

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.62894 / September 13, 2010

Admin. Proc. File No. 3-13782

In the Matter of the Application of

WIND ENERGY AMERICA INC.
c/o Robert O. Knutson
Wind Energy America Inc.
9372 Creekwood Dr.
Eden Prairie, Minnesota 55347

For Review of Action Taken by

Financial Industry Regulatory Authority, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REMOVAL FROM QUOTATION
ON THE OTC BULLETIN BOARD

Failure to Meet Continued Quotation Requirements

Registered securities association removed issuer's securities from quotation because the issuer failed to timely file a required annual or quarterly report three times within two years. *Held*, the application for review is *dismissed*.

APPEARANCES:

Robert O. Knutson, for Wind Energy America Inc.

Marc Menchel, Alan Lawhead, Gary J. Dernelle, and Andrew J. Love, for Financial Industry Regulatory Authority, Inc.

Appeal filed: February 16, 2010
Last brief received: June 1, 2010

I.

Wind Energy America Inc. ("Wind Energy" or the "Company"), an issuer formerly quoted on the OTC Bulletin Board Service ("OTCBB"),¹ appeals the decision of Financial Industry Regulatory Authority, Inc. ("FINRA") to remove Wind Energy's securities from quotation on the OTCBB. FINRA determined that Wind Energy's securities were ineligible for OTCBB quotation pursuant to FINRA OTC Bulletin Board Service Rule 6530 ("Rule 6530") because the Company failed to timely file a required annual or quarterly report three times in two years.² We base our findings on an independent review of the record.

II.

The facts are largely undisputed. Wind Energy is a Minnesota-based corporation that focuses on developing wind energy production. Wind Energy's common stock is registered with the Commission under Section 12(g) of the Securities Exchange Act of 1934.³ Exchange Act Section 13(a) requires every issuer of a security registered pursuant to Section 12 to file periodic and other reports with the Commission containing such information as the Commission's rules prescribe.⁴ Pursuant to Exchange Act Section 13(a), the Commission has promulgated Rules 13a-1 and 13a-13, which require issuers to file annual and quarterly reports with the Commission.⁵

During the period at issue, Wind Energy's securities were quoted on the OTCBB. Under Rule 6530, OTCBB-quoted companies must timely file their annual and quarterly reports with the Commission as a condition of continued OTCBB quotation. Rule 6530(e) provides that an issuer that is delinquent in its reporting obligations three times during a two-year period will be denied OTCBB quotation for one year.

¹ The OTCBB is an electronic quotation system that displays real-time quotes, last-sale prices, and volume information for many over-the-counter securities not listed on The Nasdaq Stock Market or a national securities exchange. U.S. Securities and Exchange Commission, OTC Bulletin Board (OTCBB), *available at* <http://www.sec.gov/answers/otcbb.htm> (last visited June 16, 2010).

² As part of the effort to consolidate and reorganize the rules of the National Association of Securities Dealers, Inc. ("NASD") and New York Stock Exchange ("NYSE") into one FINRA rulebook, NASD Rule 6530 (which is otherwise unchanged) is now codified as FINRA Rule 6530.

³ 15 U.S.C. § 78l(g).

⁴ 15 U.S.C. § 78m(a).

⁵ 17 C.F.R. §§ 240.13a-1 and 13a-13; *see also Navistar Int'l Corp.*, Securities Exchange Act Rel. No. 56769 (Nov. 8, 2007), 91 SEC Docket 3131, 3132.

Wind Energy submitted its Form 10-Q quarterly report for the period ending March 31, 2008 (the "2008 quarterly report") pursuant to Exchange Act Rule 12b-25, which extends the filing deadline for a quarterly report to "no later than the fifth calendar day following the prescribed due date."⁶ As a result, Wind Energy's 2008 quarterly report was due on May 20, 2008. Wind Energy electronically submitted the 2008 quarterly report to the Commission on May 20, 2008 at 6:26 p.m. Eastern Time. On May 28, 2008, FINRA OTCBB staff sent a delinquency notification to Wind Energy stating that Rule 13(a)⁷ of Regulation S-T provides that electronic filings submitted after 5:30 p.m. Eastern Time shall be deemed filed as of the next business day. Because Wind Energy filed its report at 6:26 p.m. Eastern Time, the Commission deemed it filed on May 21, 2008, the day after it was due. The May 28, 2008 notification stated that Wind Energy filed the report late and warned that "[a]ny OTCBB issuer that is delinquent in its reporting obligations three times in a 24-month period . . . is ineligible for quotation on the OTCBB for a period of one year."

Wind Energy failed to file its Form 10-K annual report for the period ending June 30, 2008 (the "2008 annual report") with the Commission by the October 14, 2008 filing deadline. On October 15, 2008, FINRA OTCBB staff sent a delinquency notification to Wind Energy informing the Company of this second delinquency. The notification reminded Wind Energy of the possible consequences of delinquent reporting and stated that Wind Energy had been delinquent twice in the previous two years. Wind Energy eventually filed the 2008 annual report on November 4, 2008.

Wind Energy failed to file its Form 10-K annual report for the period ending June 30, 2009 (the "2009 annual report") with the Commission by the October 13, 2009 filing deadline. On October 14, 2009, FINRA OTCBB staff sent a notification to the Company pursuant to Rule 6530(f)(1) stating that the Company had been delinquent in its reporting obligations three times in the prior two years and that its securities would be removed from OTCBB quotation. The notification also informed Wind Energy that it could request a hearing to appeal the staff's determination of the delinquency.

On October 21, 2009, Wind Energy timely requested a hearing by the FINRA Office of Hearing Officers to appeal FINRA's determination that Wind Energy was not in compliance with Rule 6530(e). On November 16, 2009, a Hearing Officer conducted a telephonic hearing in which FINRA and Wind Energy participated. During the hearing, Wind Energy did not dispute that it filed the three reports at issue late, including the 2008 quarterly report. One day after the hearing, however, the Company filed a pleading titled "post-hearing motion for relief," claiming that it submitted the 2008 quarterly report on time. The Hearing Officer rejected the motion as untimely filed.

⁶ 17 C.F.R. § 240.12b-25.

⁷ 17 C.F.R. § 232.13(a).

On January 4, 2010, the Hearing Officer issued her decision. Although the Hearing Officer had rejected Wind Energy's "post-hearing motion for relief" as untimely, she considered and rejected the Company's argument that it timely filed the 2008 quarterly report. The Hearing Officer determined that Wind Energy filed the 2008 quarterly report late based on the provisions of Rule 13(a) of Regulation S-T and therefore found "no dispute that [Wind Energy] ha[d] been delinquent in its reporting obligations three times in a 24-month period" in violation of Rule 6530(e). The Hearing Officer concluded that Wind Energy was ineligible for continued OTCBB quotation and ordered that the Company's securities be removed from the OTCBB. FINRA's National Adjudicatory Council ("NAC") Review Subcommittee did not call the Hearing Officer's decision for review.⁸ This appeal followed.

III.

Our review of FINRA's removal of Wind Energy's securities from the OTCBB is governed by Exchange Act Section 19(f).⁹ Under Section 19(f), we must dismiss Wind Energy's appeal if we determine that (1) the specific grounds on which the removal from the OTCBB is based exist in fact, (2) the removal is in accordance with the applicable FINRA rules, and (3) those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.¹⁰ We believe that FINRA acted in accordance with Section 19(f) when it removed Wind Energy's securities from quotation on the OTCBB.

A. Specific Grounds Exist in Fact

Under Rule 6530, OTCBB-quoted companies must timely file their annual and quarterly reports with the Commission as a condition of continued OTCBB quotation. Rule 6530(e) provides that an issuer that is delinquent in its reporting obligations three times during a two-year period will be denied OTCBB quotation for one year. FINRA adopted Rule 6530(e) to address

⁸ FINRA Rule 9750 provides that, if the NAC Review Subcommittee does not call for further review of the matter, the Hearing Officer's decision shall constitute final FINRA action.

⁹ 15 U.S.C. § 78s(f). Wind Energy has not alleged, and the record does not suggest, that FINRA's action "imposes any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act. *See id.*

¹⁰ *Id.*; *see also Navistar*, 91 SEC Docket at 3138; *Fog Cutter Capital Group, Inc.*, 58 S.E.C. 1049, 1056-57 (2005), *petition denied*, 474 F.3d 822 (D.C. Cir. 2007); *Outsource Int'l, Inc.*, 55 S.E.C. 382, 390-91 (2001).

high levels of non-compliance and recidivism with respect to filing requirements.¹¹ Rule 6530(e) is "designed to foster the timeliness of disclosures available to the public by OTCBB issuers" and properly includes measures to exclude those issuers that only "occasionally and inadvertently fail to comply with their reporting obligations."¹²

It is undisputed that Wind Energy failed to file timely the 2008 and 2009 annual reports. Wind Energy objects only to the finding that it did not timely file the 2008 quarterly report. The Company submitted the 2008 quarterly report pursuant to Exchange Act Rule 12b-25, which extends the filing deadline for a quarterly report to "no later than the fifth calendar day following the prescribed due date." Wind Energy contends that because it filed the report at 6:26 p.m. Eastern Time on May 20, 2008, the calendar day it was due under the Rule 12b-25 extension, the report was not late. The Company argues that FINRA erred when it found the 2008 quarterly report to be untimely filed under the terms of Regulation S-T and that in so doing, FINRA effectively altered the Commission's rules establishing periodic reporting deadlines.

Wind Energy argues that "FINRA cannot create or impose a different filing date requirement than that of the SEC," but Rule 13(a) of Regulation S-T, not a FINRA regulation, imposes the 5:30 p.m. Eastern Time filing deadline. Wind Energy was an electronic filer of its periodic reports and, therefore, was subject to the requirements of Regulation S-T. Rule 13(a) of Regulation S-T provides that all electronic filings submitted by direct transmission after 5:30 p.m. Eastern Time will be deemed filed as of the next business day.¹³ Wind Energy submitted the 2008 quarterly report at 6:26 p.m. Eastern Time on May 20, 2008. Pursuant to Regulation S-T, the Commission therefore deemed the report filed as of May 21, 2008, rendering the filing one day late.

Contrary to Wind Energy's claim, the use of the phrase "calendar day" in Rule 12b-25 is meant to distinguish a calendar day from a business day for purposes of calculating the extended

¹¹ *Order Approving Proposed Rule Change to Limit the Eligibility for Quotation on the OTCBB of the Securities of an Issuer That Is Repeatedly Delinquent in Its Periodic Reporting Obligations*, Exchange Act Rel. No. 52786 (Nov. 23, 2005), 70 Fed. Reg. 70907, 70909 ("Rule 6530 Order"). Nasdaq reported that it had identified over 3,000 instances of delinquent or otherwise incomplete filings by 1,806 OTCBB issuers. *Id.* at 70908.

¹² *Id.* at 70909.

¹³ 17 C.F.R § 232.13(a). Similarly, the EDGAR Filer Manual provides, "If you begin direct transmission of a live submission after 5:30 p.m. Eastern time and the submission is accepted, it will have a filing date as of 6:00 a.m. the next business day." EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 14 § 11.1 (April 2010), *available at* <http://www.sec.gov/info/edgar/edgarfm-vol2-v14.pdf>.

filing date permitted under the Rule, not to change the requirements of Regulation S-T.¹⁴ As the preamble to Regulation 12B specifically states:

This regulation should be read in conjunction with Regulation S-T . . . which governs the preparation and submission of documents in electronic format. Many provisions relating to the preparation and submission of documents in paper format contained in this regulation are superseded by the provisions of Regulation S-T for documents required to be filed in electronic format.¹⁵

On this basis, we find that Wind Energy was delinquent in filing the 2008 quarterly report. Therefore, the specific grounds exist in fact for FINRA to remove Wind Energy's securities from quotation on the OTCBB pursuant to Rule 6530(e).¹⁶

B. The Removal from the OTCBB Is in Accordance with FINRA Rules

We also find that FINRA's removal of Wind Energy's securities from the OTCBB is in accordance with FINRA rules. Rule 6530(e) prohibits a FINRA member from quoting a security when the issuer of that security has failed to timely file a complete required annual or quarterly report three times in two years. Wind Energy was delinquent in filing three periodic reports in two years. Thus, FINRA OTCBB staff properly concluded that Wind Energy failed to satisfy the OTCBB eligibility requirements set forth in Rule 6530(e). FINRA OTCBB staff notified Wind Energy of this determination pursuant to Rule 6530(f)(1), and the Hearing Officer subsequently granted Wind Energy's request for review of the decision pursuant to Rule 6530(f)(2). Following the hearing, the Hearing Officer affirmed FINRA OTCBB staff's determination and ordered the

¹⁴ Under Exchange Act Rule 12b-25, issuers are required to notify the Commission of their inability to file a periodic report, along with supporting reasons, by filing a Form 12b-25 "no later than one business day after the due date" for such report. 17 C.F.R. § 240.12b-25(a); *see* 17 C.F.R. § 249.322 (Form 12b-25). Filing a Form 12b-25 in accordance with the rule provides an automatic extension of fifteen calendar days for filing a Form 10-K or Form 10-KSB and five calendar days for filing a Form 10-Q or Form 10-QSB. 17 C.F.R. § 240.12b-25(b).

¹⁵ 17 C.F.R. § 240.12b; *see also* *Rulemaking for EDGAR System*, Exchange Act Rel. No. 31905 (Feb. 23, 1993), 53 SEC Docket 1798, 1852 (announcing the addition of the preamble to Regulation 12B); Rule 10 of Regulation S-T, 17 C.F.R. § 232.10.

¹⁶ *Cf. e.g., SC&T Int'l, Inc.*, 54 S.E.C. 320, 325 (1999) (determining that specific grounds for delisting existed in fact where company failed to file its quarterly and annual reports in a timely manner).

removal of Wind Energy's securities from the OTCBB.¹⁷ Because the NAC Review Subcommittee did not call for further review, the Hearing Officer's decision constituted FINRA's final action under Rule 9750.

Wind Energy claims that it did not receive the delinquency notifications for the 2008 quarterly report and 2008 annual report until after the hearing. During the hearing, however, a member of FINRA's staff testified that these two notifications were sent to Wind Energy, and Wind Energy did not dispute this claim.¹⁸ In any event, Rule 6530(f)(1) requires FINRA to send a notification to an issuer, "[u]pon determining that an issuer's security would be ineligible for quotation under this Rule." This requirement is "reasonably designed to inform issuers" of the consequences of their delinquencies.¹⁹ FINRA complied with this requirement when it sent the October 14, 2009 notification. Moreover, there is no evidence that Wind Energy suffered any prejudice even if it did not receive the first two notifications. The reporting requirements of the Exchange Act "are clear and unequivocal, and they are satisfied only by the filing of complete, accurate and timely reports."²⁰ Wind Energy failed to meet these requirements three times in a two-year period, and on this basis FINRA removed Wind Energy's securities from quotation on the OTCBB.

Wind Energy claims that the Hearing Officer unfairly rejected Wind Energy's memorandum arguing that the Company submitted the 2008 quarterly report on time. The Hearing Officer rejected the memorandum because it was filed late but nevertheless addressed the argument in her decision. Moreover, our *de novo* review permits us to review the entire record, and we have considered and rejected Wind Energy's argument here. We conclude that the removal of Wind Energy's securities from the OTCBB accorded with FINRA rules.

¹⁷ See Rule 6530(f)(2) (providing that the hearing officer "will consider only the issues of whether the issuer's security is then eligible for quotation" and "whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to" Exchange Act Rule 12b-25, and "shall not have the discretion to grant any extensions of time for ineligible securities to become eligible").

¹⁸ FINRA staff stated that there had been "a successful delivery" of the notifications because FINRA "had not received any notifications back in the mail."

¹⁹ *Order Granting Approval to Proposed Rule Change Relating to Amendments to NASD Rule 6530 to Clarify the Review Process for OTCBB Eligibility Determinations*, Exchange Act Rel. No. 54028 (June 28, 2006), 71 Fed. Reg. 36847, 36848.

²⁰ *SEC v. IMC Int'l, Inc.*, 384 F. Supp. 889, 893 (N.D. Texas), *aff'd*, 505 F.2d 733 (5th Cir. 1974).

C. The Rule Is, and Was Applied in a Manner, Consistent with the Exchange Act

Exchange Act Section 2 provides that securities transactions are "affected with a national public interest," making it necessary that issuers file appropriate reports in order to "insure the maintenance of fair and honest markets in such transactions."²¹ As a result, we have recognized that "the availability of current financial information is critical to the proper operation of the financial markets."²² We have held that "the failure 'to provide timely reports and adequate financial information [is] offensive to the central purpose of the periodic reporting system Congress established through the Exchange Act.'"²³

Rule 6530 is consistent with Exchange Act Section 15A because it protects investors and the public interest by requiring issuers quoted on the OTCBB to file reports containing current financial information with the Commission or appropriate regulatory agency.²⁴ When the Commission approved Rule 6530, it found that, by precluding issuers who failed to meet their reporting requirements on numerous occasions from OTCBB quotation, Rule 6530 was designed to protect investors and the public interest.²⁵ We find that the FINRA rule is, and was applied in a manner, consistent with the purposes of the Exchange Act.

Wind Energy argues that FINRA's actions were unfair and inequitable in a number of ways. For example, Wind Energy argues that the Exchange Act's reporting requirements are "onerous" and make it "almost impossible for small SEC reporting companies to even exist." However, given the importance of current financial information to the proper operation of the financial markets, investors are "entitled to assume" that reporting companies, regardless of their size, will comply "promptly" with their obligations under the Exchange Act.²⁶

²¹ 15 U.S.C. § 78b.

²² *Navistar*, 91 SEC Docket at 3143; *see also SC&T*, 54 S.E.C. at 326 ("Requiring public companies to file appropriate reports ensures the maintenance of fair and honest markets in securities.").

²³ *Navistar*, 91 SEC Docket at 3143 (quoting *SEC v. Beisinger Indus. Corp.*, 421 F. Supp. 691, 695 (D. Mass. 1976), *aff'd*, 552 F.2d 15 (1st Cir. 1977)).

²⁴ *Order Granting Approval of Proposed Rule Change Relating to Microcap Initiatives – Amendments to NASD Rules 6530 and 6540*, Exchange Act Rel. No. 40878 (Jan. 8, 1999), 64 Fed. Reg. 1255, 1257. Specifically, the Commission believes that Rule 6530 is consistent with the requirements of Section 15A(b)(6) and (11).

²⁵ *Rule 6530 Order* at 70909.

²⁶ *SC&T*, 54 S.E.C. at 326.

Wind Energy claims that it was unaware of the "three-strike" provision of Rule 6530(e) and the filing deadline provided by Regulation S-T. Wind Energy's ignorance of these rules, however, does not excuse its obligation to comply with them.²⁷ Moreover, the notifications that FINRA OTCBB staff sent to Wind Energy following the Company's delinquent filings of the 2008 quarterly report and 2008 annual report each stated the applicable Rule 6530 and Regulation S-T filing requirements.

Wind Energy asserts that its "auditors needed more time to satisfy comments from the SEC Staff Accountants regarding valuations of certain wind energy purchases" in connection with the Company's preparation of its 2008 and 2009 annual reports. Wind Energy contends that the two annual reports "would have been on time if [the Company] hadn't been concerned with responding correctly on such SEC accounting comments." Public companies are encouraged to consult with Commission staff on accounting concerns or questions, and responding to staff comments is a routine part of this process.²⁸ But it is Wind Energy's obligation under Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13 to ensure that its periodic reports are filed accurately, completely, and on time.²⁹

Wind Energy argues that FINRA's decision makes it difficult for the Company to raise capital and will cause the Company and its existing investors irreparable harm. However, the mere "fact that a security is delisted does not necessarily result in irreparable harm to the issuer because its securities may continue to trade in other markets."³⁰ Here, despite being removed from quotation on the OTCBB, Wind Energy's securities will still be eligible for quotation in the Pink OTC Markets.³¹ Moreover, under Rule 6530(e)(2), Wind Energy can seek reinstatement on

²⁷ Cf. *Guang Lu*, Exchange Act Rel. No. 51047 (Jan. 14, 2005), 84 SEC Docket 2639, 2646 n.16 (citing *Gilbert M. Hair*, 51 S.E.C. 374, 378 (1993)) (holding that "ignorance of NASD rules does not excuse an associated person from compliance with those rules"), *aff'd*, 179 Fed. Appx. 702 (D.C. Cir. 2006).

²⁸ See, e.g., Guidance for Consulting on Accounting Matters with the Office of the Chief Accountant, available at <http://www.sec.gov/info/accountants/ocasubguidance.htm> (last visited August 18, 2010).

²⁹ See *Impax Labs., Inc.*, Exchange Act Rel. No. 57684 (May 23, 2008), 93 SEC Docket 6241, 6255.

³⁰ *Navistar Int'l Corp.*, Exchange Act Rel. No. 55304 (Feb. 13, 2007) (order denying stay), 89 SEC Docket 3384, 3392 (citing *JD Am. Workwear, Inc.*, Exchange Act Rel. No. 43283 (Sept. 12, 2000), 73 SEC Docket 748, 753-54).

³¹ Pink OTC Markets, formerly known as Pink Sheets, operates Pink Quote, an electronic quotation system that displays quotes from broker-dealers for many over-the-counter

(continued...)

the OTCBB after it achieves compliance with the Commission's reporting requirements for one year. We recognize that existing Wind Energy shareholders may be disadvantaged by the removal of the Company's securities from OTCBB quotation, but this is outweighed by the public interest in Wind Energy's compliance with the disclosure requirements, so that both existing and prospective investors on the OTCBB will have current information about the Company.³²

We find that a factual basis exists to remove Wind Energy's securities from quotation on the OTCBB; that FINRA acted in accordance with its applicable rules in removing Wind Energy's securities; and that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. Accordingly, we dismiss this review proceeding.

An appropriate order will issue.³³

By the Commission (Commissioners CASEY, WALTER, AGUILAR, and PAREDES);
Chairman SCHAPIRO not participating.

Elizabeth M. Murphy
Secretary

³¹ (...continued)
securities. See U.S. Securities and Exchange Commission, Pink Sheets, *available at* <http://www.sec.gov/answers/pink.htm> (last visited June 16, 2010).

³² See *Navistar Order*, 89 SEC Docket at 3392-93 (citing *JD Am. Workwear*, 73 SEC Docket at 754).

³³ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62894 / September 13, 2010

Admin. Proc. File No. 3-13782

In the Matter of the Application of

WIND ENERGY AMERICA INC.
c/o Robert O. Knutson
Wind Energy America Inc.
9372 Creekwood Dr.
Eden Prairie, Minnesota 55347

For Review of Action Taken by

Financial Industry Regulatory Authority, Inc.

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION OF REGISTERED
SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review of action taken by Financial Industry
Regulatory Authority, Inc. against Wind Energy America Inc. be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary