. Black Fork notes that, since it had the burden of proof, it submitted into evidence the application, ten pieces of direct testimony and six pieces of additional testimony addressing all aspects of the application and the conditions proposed in the Stipulation. Moreover, according to Black Fork, the intervenors, including Mr. Heffner, submitted written testimony and engaged in robust cross-examination of the Applicant's witnesses, the OFBF's witness, and the Staff's witness.

- (60) Upon review, we find that Mr. Heffner has established no basis for his claim that the hearing was, in any way, unreasonably or unlawfully focused. Once a stipulation is submitted it is appropriate for the hearing to proceed allowing the stipulating parties to present the stipulation on the record and provide support for the stipulation. Those parties that do not support the stipulation are permitted to question witnesses on the stipulation and provide testimony in opposition to the stipulation. Such was the situation in this case wherein all parties were afforded due process and given an opportunity to address the proposed application and Stipulation. Consequently, we find that Mr. Heffner has established no basis for his claim that the Stipulation shifted the focus of the hearing, thus, unreasonably and unlawfully affecting the rights of parties that did not sign it. Accordingly, we find that the first assignment of error is without merit and should be denied.
- (61) In his second assignment of error, Mr. Heffner states that "the public was not made aware of the settlement conference before the public meeting" and that "significant and material changes were made without the opportunity of public inquiry."
- (62) In consideration of this claim, the Board notes Mr. Heffner fails to clearly state what set of facts he is referring to. The record demonstrates that, contrary to Mr. Heffner's assertion, several entries were issued in this docket setting forth the procedural schedule; these entries are public documents available through the Board's docketing system. In fact, the public generally was made

aware, by the September 12, 2011, entry, i.e., prior to the September 15, 2011, public hearing in Shelby, that the parties to the case, as opposed to members of the public who were not parties, would commence a settlement conference on September 19, 2011. In any event, there is no legal requirement that notice be given to the public that parties are engaged in private settlement discussions. Accordingly, we find that Mr. Heffner's second rehearing argument is without merit, presents no grounds for rehearing of the order, and should be denied.

- (63) In his third rehearing argument, Mr. Heffner alleges that it is "unreasonable and unlawful to conduct a procedure called a hearing, preside over it with persons called judges, and practice before them with entities called attorneys and parties, and under the rules of procedure include as a general provision the ability for the presiding officers to 'waive any requirement, standards, or rule set forth in this chapter or prescribe different practices or procedures to follow in this case.'" Mr. Heffner goes on to state that untranscribed or off-the-record conversations with the ALJs violated the rules and procedures which were laid down in front of all the parties with all having the opportunity to participate, but were then ignored and countermanded in subsequent process. Mr. Heffner provided no citations for these claims.

In its memorandum contra, Black Fork submits that the Board and the ALJs followed procedural rules and did not violate them.

- (64) To the extent there were off-the-record discussions, as there customarily are in most hearings, these discussions were held in front of all parties. In this case, there were off-the-record discussions in the form of prehearing conferences which are not transcribed, because all parties were notified of these conferences and Mr. Heffner was present during those conferences. Moreover, as the record reflects, Mr. Heffner fully participated in the evidentiary hearing by filing testimony, cross-examining witnesses, and giving closing statements. There is simply no basis for Mr. Heffner's third ground for rehearing and it should be denied.
- (65) In his fourth set of rehearing arguments, Mr. Heffner alleges that the order is unlawful on grounds that the staff report and "Staff Opinion" are used extensively in the Board's formation of findings of fact and conclusions of law, despite the fact that: the staff report was not treated as evidence in the adjudicatory hearing; and

intervenors were not permitted to cross-examine the authors of the staff report, nor were intervenors permitted to cross-examine other signatories to the Stipulation.

- (66) We find no merit in Mr. Heffner's fourth set of rehearing arguments. The staff report became a part of the record in this case by operation of Section 4906.07(C), Revised Code. It was marked as an exhibit and it was treated accordingly. The record is clear that the intervenors were provided the opportunity to cross-examine all witnesses who testified at hearing on the staff report, the Stipulation, or both. The Staff provided the testimony of a witness, the team project leader, who was available for cross-examination on both the staff report and the Stipulation. The OFBF provided the testimony of a witness, as did Richland County. Likewise, the Applicant, as the party who has the burden of proof in this certificate application case, presented and made available for cross-examination, its witnesses who testified both as to the contents of the application and the conditions proposed in the Stipulation. Accordingly, rehearing on this issue should be denied.
- (67) In his fifth ground for rehearing, Mr. Heffner alleges that the certificate is unreasonable and unlawful as the Board did not review evidence and testimony.
- (68) The Board notes that Mr. Heffner provides no evidence that demonstrates that the Board did not review the evidence of record, when in fact, the Board thoroughly reviewed and considered the record in this case as evidenced by our comprehensive 75 page order. Mr. Heffner's argument is similar to the one raised by Mr. Biglin, who felt that the Board improperly delegated authority to the ALJs. We have already fully addressed this issue at Finding (48), and Mr. Heffner's argument should be denied on the same grounds as are set forth therein.
- (69) In his sixth ground for rehearing, Mr. Heffner challenges whether proper procedure was followed when, during the procedural teleconference that took place on September 9, 2011, the ALJ granted a request to convert the then-scheduled September 19, 2011, hearing into, instead, a settlement conference. Mr. Heffner believes that, in taking that course of action, the ALJ "unreasonably and unlawfully made a motion and subsequent expedited ruling without showing good cause." He further claims that this was

objectionable in that a ruling was made without notifying all parties.

In its memorandum contra, Black Fork, states that the ALJ did not make a motion or issue an expedited ruling pursuant to Rule 4906-7-12(C), O.A.C., but rather, simply ruled on a request for a procedural matter, as permitted under Rule 4906-7-10(A)(7), O.A.C., which governs prehearing conferences.

(70) Upon review of the sixth ground for rehearing, we find that the ALJ's ruling, during the September 9, 2011, procedural teleconference, to permit conversion of the September 19, 2011, hearing into a settlement conference was appropriate. All parties were served with a copy of the entry scheduling the September 9, 2011, procedural teleconference. We find that, in making that decision, the ALJ was simply ruling on a request for a procedural matter, as permitted under our rule governing prehearing conferences. Moreover, pursuant to that same rule, on September 12, 2011, the ALJ issued an entry memorializing the request and the grant to convert the September 19 hearing into a settlement conference. If Mr. Heffner objected to the ruling, he should have challenged the September 12, 2011, entry. He did not do so and, moreover, even now, has failed to show any prejudice resulting from the ALJ's decision, as memorialized in that entry. For all of these reasons, we find no merit in Mr. Heffner's sixth ground for rehearing.

(71) In his seventh ground for rehearing, Mr. Heffner alleges that Staff's counsel made a motion to have the September 19, 2011, hearing called and continued to a later date. Mr. Heffner submits that the motion made by Staff's counsel was invalid and, as a consequence, the subsequent ruling by the ALJ on that motion was also invalid. The motion was invalid, says Mr. Heffner, for its failure to comply with Rule 4906-7-12(A), O.A.C, which requires that all motions, unless made at a public hearing or transcribed prehearing conference, or otherwise ordered for good cause shown, shall be in writing and shall be accompanied by a memorandum in support.

In its memorandum contra, Black Fork contends that there is nothing unreasonable or unlawful about the ALJ's decision to call and continue the September 19, 2011, evidentiary hearing in order to allow the parties to hold a settlement conference. Further, the ALJ's ruling was made, not on a motion made under Rule 4906-7-

12, O.A.C., but rather on a request for a ruling on a procedural matter, under Rule 4906-7-10, O.A.C., and as such was not invalid.

- (72) Upon review, we find that the ALJs did not err in making any of the rulings now being challenged by Mr. Heffner. Converting the scheduled adjudicatory hearing to a settlement conference is a procedural matter which the ALJ has the authority to rule on pursuant to Rules 4906-7-10 and 4906-7-14, O.A.C. In fact, the ALJ memorialized his decision by entry issued pursuant to Rule 4906-7-10(C), O.A.C., on September 12, 2011. Again, all parties were served a copy of the entry scheduling the conference and the conference was followed by a procedural entry that was also served on all parties. Parties have the responsibility to follow the rules and processes of the Board, all of which were appropriately documented in entries filed in the docket and served on the parties. Mr. Heffner did not challenge the entry. In addition, nowhere in his application for rehearing has he shown any prejudice resulted from the ruling. In point of fact, continuing the hearing gave the intervenors additional time to prepare for the hearing and there is no basis to find and no party has demonstrated that any party was disadvantaged by the ruling. We find no merit to Mr. Heffner's assignment of error and accordingly, this request for rehearing should be denied.

- (73) In his eighth ground for rehearing, Mr. Heffner alleges that an "expedited ruling" was made with respect to this same request to convert the hearing into a settlement conference. He submits that granting such a ruling was unreasonable and unlawful, both because no party made a motion for an expedited ruling, pursuant to Rule 4906-7-12(C), O.A.C., and because all parties were not contacted.

In its memorandum contra, Black Fork contends that the ALJ did not make an expedited ruling, pursuant to Rule 4906-7-12(C), O.A.C., but did reasonably and lawfully resolve a procedural matter involving whether a scheduled hearing could be converted into a settlement conference.

- (74) As explained above, the request made by Staff's counsel to convert the hearing to a settlement conference was a procedural matter which could be disposed of by way of a procedural ruling by the ALJ, pursuant to Rules 4906-7-10 and 4906-7-14, O.A.C. No motion was necessary in order for the ALJ to rule, in the manner he did,

upon such a procedural matter. Once more, Mr. Heffner has failed to show prejudice resulting from either the ruling in question, or from the manner in which the request was disposed of. We find no merit in Mr. Heffner's eighth rehearing argument; therefore, it should be denied.

- (75) In his ninth rehearing argument, Mr. Heffner alleges that the ALJ's ruling on Staff's counsel's request to convert the hearing into a settlement conference was not valid because, according to Mr. Heffner, Rule 4906-7-03(C), O.A.C., precludes the Staff from participating as a party to the prehearing teleconference.

In its memorandum contra, Black Fork explains its position that Mr. Heffner's ninth rehearing argument should be rejected because it hinges on his misinterpretation of Rule 4906-7-03(C), O.A.C.

- (76) We find no merit to this assignment of error. Rule 4906-7-03(C), O.A.C., provides that the Staff shall not be considered a party to any proceeding, except for purposes of certain named O.A.C. provisions including, as applicable here, Rule 4906-7-14, O.A.C. The fact that Rule 4906-7-14, O.A.C., is one of the listed exceptions means that the Staff is a party to a proceeding and can make a request for a procedural matter which the ALJ has the authority to address. Moreover, nothing in Rule 4906-7-10, O.A.C., precludes Staff's counsel from participating in a prehearing conference. The ALJ ruling which Mr. Heffner has challenged was appropriate. Again, Mr. Heffner has not cited any prejudice resulting from the ruling. Accordingly, Mr. Heffner's ninth assignment of error is denied.

- (77) In his tenth rehearing argument, Mr. Heffner complains that the hearing on October 11, 2011, gave the intervenors less than three days to react to a "completely novel agreement without time to secure witnesses to testify concerning such an agreement." He complains that all of the intervenors' prefiled testimony became inactive and they had to start from scratch on testimony regarding the Stipulation.

Black Fork, in its memorandum contra, points out that the intervenors knew as early as September 9, 2011, that there was a potential for a settlement agreement because that is when the September 19, 2011, hearing was converted to a settlement conference. Further, as noted by Black Fork, the Stipulation was



filed on September 28, 2011, and, according to Black Fork, was served via overnight, giving the intervenors seven calendar days to prepare any testimony concerning the Stipulation. Black Fork notes that, as evidenced by the ALJ's September 21, 2011, entry resetting the hearing date, it was the parties and not the ALJs that proposed the dates for the filing of any Stipulation and the dates for filing testimony. Further, says Black Fork, Mr. Heffner made no objection at the hearing to the introduction of the Stipulation, stating that "I have nothing to say about it."

- (78) Upon consideration of Mr. Heffner's tenth assignment of error, the Board finds that it is without merit. The Stipulation itself contains the proposed resolution of issues that were in contention since the filing of the application. As evidenced by the staff report and the Stipulation, these issues were the subject of this case. For Mr. Heffner to assert now that he was not aware of the issues contemplated for settlement and unable to prepare testimony on those issues is misleading. Accordingly, the Board finds that this request for rehearing should be denied.
- (79) As his eleventh rehearing argument, Mr. Heffner alleges that Staff and Staff's counsel unreasonably and unlawfully conducted numerous *ex parte* discussions with the Applicant.
- (80) The Board notes that Heffner's assertion of *ex parte* discussions is without merit in that Rule 4906-7-02, O.A.C., prohibits a Board member or ALJ assigned to a case from discussing the merits of the case with any party or intervenor to the proceeding; however, no prohibition is placed on the discussions that Staff or its counsel may have with parties. Accordingly, this ground for rehearing should be denied.
- (81) In his twelfth assignment of error, Mr. Heffner asserts that: the application was unreasonably and unlawfully deemed complete; the application must be considered incomplete and in contravention of Rule 4906-17-03, O.A.C., because no specific wind turbine model has yet been chosen; inasmuch as the project's wind turbine sites are moveable after certification, the application must be considered incomplete and in contravention of Rule 4906-17-03, O.A.C., because no final version of the project's layout or construction is available; it was error to deem the application complete because it did not contain, as required by Rule 4906-17-08(E)(1), O.A.C., a description of the Applicant's public interaction

program; and rehearing should be granted on grounds that the application both was and was not part of the adjudicatory hearing.

In its memorandum contra, Black Fork points out, among other things, that Mr. Heffner was present when the application was marked and introduced into evidence. It argues that, by failing to object to its admission at the hearing, Mr. Heffner waived any claim to raise the issue of completeness of the application. In addition, Black Fork contends that Rule 4906-17-03(A)(1), O.A.C., expressly contemplates that a specific model of turbine may not be chosen at the time the application is filed.

- (82) We find this claim by Mr. Heffner to be without merit. As approved, the Stipulation authorizes three possible turbine types. A situation in which the actual turbine model of the three authorized has not yet been selected is contemplated within Rule 4906-17-03, O.A.C., i.e., the rule that establishes what information must be included in the detailed description of the proposed facility included in an application before it may be deemed complete. Thus, notwithstanding Mr. Heffner's claim to the contrary, Rule 4906-17-03, O.A.C., is not violated, and an application is not considered incomplete, just because the specific turbine model has yet to be chosen, where the information called for in Rule 4906-17-03(1)(a), O.A.C., is included as part of the application at the time it is filed. In the case at hand, the case was appropriately deemed complete, in part because, in filing the application, Black Fork fulfilled the informational filing requirements of Rule 4906-17-03(1)(a), O.A.C. The fact that the Applicant is notified by the Board that the application is considered complete, does not mean the certificate is granted at that point. Rather, it means that sufficient information required by the rules has been provided to enable Staff to commence its formal investigation. Furthermore, Mr. Heffner's claim to the contrary notwithstanding, there are certain specific conditions of the Stipulation that, considered together, require that detailed engineering drawings of the final layout of the project be completed and submitted to Staff prior to construction.

Moreover, Rule 4906-17-08(E)(1), O.A.C., requires the Applicant to describe its program for public interaction for the siting, construction, and operation of the proposed facility, i.e. public information programs. Black Fork complied with this requirement by providing such information at pages 138-139 of its application.

The application was introduced and admitted into evidence as Company Exhibit 1 without objection from any party, including Mr. Heffner. In addition, we find that the record clearly reflects that the purpose of the adjudicatory hearing was to enable the Board to establish a full evidentiary record on which to base its decision in this matter on whether or not to grant the application submitted in this case contingent upon the conditions proposed in the Stipulation. In this sense, the application was, clearly and appropriately, the major focus and topic of the hearing. At the hearing, the Applicant, as the party having the burden of proof to prosecute the case that the application should be granted, introduced the application and testimony supporting it. Mr. Heffner was present but did not object to the admission into evidence of the application.

Furthermore, we note that the Ohio Supreme Court has recognized that the statutes governing these cases vest the Board with the authority to issue certificates upon such conditions as the Board considers appropriate; thus acknowledging that the construction of these projects necessitates a dynamic process that does not end with the issuance of a certificate. The Court concluded that the Board has the authority to allow Staff to monitor compliance with the conditions the Board has set. *In re Application of Buckeye Wind, L.L.C. for a Certificate to Construct Wind-Powered Electric Generation Facilities in Champaign County, Ohio, 2012-Ohio-878, ¶16-17, 30 (Buckeye)*. Such monitoring includes the convening of preconstruction conferences and the submission of follow-up studies and plans by the Applicant to, ensure compliance with Board-approved conditions. As recognized in *Buckeye*, any deviation from the certificate issued would require an Applicant to file an amendment. If an amendment is filed, in accordance with Section 4906.07, Revised Code, if such amendment involves any material increase in any environmental impact or substantial change in the location of all or a portion of the facility, the Board would be required to hold a hearing and to take further evidence. Accordingly, we find Mr. Heffner's twelfth assignment of error to be without merit and it should, therefore, be denied.

- (83) In his thirteenth argument on rehearing, Mr. Heffner claims that the order was unreasonable and unlawful because it reflects that the Board improperly relied, when it comes to its consideration of the potential impact of the project on property values, on the expert opinion testimony of Black Fork witness David Stoner. Mr. Heffner

claims that Mr. Stoner is not an expert in real estate and that the ALJs did not research into the actual work histories of the wind industry employees.

In its memorandum contra, Black Fork claims that it was not error for the Board to find Mr. Stoner qualified as an expert to provide the testimony he did and to rely on it in reaching the decision it made in the order. The Applicant notes the record evidence describing Mr. Stoner's background and professional experience, shows that he had the necessary qualifications to provide the expert testimony.

- (84) We find no merit in Mr. Heffner's thirteenth assignment of error. The evidence demonstrates that, given his professional experience and educational background, Black Fork witness Stoner was qualified to testify regarding his opinions on property values. The ALJ's ruling to allow him to testify as an expert, was, we find, correct. Mr. Stoner's testimony on the topic of wind energy projects related to matters beyond the knowledge or experience possessed by lay persons and also dispelled a misconception common among lay persons. Mr. Stoner was qualified as an expert by his specialized knowledge in the wind industry, his education, and his experience regarding the subject matter of his testimony. Mr. Stoner's testimony is based on specialized information that he possesses by reason of his experience with various wind industry projects. Thus, Mr. Stoner was qualified to offer an opinion as an expert on this topic. Accordingly, Mr. Heffner's thirteenth assignment of error is denied.
- (85) In his fourteenth argument on rehearing, Mr. Heffner claims that the order is unreasonable and unlawful as it does not adequately address, pursuant to Section 4906.10(A)(1), Revised Code, the basis of need.
- (86) Initially, the Board notes that Section 4906.10(A)(1), Revised Code, provides, in relevant part, that the Board shall not grant a certificate for the construction, operation, and maintenance of an electric transmission line or gas or natural gas transmission line, unless it finds and determines the basis of the need for the facility. In this case, the Applicant is proposing to construct and operate a wind-powered electric generation facility, not an electric transmission line, nor a gas or natural gas transmission line. In the order, we found that the basis of need, under Section 4906.10(A)(1), Revised

Code, is not applicable in this case (Order at 72). This finding is supported by the fact that the Applicant is proposing to construct and operate a wind-powered electric generation facility, not an electric transmission line, or a gas or natural gas transmission line. Accordingly, we find that Mr. Heffner's fourteenth rehearing argument is without merit and should be denied.

- (87) In his fifteenth rehearing argument, Mr. Heffner claims that it is unreasonable and unlawful for the Board to not be bound by the Stipulation, a circumstance which, Mr. Heffner complains, makes it possible for the Board to make "many substantial and material changes to the certificate without the opportunity for public review and involvement.

In response, Black Fork points out the Board's ability to impose terms and conditions is very important because the Board evaluates applications for proposed projects, not constructed projects.

- (88) Contrary to Mr. Heffner's assertions, the Applicant is bound by the conditions set forth in the Stipulation and approved by the Board in our order. However, as we mentioned above, the Ohio Supreme Court in *Buckeye* recognized that the construction of these projects necessitates a dynamic process that does not end with the issuance of a certificate. Once a certificate with conditions is granted, the Staff serves as the Board's eyes and ears in the field to ensure compliance with certificate condition approval. The Board has the authority to allow Staff to monitor compliance with the conditions the Board has set. As recognized in *Buckeye*, if the Applicant proposes a change to any of the conditions approved in the certificate, the Applicant is required to file an amendment. In accordance with Section 4906.07, Revised Code, the Board would be required to hold a hearing, in the same manner as on an application, where an amendment application involves any material increase in any environmental impact or substantial change in the location of all or a portion of the facility. Thus, the Board finds that Mr. Heffner's fifteenth assignment of error is without merit and should be denied.
- (89) In his sixteenth assignment of error, Mr. Heffner argues that the general public did not have an opportunity to comment on the Stipulation at the public hearing.

- (90) Upon consideration, the Board finds that this claim falls short of presenting reasonable grounds for granting rehearing of the order. There is no legal requirement that the Board hold a local public hearing on a stipulation, whether partial or full. Section 4906.07, Revised Code, controls when the public hearing is held, and provides that the Board must hold the public hearing on the application no later than 90 days after the filing of the complete application. In this case, the application was deemed filed on June 21, 2011, and the public hearing was set for Thursday, September 15, 2011. As a practical matter, the filing of stipulations after public hearings is not an unusual occurrence in proceedings before the Board. Moreover, the Board notes that, the general public did have the ability to provide testimony on the proposed project at the hearing held in Shelby, Ohio. Accordingly, the Board finds that Mr. Heffner's sixteenth assignment of error is without merit and should be denied.
- (91) In his seventeenth assignment of error, Mr. Heffner argues that nonparticipating landowners will have no way of mitigating injuries.
- (92) We find no merit in this argument. The General Assembly, in Section 4906.98, Revised Code, has vested the Board with oversight over the construction, operation and maintenance of major utility facilities as approved in a certificate of environmental compatibility and need. In addition to the statutory complaint process, the order provides nonparticipating landowners the ability to submit complaints and to engage in a complaint resolution process should compliance issues arise. Accordingly, the Board finds that this assignment of error is without merit and should be denied.
- (93) In his eighteenth rehearing argument, Mr. Heffner alleges that the order is unlawful, as it violates the Valentine Anti-Trust Act of 1898, as codified in Ohio Revised Code 1331.

In response, Black Fork notes that the Valentine Act, as codified in Chapter 1331 of the Revised Code, was patterned after the federal Sherman Anti-Trust Act. Although he has quoted various sections contained within Chapter 1331 of the Ohio Revised Code, Black Fork points out that Mr. Heffner has failed to cite Section 1331.11, Revised Code, which provides that the Courts of Common Pleas, not the Board, are vested with jurisdiction to determine if violations

of the Valentine Anti-Trust Act of 1898 have occurred. Nor has the General Assembly vested the Board with the task of regulating competition among power plant developers. Furthermore, the Applicant states that, in this case, the Board approved the project as proposed in the application and the Stipulation, applying the applicable statutory criteria set forth by the General Assembly; those criteria do not include ensuring that landowners have the opportunity to select their preferred developer.

- (94) Upon review of Mr. Heffner's eighteenth assignment of error and the Applicant's response we find that the assignment is without merit and should, therefore, be denied.
- (95) As a final matter, the Board finds that rehearing should be denied with respect to any of the arguments made by any of the parties seeking rehearing that are not specifically addressed in this entry on rehearing.

It is, therefore,

ORDERED, That Mr. Heffner's request to have the CD admitted into the record be denied and all arguments in Mr. Heffner's application for rehearing that cite or reference the CD be denied, and the Applicant's motion to strike be dismissed as moot. It is, further,

ORDERED, That, in accordance with the above findings, the rehearing applications filed by Alan Price, Catherine Price, Gary Biglin, Brett Heffner, John Warrington, Carol Gledhill, and Loren Gledhill are all denied in their entirety and dismissed of record. It is, further,


ORDERED, That rehearing is hereby denied with respect to any of the arguments made by any of the parties seeking rehearing that are not specifically addressed in this entry on rehearing. It is, further,

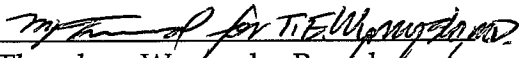
ORDERED, That a copy of this entry on rehearing be served upon each party of record and any other interested persons of record.

THE OHIO POWER SITING BOARD


  
Todd A. Snitchler, Chairman  
Public Utilities Commission of Ohio

\_\_\_\_\_  
Christiane Schmenk, Board  
Member and Director of the Ohio  
Department of Development

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

  
Theodore Wymyslo, Board  
Member and Director of the  
Ohio Department of Health

\_\_\_\_\_  
Scott Nally, Board Member  
and Director of the Ohio  
Environmental Protection Agency

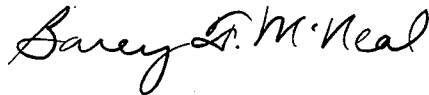
  
David Daniels, Board Member  
and Director of the Ohio  
Department of Agriculture

\_\_\_\_\_  
Board Member  
and Public Member

DEF/SEF/dah

Entered in the Journal

**MAR 26 2012**



Barcy F. McNeal  
Secretary

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