

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. 12-0900

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

REPLY BRIEF OF APPELLANTS GARY J. BIGLIN, BRETT A. HEFFNER,
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ARGUMENT

FIRST PROPOSITION OF LAW:

The Certificate Issued To Black Fork Violates The Requirements Under R.C. 4906.02(C) And Is Void Ab Initio, As The Opinion, Order, And Certificate And Judgment Denying Rehearing Were Not Approved By The Board But Rather By Unknown Individuals.

First, the 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 previously designated assistant directors or deputy directors to further 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, it is the Appellants' position that R.C. §4906.02, the Board's enabling statute, controls R.C. §121.05 because it specifically sets forth what the Board can and cannot do. "The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly. *Tongren v. Public Utilities Commission of Ohio*. (1999), 85 Ohio St.3d 87, at 88, 706 N.E.2d 1255, 1999-Ohio-206; citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051. Thus, the specificities of R.C. §4906.02(C) require the Board members themselves to vote on and to sign a Certificate. Nowhere does the statute afford the right for the Board to have its assistant directors or deputy directors vote or sign a Certificate on its behalf. Clearly, R.C. §4906.02 and R.C. §121.05 are inconsistent with each other, therefore, the state legislature's intention regarding R.C. §4906.02 must take precedence.

R.C. §1.49 and §1.51 clearly accepts there is a preference to specific provisions over general provisions of conflicting law, unless such general provisions were adopted later and manifest an intention to override the specific provisions. R.C. §1.51 states:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If a conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Here, R.C. §121.05 was adopted after R.C. §4906.02, however, nothing in R.C. §121.05 addresses or overrules the mandates set forth by R.C. §4906.02 which the legislature created to provide the specific requirements of the Board. In fact, R.C. §121.05 says nothing about the Board or any of the members of the Board except for the director of health. This Court has addressed this type of issue on at least four other occasions and has held that “where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence”. *State ex rel. Myers v. Chiaramonte*. (1976), 46 Ohio St.2d 230, at Syllabus ¶1, 348 N.E.2d 323; *City of Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St.2d 76, at Syllabus ¶1, 369 N.E.2d 778; *Johnson’s Markets, Inc. v. New Carlisle Dept. of Health*. (1991), 58 Ohio St.3d 28, at 35, 567 N.E.2d 1018; and *Summerville, Admr. v. City of Forest Park*. (2010), 128 Ohio St.3d 221, at 226-227, 2010-Ohio-6280. Therefore, R.C. §4906.02 takes precedence over R.C. §121.05.

Second, R.C. §121.05 does not control this matter because the record in this case is completely void as to who the people were that voted and signed on behalf of the Board. R.C. §4906.02(B) states:

“the chairman shall keep a complete record of all proceedings of the board, issue all necessary process, writs, warrants, and notices, keep all books, maps, documents, and papers filed by the board, conduct investigations

pursuant to §4906.07 of the Revised Code, and perform such other duties as the board may prescribe.

There is nothing in the record that demonstrates these unknown individuals were, in fact, assistant directors or deputy directors. (Appendix (“Appx.” at 43 and 176)). In *Tongren*, this Court stated:

this court in a number of decisions has addressed the question of what constitutes adequate factual support for commission orders. Suffice it to say, some factual support for commission determinations must exist in the record, an obligation which the commission itself has recognized in its orders.

Tongren, 85 Ohio St.3d 87, at 89-90.

In the case at bar, it is the obligation of the Board to have in the record who these people are if the Board is going to argue that these people were assistant directors or deputy directors. Since the record is void as to the status of these individuals there can be no presumption that the issuance of the Certificate to Black Fork accords with normal process.

Where, as in this case, the Public Utilities Commission fails to provide a record, the complaining party is effectively foreclosed from “demonstrating” the prejudicial effect of the order. Therefore, where the Public Utilities Commission fails to meet the requirements of R.C. 4903.09 by not disclosing the sources of its information to those who most require it, thereby preventing the complaining party from demonstrating prejudice, the matter must be remanded for development of an appropriate record, to leave open the potential demonstration of prejudice by a party based upon that record in a subsequent appeal.

Tongren, 85 Ohio St.3d 87, at 92-93.

It is clear that this Court looks to the record before it decides cases. Here, the Board failed to present a record as to who the individuals voting on and signing the Certificate were.

Third, should this Court hold that R.C. §121.05 be read *in pari materia* with R.C. §4906.02 then the Board still has the problem that neither assistant directors nor deputy directors can sign any obligation of the Board. In their argument, both Appellees fail to disclose 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”. Even 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 or deputy directors. Therefore, the Board is still in violation of their own enabling statute pursuant to R.C. §4906.02.

Finally, Appellees cite *Miller v. Nelson-Miller* in support of their argument that if the Board’s order was executed by unauthorized persons then the Board’s order would be voidable, not “void ab initio”. *Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 385, 2012-Ohio-2845, ¶ 17, 972 N.E. 2d 568. This was a divorce case which involved a judge and a magistrate in the judiciary branch of government. Here, this case involves the Ohio Power Siting Board which, as stated above, is a creature of the state legislature as provided for by R.C. §4906.02. This Court just recently formulated the rule of law as to whether the Board’s actions were illegal and outside the scope of its authority in *In re Application of Am. Transm. Sys., Inc. In re Application of Am. Transm. Sys., Inc*, 125 Ohio St.3d 333, 2010-Ohio-6718, 780 N.E.2d 427. Thus, the *Miller* case is not applicable and does not present a proper comparison to the case at bar.

It is evident from the face of the orders that the Board did not vote nor did it sign the Certificate and Entry on Rehearing, which is reason enough for this Court to disturb the presumption of regularity in this case.

SECOND PROPOSITION OF LAW:

The Board Failed To Ensure That The Black Fork Wind Energy, LLC Wind-Powered Facility Will Serve The “Public Interest, Convenience And Necessity” As Required By R.C. 4906.10(a)(6) By Not Resolving The Material Issue of Posting A Decommissioning Bond And It Erred In Permitting Black Fork To Retain An Engineer To Estimate The Total Cost Of Decommissioning Without Public Input, Thereby Making The Board’s Determination Unlawful And Unreasonable.

The Appellees contend that the Board resolved the decommissioning issue, including financial assurances, and, accordingly, the Board’s order was reasonable. The Board’s order was simply not reasonable.

The Appellees are correct when they state that:

in the Staff Report, Staff recommended the Board include that decommissioning condition (Condition 66) in Black Fork’s certificate as a precondition to the Board finding. Subsequently, the stipulating parties (Black Fork, the Board’s Staff, the Ohio Farm Bureau, and the Board of County Commissioners of Crawford County) recommended that condition practically verbatim to the Board”.

(Ohio Power Siting Board Merit Brief at 14).

This demonstrates that the condition proposed by the Board’s Staff was, indeed, incorporated into the Stipulation. The decommissioning condition was ultimately adopted by the Board and became part of Black Fork’s certificate. Condition (66) became part of Black Fork’s Certificate because as the Staff noted in the Board’s Order, Opinion, and Certificate:

Staff notes that the applicant has not proposed the posting of a bond or equivalent financial security in an amount to ensure that funds are available to complete decommissioning. According to Staff, the applicant has proposed posting a financial instrument within 180 days after the twentieth anniversary of the operations date, per landowner lease agreements. Staff believes this schedule is inadequate due to the time that would elapse before assurance funds would be posted. Staff also believes that the application lacks specificity in a schedule and method by which requisite decommissioning funds are to be posted. Staff states that a project-specific decommissioning plan, which provides a proposed timetable and methodology for posting adequate

decommissioning funds, should be required at least 30 days prior to a preconstruction conference for Staff review and acceptance.

(Opinion, Order, and Certificate (“Certif.”), ICN 134, at 24 (Appx. at 68)).

Clearly, the Staff quote above reiterates Appellant Catherine Price’s concerns in her application for rehearing that Black Fork does not want to insure funding for this and what might happen if Black Fork files bankruptcy before providing decommissioning funds. (Appx. 131). This is why Condition 66 was adopted. However, Condition 66 still only proposes a timetable and methodology for posting adequate decommissioning funds, not a finalized plan. Although Condition 66 was adopted because the Staff had the same concern as Catherine Price it is still the fact that Condition 66 does not describe any financial arrangements that Black Fork has made. Further, Condition 66 highlights the fact that the Appellants’ right to participate and present evidence is not safeguarded by R.C. §4906.07, which discusses when the Board must hold a new hearing, because no amendment will be required since the finalized “decommissioning plan” has yet to be decided. (Appellants’ Merit Brief at 23). So even though Condition 66 was incorporated into Black Fork’s Certificate it still holds true that the decommissioning plan has not yet been determined.

Moreover, Nicholas E. Doss, the staff member who was responsible for the issue of decommissioning did not testify at the evidentiary hearing. As stated in the due process arguments below, Nicholas E. Doss along with six (6) other staff members were pulled from testifying at the evidentiary hearing regarding their respective reports, in violation of the Board’s own rules. In its Merit Brief, Black Fork asserts that its own witness, Mr. Scott Hawken, provided the needed testimony for Condition 66, however, what Black Fork fails to realize is that the Board’s own staff member responsible for the issue of decommissioning did not. Nicholas E. Doss played a critical role for the Staff in the certificating process because he was responsible for

the decommissioning issue. Black Fork and the Staff entered into the Stipulation which incorporated the Staff's proposal regarding decommissioning (Condition 66). By not having Mr. Doss available to testify concerning his findings it severely prejudiced Appellants. Appellants were foreclosed from cross-examining Mr. Doss as to how the Staff arrived at the proposed timetable and methodology contained in Condition 66 and what information lead the Staff to believe it was the most appropriate way of handling the issue. Since the Board adopted the staff's "determination of reasonableness" as its own pertaining to Condition 66, it is impossible to determine what evidence was considered by the Board other than the conclusions of its staff that Condition 66 appropriately addressed the issue of decommissioning.

The same argument applies to the independent engineer that Black Fork is to retain to estimate the total costs of decommissioning. The Appellants have no opportunity to cross-examine the engineer on his or her estimation. Appellees' claim that Black Fork's engineer's estimate is safeguarded because said estimate is subject to Staff's approval. But, what information does the Staff base its conclusion on that the engineer's calculation is sufficient? This also calls into question whether the Board will simply yield to the staff's "determination of reasonableness" as it pertains to the estimation as it did when Condition 66 was adopted and incorporated into Black Fork's Certificate.

THIRD PROPOSITION OF LAW:

The Board Violated The Appellants' Right To Procedural Due Process By Disallowing The Appellants From Conducting Cross-Examination on Staff Members, Prohibiting The Presentation of Evidence And By Permitting Black Fork To Make Post-Certificate Alterations And Information Submissions Without A Hearing.

The Appellees argue that the Board did not commit any due process violations and that Appellants have not demonstrated any prejudice. However, the Board did, in fact, commit due process violations and the Appellants were prejudiced by those violations in the following ways:

First, the Appellants, as parties to the certification proceeding, have the statutory right to call and examine witnesses at the hearing pursuant to R.C. § 4906.08. (Appx. 219). The Appellants were effectively denied this right because they were foreclosed from cross-examining the other seven (7) staff members responsible for developing specific sections of the staff report of investigation that proposed conditions that were incorporated into the Stipulation.

On September 9, 2011, at a prehearing conference, Administrative Law Judge (“ALJ”) Scott Farkas stated that the evidentiary hearing was to be held on September 19, 2011 and that any party wishing to testify must prefile their written testimony by September 15, 2011. (Appellants’ Supplement (Appellants’ “Supp.” at 2)).

On September 15, 2011, staff members: Timothy S. Burgener, Donald E. Rostofer, Nicholas E. Daus, Christopher K. Cunningham, Andrew Conway, John R. Whitus, Paul A. Laurent, and John C. Pawley submitted their prefiled testimony concerning each of their particular responsibilities of the staff investigation. (Appellants’ Supp. 5-48).

On September 19, 2011, the adjudicatory hearing commenced, however, said hearing was converted into a prehearing settlement conference. (Entry of September 12, 2011, Appx. 9). During the conference, ALJ Farkas acknowledged that the testimony filed in this case from the staff was from all of the above mentioned staff members. (Appellants’ Supp. 55-56). ALJ Farkas further determined that those staff witnesses will testify at the evidentiary hearing on September 26th and 27th. (Appellants’ Supp. 65). Subsequently, the evidentiary hearing was continued to October 11, 2011. (Appellants’ Supp. 70).

When the evidentiary hearing commenced, seven (7) of the eight (8) staff members, that were identified as being testifying witnesses at the prehearing settlement conference of

September 19, 2011, were pulled from the evidentiary hearing. Jon C. Pawley was the only staff member that was present and testified on behalf of the staff.

Thus, since the September 19, 2011 hearing was converted into a prehearing settlement conference the Board in conjunction with the ALJs violated their own procedure as it pertains to prehearing conferences pursuant to O.A.C. §4906-7-10. Specifically, O.A.C. §4906-7-10 states:

(A) In any proceeding, the board or the administrative law judge may, upon motion of any party or upon their own motion, hold one or more prehearing conferences for the purposes of:

(3) Identifying the witnesses to be presented in the proceeding and the subject matter of their testimony.

(C) Following the conclusion of a prehearing conference, the board or the administrative law judge may issue an appropriate order, reciting or summarizing any agreements reached or rulings made at such conference.

Unless otherwise ordered for good cause shown, such order shall be binding upon all persons who are or subsequently become parties, and shall control the subsequent course of the proceeding.

§4906-7-10; (Ohio Power Siting Board Appendix at 3-4).

Here, the Appellants relied on the representation that all the staff witnesses identified at the prehearing settlement conference would be available to testify at the subsequent evidentiary hearing. The only Staff member that was made available as a witness was Jon C. Pawley, who was responsible for issues not covered by the other staff witnesses. This one Staff member cannot lay the foundation for the testimony of all the other staff members. Moreover, the Board and the ALJs violated O.A.C. §4906-7-10 because the staff witnesses that were identified to testify at the evidentiary hearing were unilaterally pulled from the evidentiary hearing. **The Board and the ALJs did not allow or follow their prior identification of the testifying staff witnesses, at the settlement conference of September 19, 2011, to control the subsequent course of the proceedings.** This is clearly why the Appellants were prejudiced. The Appellants did not exercise their subpoena power because the prehearing settlement conference determined

that all the particular staff witnesses that prefiled their testimony would be available to testify at the evidentiary hearing. Therefore, the Appellees are wrong when they state Appellants should have used their subpoena power. The fact of the matter is that the Appellants did not have to exercise their subpoena power because it was already determined at the prehearing settlement conference that those staff witnesses were going to testify.

Second, if the post-certificate submission of information does not amend the Certificate, then the Appellants will be unable to obtain a hearing to challenge that information. The condition that Black Fork is to retain its own engineer to estimate the total decommissioning costs defers that relevant evidence to a later time. This evidence should have been presented at the hearing, allowing Appellants to conduct cross-examination. When such essential information is deferred until after the Certificate is approved, the hearing required pursuant to R.C. §4906.07 is fundamentally unfair.

The test in *Mathews v. Eldridge* (1976), 424 U.S. 319, applies to the evaluation of due process in administrative cases. *State ex rel. Ormet v. Ind. Comm'n* (1990), 54 Ohio St.3d 102, 104; *LTV Steel Co. v. Indus. Comm'n* (2000), 140 Ohio App.3d 680, 689-690. Thus, Black Fork's assertion (at p. 22) that these cases are "not applicable to the matter at bar" is clearly erroneous. The Appellants are, indeed, deprived of their liberty interest when the Board's post-Certificate condition allowing Black Fork's engineer to estimate the total decommissioning costs bypasses their right to cross-examine the engineer on his or her estimation and to submit evidence on the issue. Appellants are further prejudiced by this because they have an interest in protecting themselves along with the community from the impacts of Black Fork's Facility that would adversely affect their health, safety, and property. It is the Board's duty to insist that financial safeguards are available to protect that public interest when decommission occurs.

Black Fork could, and should, submit the estimation information as evidence at the hearing, consistent with its burden of proof, and the Board must consider that information pursuant to R.C. 4906.10(A). Nowhere in either of the Appellees' merit briefs was it suggested that requiring an evidentiary hearing on this information would impose significant fiscal and administrative burdens on the Board and Staff.

Appellees' claim that Appellants' argument to a "statutory right to participation" beyond the hearing on the application for a certificate is wrong. (Ohio Power Siting Board Merit Brief, at 20). This is a gross mischaracterization of the Appellants' argument. Appellants never argued that they have a right to participate after the certificate has been issued. What the Appellants do argue is that such integral features of the certifying process, such as the costs for decommissioning, should have been presented at the actual hearing and not postponed to be decided at a later date after the certificate has been issued. By postponing vital determinations until after the certificate has been issued undermines the fairness of the public hearing and forecloses the Appellants from addressing such issues since such issues have not been decided.

CONCLUSION

For all of the foregoing reasons, this Court should remand the Certificate to correct all of the errors as described above.

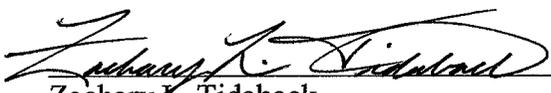
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served by First Class U.S. mail on the following counsel of record on November 5, 2012.

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