

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. 12-0900

**On Appeal from the Ohio Power Siting
Board, Case No. 10-2865-EL-BGN**

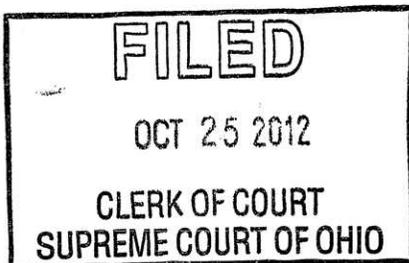
**APPELLANT’S MEMORANDUM IN OPPOSITION TO INTERVENOR-APPELLEE
BLACK FORK WIND ENERGY LLC’S MOTION TO DISMISS THE APPEAL OF
APPELLANTS GARY J. BIGLIN, BRETT A. HEFFNER, ALAN PRICE, CATHERINE
PRICE, AND JOHN WARRINGTON**

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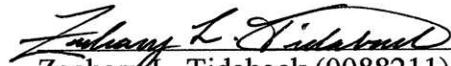
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Pursuant to S. Ct. Prac. R. 14.4(B), Gary J. Biglin, Brett A. Heffner, Alan Price, Catherine Price and John Warrington (collectively “Appellants”) respectfully request this Honorable Court for an order overruling Intervenor-Appellee Black Fork Wind Energy LLC’s (hereinafter “Black Fork”) motion to dismiss the Appeal in Case No. 2012-0900. 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. Black Fork contends that the issues Appellants present in their Merit Brief were either not raised in their applications for rehearing or, alternatively, in their Notice of Appeal to this Court. To the contrary, the Board was reasonably apprised of the issues Appellants raised in their applications for rehearing and which are now presented before this Court, as demonstrated in the memorandum below. Therefore, Appellants respectfully request this Honorable Court for an order overruling Black Fork’s Motion to Dismiss.

Respectfully Submitted,



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MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

I. ARGUMENT

A. Appellants Do Not Raise New Arguments In Each Of Their Three Propositions Of Law.

1. Appellants' First Proposition of Law

Appellant's argument under their first proposition of law should be heard by this Court.

The Appellants' first proposition of law is based on their fifth assignment of error in their Notice of Appeal to this Court. Such assignment of error reads as follows:

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 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 __").

First the methodology of the vote and granting of the Certificate was raised. Appellant, Brett A. Heffner, raised the issue that the Board granted the Certificate unlawfully in his fourth assignment of error in his application for rehearing. Mr. Heffner's fourth assignment of error reads:

Opinion, Order and Certificate is unreasonable and unlawful as the Board did not review evidence and testimony. (Appendix 147).

In support of this assignment of error, Mr. Heffner, on page four (4), paragraph (4) in his memorandum in support of his application for rehearing, states:

§4906-1-01(F) ""Board"" means the Ohio Power Siting Board, as established by division (A) of section 4906.02 of the Revised Code."

Opinion, Order and Certificate 10-2865-EL-BGN Page 1 "The Ohio Power Siting Board (Board) coming now to consider the above entitled matter, having

appointed Administrative Law Judges to conduct the hearings, having reviewed the exhibits and testimony introduced into evidence in this matter, and being otherwise fully advised, hereby issue its Opinion, Order and Certificate in this case as required by Chapter 4906 of the Revised Code.

After 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(s) and the Board as above defined.

§4906-1-01(F) Defines the Board

§4906.02(C) "The Chairman of the Public Utilities Commission may assign or transfer duties among the Commission's Staff. However, the Board's authority to grant Certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the Board itself."

§4906.02(A) specifies members of the Board, and what duties they may delegate.

(Appendix 154-155).

Furthermore, Appellant, Gary J. Biglin, raised the issue that the Board granted the Certificate unlawfully under subsection (a) of his third assignment of error. Subsection (a) states:

Instead of rendering an independent decision the Board adopted, without due consideration, an Opinion, Order, and Certificate that was pre-drafted by the ALJ's. The Opinion, Order, and Certificate (which was apparently prepared before the Board ever met on this matter) states: "Upon review of the record, as a whole, we find that intervenors who were not parties to the Stipulation have not presented evidence sufficient to persuade the Board to reach a contrary finding. Any allegation presented in opposition to the Stipulation is hereby considered denied."

It appears that the Board relied upon the ALJ's to reach a final decision which was merely rubber-stamped by the Board. This project will affect the lives and property rights of citizens living in this project area. **Therefore, the Board must meet its statutory obligation to carefully weigh the issues and evidence and to reach an independent determination whether the Project should be constructed as proposed.**

(Appendix 127-128).

Therefore, both Mr. Heffner and Mr. Biglin raised the issue that the Board did not make an independent decision concerning the issuance of the Certificate nor comply with the mandates

of its enabling statute. As referenced above, Mr. Heffner **specifically** alleged that the Board unlawfully delegated its duties pursuant to R.C. §4906.02(C) when issuing the Certificate. It is true that both Mr. Heffner and Mr. Biglin did not use the legal term of art “void ab initio” in their applications for rehearing but, nevertheless, they clearly point out the fact that the Board did not make an independent determination and unlawfully delegated its duties when issuing the Certificate to Black Fork. Appellants did not voice their applications for rehearing in technical legal semantics, however, they clearly did so in a way that put the Board on notice to give them a fair chance to address the Appellants’ concerns.

Second, if the issuance of the Certificate is void then it is void, i.e. a nullity. If it is a nullity then there is no determination and a request for a rehearing is not needed because R.C. §4903.10 pertains to “any matters **determined** in the proceeding”. “Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶11; citing *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002. Appellants state that the Board made no determination as the Board did not follow their own enabling statute and acted beyond the scope of the power delegated to it by the legislature, even when read in conjunction with R.C. §121.05.

Appellees contend that Appellants failed to take into account R.C. §121.05, which has to be read in pari materia as mandated by §1.51 of the Ohio Revised Code. Appellees are correct that R.C. §121.05 expressly authorizes the director of an administrative department to “designate any of the director’s assistant directors or a deputy director to serve in the director’s place as a member of any board, committee, authority or commission of which the director is, by law, a

member”. However, what the Appellees fail to disclose is the portion of R.C. §121.05 that states, “The designee may vote and participate in all proceedings and actions of the board, committee, authority, or commission, **provided that the designee shall NOT execute or cause a facsimile of the designee’s signature to be placed on any obligation** or execute any trust agreement or indenture”.

Here, assuming *arguendo*, the persons not identified by the record as being designated assistant directors in accordance with R.C. §121.05 are deemed to be designated persons, it still remains that they were not endowed with the power to execute the Certificate. The signing of the Certificate issued to Black Fork is an obligation that only the Board has, not the Board’s designated assistant directors. Therefore, the Board is still in violation of their own enabling statute pursuant to R.C. §4906.02.

As demonstrated by the foregoing, the Appellants did, indeed, raise this issue before the Board and in their Notice of Appeal to this Court. Accordingly, this Court can and should consider this argument of Appellants.

2. Appellants’ Second Proposition of Law

Appellants’ second proposition of law should be heard by this Court. In its Motion, Black Fork quotes both Mr. Price and Mrs. Price’s applications for rehearing which clearly raise the issue of bonding in connection with decommissioning. The Board in response to both Mr. and Mrs. Price’s applications for rehearing plainly states that the bonding requirements for decommissioning have been provided for in the Stipulation. In particular, the Board cites condition 66(h) as resolving the decommissioning issue. It is obvious that the Board knew what issues were being raised by Mr. and Mrs. Price in their applications for rehearing. It is somewhat mysterious as to why Black Fork does not see this. The whole purpose of requiring applications

for rehearing is to state the reasons for why such a rehearing is necessary and grant the Board the opportunity to correct or rectify the problem.

Here, the Board specifically discussed the issue of decommissioning as pertaining to Mr. and Mrs. Price's applications for rehearing. Mrs. Price clearly raised the issue that some type of bond for decommissioning should be required of Black Fork prior to the commencement of construction in case Black Fork goes bankrupt or if some other catastrophe occurs there will be funds in place to remove the wind turbines. Furthermore, Mrs. Price also addressed the possible damage that would occur to the roadways when the turbines are transported. Subsequently, the Board overruled Mrs. Price's request for rehearing by citing that the issue was resolved by the Stipulation which adopted the Staff Report's condition concerning decommissioning. It is obvious from a reading of Mrs. Price's application for rehearing that she was concerned that the decommissioning condition in question does not require a bond at the commencement of construction or resolves what happens when the wind turbines become obsolete or if Black Fork goes bankrupt. It is true that Mr. Price and Mrs. Price did not artfully raise the issue as specific as Black Fork would like, however, the issue was argued and presented in their applications for rehearing as well as in their Notice of Appeal which is properly before this Court. It should be noted that the Board did not file a Motion to Dismiss because it understood that Mr. Price and Mrs. Price raised the issue of decommissioning in their applications for rehearing. Therefore, this Court should hear Appellants' second proposition of law.

3. Appellants' Third Proposition of Law

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).

Appellant's first argument under their third proposition of law should be heard by this Court. As referenced below, Mr. Heffner specifically stated in his third assignment of error, in his application for rehearing, that Appellants were foreclosed from cross-examining the signatories to the Stipulation:

The Opinion, Order and Certificate is unlawful as the Staff Report and Staff opinion are used extensively in the formation of finding of fact and conclusion of law, but the Staff Report was not treated as evidenced in the adjudicatory hearing, and **citizen 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.**

(Appendix 147).

It is completely clear from the above that Mr. Heffner addressed the issue of cross-examining the signatories to the Stipulation in his application for rehearing. Accordingly, this Court should hear this issue.

Appellants' second argument under their third proposition of law should be heard by this Court. Black Fork is correct when it states that Appellants argue that their due process rights were violated because they were deprived of the opportunity to cross-examine all but one

member of the Board's Staff that developed the Staff Report of Investigation. Further, Black Fork is correct when it states that Appellants Brett A. Heffner and Gary J. Biglin raised this issue in their administrative appeals to the Board. (Appendix 128-129; 147; and 153-154). What Black Fork argues is that the 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.

Mr. Biglin raised the issue of cross-examining the Staff witnesses of the Staff Report in his fourth assignment of error under subsection (d). Subsection (d) reads as follows:

Fourteen (pro se.) citizen intervenors were not parties to the Stipulation. As of discussions in the (Sept. 9, 2011) teleconference non-stipulating parties were to be able to address all issues at the evidentiary hearing, but at the hearing OPSB staff witnesses that represented different areas of the Staff Report were removed from testifying, thus not affording the intervenors the right to cross-examine them. These non-stipulating parties were unjustly denied opportunity to cross-examine staff witnesses. After pulling all the previous staff witnesses the ALJ's allowed OPSB staff to appoint a Mr. Jon Pawley as the only available staff representative witness for cross-examination. He repeatedly could not answer the questions asked of him by intervenors about specific areas of the Staff Report, thus the intervenors were not given adequate answers to questions by only this witness. All staff witnesses who filed testimony in this case should have been made available for cross-examination by intervenors not party to the Stipulation.

(Appendix 129).

Moreover, Mr. Heffner raised the issue of cross-examining the authors of the Staff Report along with the other signatories to the Stipulation. Mr. Heffner's third assignment of error in his application for rehearing reads as follows:

The Opinion, Order and Certificate is unlawful as the Staff Report and Staff opinion are used extensively in the formation of finding of fact and conclusion of law, but the Staff Report was not treated as evidenced in the adjudicatory hearing, and citizen 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.

(Appendix 147).

Here, Black Fork makes a very clever argument that Appellants' Notice of Appeal fails to address the cross-examination of the authors of the Staff Report, however, its argument is disingenuous. Black Fork's argument stems from its attempt to distinguish the Staff Report of Investigation from the Stipulation as two separate documents. This characterization by Black Fork is a distinction without a difference because the seventy-one (71) conditions proposed in the Staff Report of Investigation were incorporated into the Stipulation. Thus, the documents are one and the same. The Appellants' fourth assignment of error in their Notice of Appeal specifies their inability to cross-examine **"the proponents of the Stipulation"**. The Board's Staff, which developed the Staff Report of Investigation, was a party and signatory to the Stipulation. Mr. Heffner's third assignment of error specifically states **"other signatories to the Stipulation"**. The word **"other"**, as used by Mr. Heffner, qualifies the beginning of his statement that the authors of the Staff Report were also signatories to the Stipulation which incorporated the Staff Report. Clearly, the Appellants' Notice of Appeal covers this issue and this Court should address it.

Furthermore, it was represented to Appellants that the Staff witnesses would be scheduled to testify at the evidentiary hearing on September 26th and 27th. (Appellants Supplement at 65, lines 20-21). Subsequently, the evidentiary hearing was continued to October 11, 2011. (ICN 117 (Appellant's Supplement. 70)). On September 28, 2011, Black Fork entered into the Stipulation with the Board's Staff and the Ohio Farm Bureau for revised conditions for the facility's construction and operation. (Appendix 13). On October 5, 2011, Black Fork, the Board's Staff, the Ohio Farm Bureau and the Commissioners of Crawford County entered into an amended Stipulation which added nine (9) more conditions to the seventy-one (71) and which none of the Appellants stipulated to. (Appendix 38). When the evidentiary hearing reconvened and was held on October 11th, 12th and 13th the only Staff member made available to testify was

Jon C. Pawley contra to the representation made to Appellants during the September 19, 2011 hearing . (Appellant's Supplement. 49, at 65 and 72, at 75). Thus, Black Fork's complaint that Appellants were silent on this issue in their Notice of Appeal cannot hold up since the Board's Staff was a party to the Stipulation which incorporated the conditions the Staff proposed in their Staff Report of Investigation. Accordingly, this Court can and should hear Appellants' argument pertaining to this issue.

Appellants' third argument under their third proposition of law should also be heard by this Court. Again, Mr. Heffner stated that the intervenors to this case were not provided the opportunity to cross-examine the signatories to the Stipulation. (Appendix 147). Black Fork was a signatory to the Stipulation which proposed that Black Fork is to retain an independent engineer to estimate the total cost of decommissioning. Furthermore, as referenced in Black Fork's Motion, Mrs. Price raised the issue of what funds will be available to repair, replace or remove the turbines. All this depends on the estimation that Black Fork's independent engineer arrives at and which the Appellants are foreclosed from cross-examining. Mr. Heffner, in his fifteenth assignment of error in his application for rehearing, states "It is unlawful and unreasonable for the legislature to create a judicial body....that grants a certificate that allows substantial and material changes to the particulars of the Certificate without the opportunity of a public hearing". (Appendix 149). Appellants will never get the opportunity to cross-examine Black Fork's engineer on his or her estimation of the decommissioning costs since such estimation will occur outside the public hearing. Therefore, this issue should be heard by this Court.

II. CONCLUSION

Black Fork's entire complaint hinges on the fact that Appellants were not as artful in expressing their grounds for rehearing as they would like. Appellants are members of the public

who have a vested interest in the Black Fork Wind Energy, LLC Project and the effect it may have on their community. What Black Fork is striving for with its Motion is not only to dismiss this case, but to put the public at large on notice that if they want to appeal a particular matter then they must obtain a legal team to ensure that matter will be preserved in legalistic language so that the Board and the attorneys for the private company can adequately understand. This defeats the purpose of a public hearing. Although Ohio law holds that pro se litigants are held to the same rules, procedures, and standards as litigants represented by counsel, it is also true that a court may, in practice, grant a certain amount of latitude toward pro se litigants. *Goodrich v. Ohio Unemployment Compensation Review Commission*, 2012-Ohio-467, 11AP-473 ¶ 25; citing *Robb v. Smallwood*, 165 Ohio App.3d 385, 2005-Ohio-5863, at ¶5. Here, the Appellants have put forth cognizable arguments in their applications for rehearing and in their Notice of Appeal which this Court can and should consider.

Accordingly, all of the Appellants' arguments in their merit brief to this Honorable Court should be heard. For all of the above reasons, Appellants respectfully request this Honorable Court to issue an order opposing Intervenor-Appellee Black Fork Wind Energy LLC's Motion to Dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum In Opposition to Intervenor-Appellee Black Fork Wind Energy LLC's Motion to Dismiss was served via U.S. first class mail, postage prepaid, upon the following persons this 25th day of October, 2012:

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