

FILE

BEFORE THE OHIO POWER SITING BOARD

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In the Matter of the Application )  
of Buckeye Wind LLC for a Certificate )  
to Install Numerous Electricity ) Case No. 08-666-EL-BGN  
Generating Wind Turbines in )  
Champaign County to be Collected at )  
an Electric Substation in )  
Union Township, )  
Champaign County, Ohio )

**MEMORANDUM CONTRA TO MOTION OF INTERVENORS UNION  
NEIGHBORS UNITED, ROBERT AND DIANE MCCONNELL AND  
JULIA JOHNSON FOR LEAVE TO FILE A RESPONSE TO APPLICANT'S  
REPLY MEMORANDUM REGARDING MOTION FOR WAIVER**

**I. INTRODUCTION**

Now comes Buckeye Wind LLC ("Buckeye Wind") and submits its opposition to Union Neighbors United, Robert and Diane McConnell and Julia Johnson's (collectively, "Intervenors") motion for leave to file a response to Buckeye Wind's reply memorandum ("Motion for Leave"). Intervenors' Motion for Leave should be denied for several reasons. First, Intervenors' response is not permitted under the Board's pleading rules. Second, Intervenors cannot file a supplemental response because they do not have standing in this matter to oppose the waivers, the grant of which is in the sole discretion of the Board or the Administrative Law Judge. *See In re: Vectren Energy Delivery of Ohio*, Case Nos. 07-1080-GA-AIR and 07-1081-GA-ALT, Entry, January 16, 2008. Moreover, Intervenors' claim that the waivers will bar discovery is without merit because it is the Board's rule on the scope of discovery (Rule 4906-7-07(A)(2)) that governs the topics for discovery and not a waiver. Intervenors have no basis for filing a supplemental brief. The Board should deny the Intervenors' Motion for Leave and strike the proffered response from the record.

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## II. BACKGROUND

On April 24, 2009, Buckeye Wind filed a motion with the Board to grant waivers from Section 4906.06(A)(6), Revised Code, and from Chapter 4906-13 of the Ohio Administrative Code. On May 11, 2009, Intervenors filed a memorandum contra to Buckeye Wind's motion, opposing the waivers, in part, because the waivers might have the effect of "precluding discovery, the submission of relevant evidence, or cross-examination of witnesses regarding information covered by the requested waiver."<sup>1</sup> Buckeye Wind filed a reply memorandum in response to the Intervenors' memorandum contra to the motion for waiver on May 15, 2009.

Although briefing was complete, Intervenors filed a motion for leave on June 2, 2009 to file a response to Buckeye Wind's reply memorandum regarding the motion for waiver. Intervenors claim they are "only requesting leave to address the standing issues raised by [Buckeye Wind] due to the novelty and significance of this issue [standing]."<sup>2</sup> Intervenors state that "[t]he standing issue raised by [Buckeye Wind] is significant because, in a prior Power Siting Board decision, the intervenors were barred from conducting discovery, cross-examining witnesses, or presenting evidence on issues within the scope of Power Siting Board rules that previously had been waived."<sup>3</sup>

## III. ARGUMENT

### A. **The Intervenors' motion for leave should be denied because Buckeye Wind's reply brief did not raise new arguments as to the grant of the waivers.**

As an initial point, the Board's rules do not permit the filing of a response to a reply memorandum. Intervenors may ask for leave, but are required to show extraordinary

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<sup>1</sup> See Intervenors' Memorandum Contra Motion for Waiver, filed May 8, 2009.

<sup>2</sup> See Motion for Leave, filed June 2, 2009 at page 2.

<sup>3</sup> *Id.*

circumstances. Such has not been done, and for that reason alone, Intervenor's Motion for Leave may be denied. Moreover, in response to Intervenor's memorandum contra, Buckeye Wind pointed to Intervenor's lack of standing and precedent from the Public Utilities Commission of Ohio that precludes Intervenor from raising issues regarding the grant or denial of waivers. Buckeye Wind did not assert any new request for waivers in its reply memorandum, which might have created the type of extraordinary circumstance which would entitle Intervenor to file a supplemental response if they had standing.

**B. Intervenor cannot file a supplemental response because they do not have standing to oppose the waivers.**

As noted in Buckeye Wind's reply memorandum, the Public Utilities Commission of Ohio has consistently held that intervenors cannot properly raise issues concerning either the filing of data or the granting or denying of waivers under the standard filing requirements in rate increase cases, as such determinations are solely within the discretion of the Commission and its Staff. *See In re: Vectren Energy Delivery of Ohio*, Case Nos. 07-1080-GA-AIR and 07-1081-GA-ALT, Entry, January 16, 2008; *In re: Youngstown Thermal Corporation*, Case No. 85-1825-HT-CMR, Entry on Rehearing, March 5, 1986. This is because the standard filing requirements are in place to obtain sufficient information to enable the Commission's Staff to fulfill its duty to investigate and prepare a report.<sup>4</sup>

The above principle is equally applicable to the matter at bar. The Staff, in this proceeding, must prepare and submit a report on the application pursuant to Section 4906.07, Revised Code and Rule 4906-5-05. Whether the Board or Administrative Law Judge grants a waiver does not depend on the Intervenor's wishes, but rather whether the waiver will impede

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<sup>4</sup> *In re: Cleveland Electric Illuminating Company*, Case No. 84-188-EL-AIR, Entry, March 20, 1984, Finding (7).

the Staff's ability to investigate the application and prepare the required report. This decision is in the sole discretion of the Board or the Administrative Law Judge.<sup>5</sup>

Intervenors do not dispute this principle, but contend they have standing because they will be affected by the waivers. Specifically, Intervenors contend that the waivers may bar them from conducting discovery, presenting evidence and cross-examining witnesses. Intervenors claim that in a separate proceeding, an Administrative Law Judge ("ALJ") barred an intervening party from conducting discovery or cross-examination as the result of a waiver on the site alternative analysis.<sup>6</sup> Intervenors claim that this "injury" gives them standing to argue against the waivers.

Intervenors' argument is without merit. First, the issue in the *Middletown Coke* proceeding was not that a waiver barred the intervenors from conducting discovery. Rather, the intervenors sought discovery on a facility (the coke facility) that was outside the Board's jurisdiction and outside the scope of the application. This is clear from the pleadings filed on that issue and the ALJ's rulings. For example, the intervenors filed a motion to compel on November 3, 2008 stating that:

Paragraph (10) of the Administrative Law Judge's (ALJ's) entry of October 9, 2008 orders that discovery not be conducted on site alternatives. However, while the ALJ has ruled that the coke plant issues will not be considered at the hearing, no order prohibits discovery about the coke plant. Consequently, to make sure Monroe [the intervenors] does not inadvertently waive its rights to perform discovery about the coke plant, it is filing this motion to compel. Accordingly, [the intervenors] asks that the ALJ either clarify that discovery on the coke plant is prohibited, or in the alternative, compel [the applicant] to produce the requested information.<sup>7</sup>

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<sup>5</sup> ORC § 4906-1-03.

<sup>6</sup> See Response attached to Motion for Leave at page 2 citing to *In the Matter of the Application of Middletown Coke Company*, Case No. 08-281-EL-BGN.

<sup>7</sup> *In the Matter of the Application of Middletown Coke Company*, Case No. 08-281-EL-BGN, Intervenor City of Monroe's Motion to Compel filed November 3, 2008 at page 2.

The ALJ immediately denied the motion, issuing an entry the next day stating:

As noted previously, by entries dated September 25, 2008, and October 9, 2008, the Board's jurisdiction is governed by Chapter 4906, Revised Code, and the Board has no jurisdiction over the coke facility. The ALJ has previously found that issues related to the coke plant would therefore not be considered in this proceeding. As issues relating to the coke plant are not relevant to the Board's determination in this proceeding, discovery on such issues is not appropriate in this forum. Accordingly, [the intervenors'] motion to compel MCC to produce the requested information should be denied to the extent that such interrogatories or requests for production of documents are related to the coke plant.<sup>8</sup>

Contrary to Intervenors' contention, the ALJ denied discovery because the sought discovery was not relevant to the proceeding – not because a waiver had been granted.<sup>9</sup> This undercuts the Intervenors' argument that they will be injured if the waivers are granted.

Second, the grant of a waiver does not impact the Intervenors' ability to conduct discovery reasonably calculated to lead to the discovery of admissible evidence. That is clear from Rule 4906-7-07(A)(2) which governs the scope of discovery and the ALJ's November 4, 2008 entry in *Middletown Coke* denying discovery only to the extent the discovery related to the coke plant (not the cogeneration plant). For example, Buckeye Wind has sought a waiver to allow it to supplement existing environmental surveys. Regardless of whether the waiver is granted or not, the Intervenors may serve discovery related to the studies attached to the application and any supplements to those studies. Another example is that Buckeye Wind has requested a waiver from a rule regarding the location of test borings, but has committed to respond to information requests from the Staff. The grant of this waiver will not preclude the

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<sup>8</sup> *In the Matter of the Application of Middletown Coke Company*, Case No. 08-281-EL-BGN, Entry, November 4, 2008, ¶ 6.

<sup>9</sup> Intervenors also claim that counsel for Buckeye Wind took a contrary position in *Middletown Coke* at page 4 of their proffered response. This statement is simply not true as reflected by the memoranda contra filed in that proceeding by the applicant on October 6, 2008 in which the applicant opposed the sought discovery because "none of the discovery served upon MCC by the City of Monroe related to alternative site information." See *In the Matter of the Application of Middletown Coke Company*, Case No. 08-281-EL-BGN, Memorandum Contra of Middletown Coke Company, October 6, 2008.

Intervenors from seeking discovery on the location of test borings. The Board's rules are clear that "...any party to a board proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding."<sup>10</sup> The Intervenors' lack of standing as to the waivers has no bearing on the application of the Board's discovery rules.

Accordingly, the Intervenors' motion for leave to file a response to Buckeye Wind's reply memorandum regarding the motion for waiver should be denied in full. Not only is the Intervenors' response not permitted under the Board's rules, but the Intervenors cannot file a supplemental response because they do not have standing to oppose the grant of any waivers. *See In re: Vectren Energy Delivery of Ohio*, Case Nos. 07-1080-GA-AIR and 07-1081-GA-ALT, Entry, January 16, 2008 and see e.g. *Murray Energy Corp. v. Pepper Pike* (June 9, 2008), Slip Copy, 2008 WL 2350886, Ohio App. 8 Dist., 2008 (neighbor of restaurant lacked standing to contest city's waiver of a deed restriction in favor of restaurant because restriction did not apply to neighbor's property). The Intervenors' Motion for Leave should be denied and the proffered response struck from the record.

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<sup>10</sup> OAC 4906-7-07(A)(2).

#### IV. CONCLUSION

For the foregoing reasons, Buckeye Wind respectfully requests that the Board deny Intervenor's Motion for Leave and strike the proffered response from the record.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing reply was served upon the following parties of record via e-mail and via First Class U.S. Mail on this 17th day of June, 2009.

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