

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF THE
APPLICATION OF BLACK FORK
WIND ENERGY, L.L.C. FOR A
CERTIFICATE TO SITE A
WIND-POWERED ELECTRIC
GENERATING FACILITY IN
CRAWFORD AND RICHLAND
COUNTIES, OHIO

:
: Case No. 2012-0900
:
: On Appeal from the Ohio Power Siting
: Board
:
: Ohio Power Siting Board
: Case No. 10-2865-EL-BGN
:

MOTION TO DISMISS THE APPEAL OF APPELLANTS GARY BIGLIN, ALAN PRICE,
CATHERINE PRICE, BRETT HEFFNER AND JOHN WARRINGTON BY
INTERVENOR-APPELLEE BLACK FORK WIND ENERGY LLC

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MOTION TO DISMISS THE APPEAL OF APPELLANTS GARY BIGLIN, ALAN PRICE, CATHERINE PRICE, BRETT HEFFNER AND JOHN WARRINGTON BY INTERVENOR-APPELLEE BLACK FORK WIND ENERGY LLC

Pursuant to S. Ct. Prac. R. 14.4, Black Fork Wind Energy LLC (“Black Fork”) respectfully moves for an order dismissing the Appeal in Case No. 12-0900 by appellants Gary J. Biglin, Brett A. Heffner, Alan Price, Catherine Price, and John Warrington (collectively “Appellants”). The Appellants appeal from the Opinion, Order, and Certificate issued by the Ohio Power Siting Board (“Board”) on January 23, 2012, and the Board’s Entry on Rehearing filed on March 26, 2012. Appellants assert three propositions of law in their merit brief based on four of the five assignments of error in their Notice of Appeal. None of the issues underlying the first two propositions of law were raised by Appellants in the proceedings below before the Board. The third proposition of law includes three separate issues; only one of those issues was raised by Appellants below, and it was not included as an assignment of error in their Notice of Appeal to this Court. Accordingly, as a matter of law, Appellants’ arguments in their Merit Brief

cannot be considered by this Court and the appeal should be dismissed outright.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Intervenor-Appellee, Black Fork Wind Energy LLC (“Black Fork”), moves to dismiss this appeal because the issues included in Appellants’ three propositions of law are not properly before this Court. None of the issues underlying the first two propositions of law were raised by Appellants in the proceedings below before the Ohio Power Siting Board (the “Board”). The third proposition of law includes three separate issues; only one of those issues was raised by Appellants below, and it was not included as an assignment of error in their Notice of Appeal to this Court. Accordingly, this appeal should be dismissed, in its entirety, as a matter of law.

II. ARGUMENT

A. A Party Cannot Make Arguments to this Court that were not Raised Before the Board and Included in the Notice of Appeal.

It is well established that a party cannot raise arguments before this Court that were not made before the Ohio Power Siting Board or listed in the notice of appeal. *City of Cincinnati v. Public Utilities Commission of Ohio et al.* (1949) 151 Ohio St. 353, 86 N.E. 2d 10 (paragraph 17 of the syllabus); *Ohio Consumers' Counsel v. PUC of Ohio*, 127 Ohio St. 3d 524, 528; 2010 Ohio 6239, ¶¶20-21; 941 N.E.2d 757, 762.

As the General Assembly has mandated, an application for rehearing to the Ohio Power Siting Board “shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the

application.”¹ R.C. § 4903.10.

The General Assembly’s mandate in Section 4903.10, Revised Code, means that the filing of an application for rehearing is a “jurisdictional prerequisite” and “... only such matters as are set forth in such application can be urged or relied upon in an error proceeding in this Court.” *Travis v. Pub. Util. Comm.* (1931), 123 Ohio St. 355, 9 Ohio Law Abs. 443, 175 N.E. 586, paragraph six of the syllabus. Put another way, a party that fails to raise an argument before the Board in its application for rehearing may not “... pursue an argument which procedurally should have been an issue ...” in the Board proceeding. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 290, 12 OBR 356, 365, 466 N.E.2d 848, 857, appeal dismissed (1986).

Likewise, the mandate of Section 4903.13, Revised Code, that an appellant list the errors complained of in the notice of appeal precludes the Court from hearing issues not included in the notice of appeal. *Disc. Cellular, Inc. v. PUC*, 112 Ohio St. 3d 360, 376 2007 Ohio 53, ¶ 66; 859 N.E.2d 957, 972 (“the failure to set forth alleged errors in the notice of appeal delimits the issues for our consideration”) *citing* R.C. 4903.13 *and Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004 Ohio 5466, 816 N.E.2d 238, at P 21.

B. Appellants Raise New Arguments in Each of Their Three Propositions of Law That Were Either Not Raised Below or Not Included in Their Notice of Appeal to this Court.

1. Appellants’ First Proposition of Law

The Appellants first proposition of law is based on their fifth assignment of error in their Notice of Appeal to this Court. Appellants wrote that assignment of error to read:

¹ Section 4903.10, Revised Code, applies to proceedings of the Ohio Power Siting Board by virtue of Section 4906.12, Revised Code, which applies certain procedures of the Public Utilities Commission of Ohio to Board proceedings.

The Board failed to follow the mandates set forth in R.C. § 4906.02(C) thereby unlawfully granting a certificate to the Applicant in accordance with R.C. § 4906.10. The Opinion, Order, and Certificate and judgment denying a rehearing were not approved by the Board but rather by unknown individuals. The Board's Order granting the Certificate and judgment denying rehearing were unlawful and unreasonable. Therefore, the Board's issuance of the certificate to the Applicant is void *ab initio*.

(Appellants' Merit Brief, Appendix at p. 5, hereinafter referred to as "Appendix __").

Appellants claim that "... Gary J. Biglin and Brett A. Heffner specifically raised the issue of the impropriety of the vote in their applications for rehearing." (Appellants' Merit Brief, p. 12).

To the contrary, neither Mr. Biglin nor Mr. Heffner made any such argument in their applications for rehearing that the Certificate was improperly executed and void *ab initio*. Mr. Biglin argued that the administrative law judge drafted the Certificate and that the Board simply "rubber stamped" that decision. (Appendix 127). Likewise, Mr. Heffner argued in his application for hearing that "[a]fter numerous off the record assurances by the ALJ that independent parties' evidence and testimony would be considered by the Board proper, no evidence exists that there is any direct or indirect flow of information between the citizen intervenor and the Board as above defined." (Appendix 155). Nowhere in Mr. Heffner's application for rehearing to the Board did he claim that the Certificate was improperly executed and void *ab initio*. (See Appendix 146-170).

The Board's Entry on Rehearing which denied Appellants' administrative appeals makes it clear that the Board did not have an opportunity to address the argument Appellants now raise in their first proposition of law. (Appendix 198). Accordingly, this Court cannot consider the argument raised in Appellants' first proposition of law.

2. Appellants' Second Proposition of Law

Appellants' second proposition of law in their merit brief combines the Appellants' first two assignments of error from their Notice of Appeal to this Court. Those assignments of error as stated in their notice of appeal relate to decommissioning of the facility at the end of its life.

The assignments of error (Appendix 4) read as follows:

I. Board failed to comply with the requirements set forth in R.C. §4906.10 by not resolving the material issue of posting a decommissioning bond. The onus is on the Board to insure that adequate financial protection is available to protect the public interest in the event of decommission, prior to the issuance of the certificate. There is no evidence in the record as to the removal costs for each wind turbine from the proposed site and to the amount of bond to be posted by the Applicant for such removal. In fact, no bond is required at all for the decommissioning. Therefore, the Board's granting of the certificate to the Applicant and denial of rehearing on this issue is unreasonable and unlawful.

II. The Board's ruling permits the Applicant to submit its final decommissioning plan to the Staff and County Engineers for review thirty (30) days prior to the preconstruction conference. Furthermore, the Applicant is to retain an independent, registered professional engineer, licensed to practice in Ohio, to estimate the total cost of decommissioning in current dollars, without regard to salvage value of the equipment seven (7) days prior to the preconstruction conference. This ruling constitutes an unlawful delegation of the Board's duties to the Applicant pursuant to R.C. §4906.02(C) and violates the Appellants due process rights to address the issue of financial security in a substantive way.

Appellants claim in their merit brief that "Alan K. Price and Catherine A. Price specifically raised the issue of whether financial assurances exist for the decommissioning of the wind turbines." (Appellant's Merit Brief, p. 12).

It is true that Alan Price and Catherine Price were the only parties to raise the topic of decommissioning in their applications for rehearing before the Board. Alan Price stated in his application for rehearing that "[e]veryone legally has to have insurance the minute they purchase a car, land or home. Why would an Applicant be allowed to ask for everything possible to build

a Wind Farm, but not have to post any kind of Bond the day construction starts?” (Appendix 137).

Catherine Price made a similar statement on decommissioning in her application for rehearing as well, writing under the heading of “Decommissioning”:

A. Applicant does not want to insure the funding for this. Funds must be in place from the time the turbines are built. What happens if a tornado comes through and damages the turbines beyond repair? What funds will be available to repair, replace or remove turbines and fix roads, once again.

B. Do not know if Applicant, Owner or Operator is responsible for these funds. But, [w]hat happens if they file bankruptcy before providing decommissioning funds.

(Appendix, 131).

The Board treated Mr. Price’s question as an assignment of error stating that “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.” (Appendix 181). The Board answered Mr. Price’s question by pointing to Condition 66(h) of the Stipulation which imposes a bonding obligation on Black Fork prior to construction. *Id.*

The Board also addressed Mrs. Price’s questions as an assignment of error, stating that:

[i]n 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.

(Appendix, p. 185). The Board rejected Ms. Price’s questions, noting that “the issue of decommissioning was fully addressed and resolved in the Stipulation and on the record in this case.” *Id.*, p. 186.

Now before this Court, Appellants attempt to rely on the Prices’ questions on whether funding for decommissioning exists as springboards to new arguments never raised before the

Board. A review of each of the Appellants' arguments under their first proposition of law makes this clear.

First, in Part A to their second proposition of law, Appellants argue that the Board's rules require Black Fork to have made financial arrangements prior to the certificate issuance to assure that financial resources exist when decommissioning occurs. (Appellants' Merit Brief, p. 20). Appellants also argue in Part E that Condition 66(h) can be modified as a result of the future submittal of a final decommissioning plan and that the Board's adoption of Condition 66(h) to resolve the "decommissioning issue" fails. (*Id.*) Neither Mr. Price nor Ms. Price made any of those arguments to the Board, and neither of them attacked Condition 66(h).

In Part B, Appellants argue that Condition 66(g), which relates to the use of an independent professional engineer to develop a cost for decommissioning, constitutes an "unlawful delegation of the Board's duties to Black Fork." (Appellants' Merit Brief, p. 21). In Part C, Appellants argue that the post-Certificate submission of decommissioning estimates, to be done every five years for the life of the facility, amount to a lack of due process for the Appellants because they will not be allowed to cross-examine the engineer preparing the estimates. (*Id.*) Neither Mr. Price nor Ms. Price made these arguments earlier in their applications for rehearing to the Board.

In Part D, Appellants continue their due process arguments, claiming that the Board's amendment process will not apply to the Applicants' required submittal of a decommissioning plan prior to construction which is required to be updated every five years. (Appellants' Merit Brief, p. 22). Appellants claim that they should have a right to be "heard on this issue[.]" *Id.* Neither Mr. Price nor Ms. Price made any of these arguments in their application for rehearing.

Lastly, in Part E, Appellants make the argument that the Board's adoption of Condition 66(h) was against the weight of the evidence as it does not serve "the public interest, convenience and necessity[.]" (Appellants' Merit Brief, p. 23.) As with every other argument raised under their second proposition of law, neither Mr. Price nor Ms. Price made any of these arguments in their application for rehearing.

As none of the arguments raised under Appellants' second proposition of law were presented to the Board, Appellants cannot raise them before this Court.

3. Third Proposition of Law

The Appellants raise three due process arguments under their third proposition of law. Appellants argue that (i) the Board "unjustifiably relied on the Joint Stipulation" as a result of Staff only providing one witness in the proceeding (Appellants' Merit Brief, pp. 28-29); (ii) that their "right to procedural due process" was violated because they were "denied" the right to cross-examine other Staff members on the Staff Report of Investigation (the "Staff Report") (Appellants' Merit Brief, pp. 29-30); and (iii) that they have been deprived of the opportunity to seek cross-examination on the post-certificate decommissioning costs estimates required every five years by Condition 66(g) of the Stipulation and Certificate.

Two of those due process arguments were not raised before the Board. Appellants did not argue in their applications for rehearing to the Board that they were precluded from cross-examining witnesses on the Stipulation. (Appendix 120-175). Appellants also did not argue before the Board that the Board's decommissioning condition requiring Black Fork to retain a professional engineer to develop updated decommissioning cost estimates resulted in a lack of due process. *Id.* Thus, the first and third arguments under the Appellants' third proposition of

law cannot be considered by this Court. *City of Cincinnati v. Public Utilities Commission of Ohio et al.* (1949) 151 Ohio St. 353, 86 N.E. 2d 10 (paragraph 17 of the syllabus).

Appellants' second argument under their third proposition of law should also not be heard by this Court. Appellants argue that their due process rights were violated because they were deprived of the opportunity to cross-examine certain members of the Board's Staff on the Staff Report. Black Fork does not dispute that Appellants Brett Heffner and Gary Biglin raised this issue in their administrative appeals to the Board. (Appendix 128-129; 147; and 153-154). However Appellants did not raise this argument in any of their assignments of error in their Notice of Appeal thereby waiving the argument in this proceeding. (Appendix 4-5); R.C § 4903.13 (requiring notice of appeal to contain errors complained of); *Ohio Consumers' Counsel v. PUC of Ohio*, 127 Ohio St. 3d 524, 528; 2010 Ohio 6239, ¶¶20-21; 941 N.E.2d 757, 762 (refusing to hear issue not raised in notice of appeal).

Appellants' failure to raise this argument as an assignment of error in their Notice of Appeal is readily apparent. Appellants' due process arguments under their third proposition of law arise from their fourth assignment of error in their Notice of Appeal to this Court. That assignment of error states:

The Board's acceptance of the facts, seventy-one (71) conditions subsequent and twelve (12) conclusions of law contained in the Stipulation violated the Appellants procedural and substantive due process rights as incorporated through the Fourteenth Amendment. The Board's unbridled adoption of the Stipulation denied all the Appellants and Intervenors their right to cross-examine the proponents of the Stipulation and the opportunity to present evidence on these issues at the hearing.

(Appendix 5). Notably, the assignment of error is silent as to Appellants' argument that they were denied the right to cross examine other members of the Board's Staff on the Staff Report, a separate document from the Stipulation. Accordingly, this Court cannot hear Appellants' argument regarding the Staff Report. *Ohio Consumers' Counsel v. PUC of Ohio, supra; Disc.*

Cellular, Inc. v. PUC, 112 Ohio St. 3d 360, 376 2007 Ohio 53, ¶ 66; 859 N.E.2d 957, 972 (“the failure to set forth alleged errors in the notice of appeal delimits the issues for our consideration”) citing R.C. 4903.13 and *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004 Ohio 5466, 816 N.E.2d 238, at P 21.

The Board should have the opportunity to address an argument prior to it being raised before this Court. Appellants have tried to circumvent the statutory mandate of Section 4903.10, Revised Code, raising new arguments to this Board. Appellants have also raised an argument that was not included as a grounds for reversal in their Notice of Appeal to this Court. For these reasons, the Court should refuse to hear Appellants’ third proposition of law.

C. Appellants have Abandoned Their Third Assignment of Error Which Presents an Issue that was Not Raised Below.

In their Merit Brief, the Appellants presented three propositions of law which incorporated the fifth assignment of error from their Notice of Appeal to this Court (who signed the Board order), the first and second assignments of error (the decommissioning bond determination) and the fourth assignment of error (opportunity to cross-examine Stipulation proponents). The Appellants, however, did not address their third assignment of error in their merit brief.

Appellants’ third assignment of error states as follows:

The Board’s decision to grant a certificate to the Applicant is not supported by the evidence. The “Joint” Stipulation and Recommendation was not entered into by all parties of record and was done in violation of the Board’s own rules. Only two parties of record signed the agreed Stipulation, however, the Stipulation is not only Stipulations as to facts but also Stipulations as to post certificate conditions and conclusions of law which are not provided for pursuant to O.A.C. §4907-7-09. The Board’s reliance on the facts, conditions, and conclusions of law contained in the Stipulations to arrive at its Order granting the certificate and judgment denying rehearing is unlawful and unreasonable.

(Appendix 4).

App. R. 16(A)(7) states that an appellant *shall* set forth in the brief “[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support * * *.” By not including any argument related to the third assignment of error, the Appellants did not comply with App. R. 16(A)(7). App. Rule 12(A)(2) provides “[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).” The Supreme Court has stated that “[e]rrors not treated in the brief will be disregarded as having been abandoned by the party who gave them birth.” *Hawley v. Ritley* (1988) 35 Ohio St. 3d 157, 519 N.E.2d 390, 1988-OhioLEXIS 41, citing *Uncapher v. Baltimore & Ohio Rd. Co.* (1933), 127 Ohio St. 351, 356, 188 N.E. 5353, 555. The Court should likewise disregard and dismiss the Appellant’s third assignment of error.

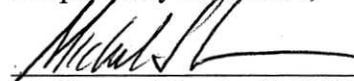
Another reason for dismissal is that the Appellants did not raise the argument set forth in the third assignment of error in their applications for rehearing. A review of the applications for rehearing will illustrate that the Applicants raised other issues on rehearing, but not the issue set forth in the third assignment of error. (Appendix 120-175). With the Appellants’ earlier failure to set forth the specific issue raised in their third assignment of error, the Court is precluded also from considering the issue raised in the third assignment of error. *Consumers’ Counsel* (2007), *supra*.

III. CONCLUSION

All of Appellants’ arguments in their merit brief to this Court should not be heard as a matter of law. None of the arguments in Appellants’ first and second propositions of law were raised in the lower proceedings before the Board. Of the three arguments under the third

proposition of law; two were not made in the lower proceedings and the third was not included in Appellants' notice of appeal. For the foregoing reasons, Appellants' appeal may be dismissed as a matter of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing Motion to Dismiss by Intervenor Appellee Black Fork Wind Energy LLC was served via U.S. first class mail, postage prepaid, upon the following persons this 16th day of October, 2012:

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