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BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application
of Buckeye Wind, LLC, for a
Certificate to Install Numerous
Electric Generating Wind
Turbines in Champaign County
to be Collected at an Electrical
Substation in Union Township,
Champaign County, Ohio

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Case No. 08-0666-EL-BGN

**POST-HEARING BRIEF OF INTERVENORS CHAMPAIGN COUNTY AND
GOSHEN, RUSH, SALEM, UNION, URBANA AND WAYNE TOWNSHIPS**

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I. INTRODUCTION

The undersigned represent seven Champaign County political subdivisions, consisting of one Board of County Commissioners and six Boards of Township Trustees ("Boards"). Buckeye Wind, LLC ("Applicant") proposes to construct a wind-powered electric generation facility in Champaign County within those townships. Applicant has sought authority to construct the Buckeye Wind Project ("Project") by filing an application ("Application") with the Ohio Power Siting Board.

As of the filing of this brief, two townships (i.e. Rush and Salem) have passed formal resolutions in support of the Project. In effect, those townships are in favor of granting Buckeye Wind, LLC ("Applicant") the Certificate of Environmental Compatibility and Public Need ("Certificate") that would authorize the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County. The remaining boards of township trustees and the county commissioners have not, at this point, passed formal resolutions either in support or opposition to the Project.

Some individual Board members, on their own, have communicated to the Ohio Power Siting Board their support for the construction of a wind-powered electric generation facility, such as the Buckeye Wind Project, in Champaign County. These individuals in support of the Project cite: (1) the need for energy independence, (2) the recognition that wind energy is a clean, renewable resource, (3) wind energy's ability to assist Ohio in meeting required renewable energy portfolio standards, (4) the creation of jobs through the Project's construction and operational phases, (5) the infusion of dollars into the local economy through the consequential use of local suppliers, restaurants, lodging and potential tourism, (6) the resulting appreciation in farmland value resulting from an increase in income

generation, (7) the tax revenue stream flowing to the local political subdivisions, (8) the potential for “cottage industry” regarding wind-related regional business development and (9) the overall need for Champaign County and its subdivisions to capture the industrial and commercial economic benefits associated with wind energy development.

The Boards have been granted intervenor status by the Ohio Power Siting Board to comment on the decision to issue a “Certificate of Environmental Compatibility and Public Need” (“Certificate”) for the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County.

Notwithstanding the aforementioned formal Board and individual support, all Board members are significantly concerned with the evident failure of the Ohio Power Siting Board Staff (“Staff”) and the submitted Application to jointly set forth adequate protection for Champaign County’s infrastructure and other economic interests as it relates to wind energy development.

The Boards are collectively concerned with the Project Application’s (1) foreseeable structural impact that the construction phase and decommissioning phase of the Project will have upon the roadways and bridges in Champaign County and the lack of adequate financial assurance to restore that infrastructure to their original condition, (2) foreseeable financial impact that the decommissioning phase of the Project will have (separate and apart from roads and bridges) and the lack of adequate financial assurance to remove the structures from the lands within the Project footprint, (3) probable adverse effect on certain viable economic interests, such as maintaining current public airport uses and the inhibition on future residential and commercial growth, (4) the true value of tax revenue that will be generated by the Project and paid to Champaign County and (5) failure to address the inadequacies of the existing local emergency services to effectively respond to an emergency at the Project’s facility sites and the financial burden imposed on the

local subdivisions to adapt and provide the necessary equipment and training to safely and effectively respond to a turbine emergency.

Apart from client concerns, the undersigned lack confidence in the recommendation process utilized by Staff to evaluate the Application. Specifically, the undersigned question whether the Staff's evaluation of the Application content was sufficiently thorough in order for the Staff to conclude that the criteria for certification as set forth in Ohio Revised Code Section 4906.10(A) has been met. The rationale for such position is set forth below.

During the adjudicatory hearing, the Applicant used a corporate executive to "sponsor" the Application. Through the sponsor's testimony, the Applicant sought to establish the foundational basis for the admissibility of the Application. Upon this sponsor's testimony, the Application was subsequently admitted into evidence.

Multiple Staff subsequently testified that they relied on the information presented in the Application to form the basis for the recommendations submitted to the Ohio Power Siting Board.

As the first large scale wind-powered electric generation facility being considered in the State of Ohio, the issues presented to the Ohio Power Siting Board are substantially unique and controversial. However, Staff testimony underscored (1) the Staff's lack of resources to independently evaluate the merits of the Application, (2) the Staff's resolve to overlook the issues raised by other intervenors, (3) the limited effort of Staff to review other information, and (4) the lack of rationale for divergence from (a) Applicant-proposed turbine manufacturer's setback recommendations, (b) in-state entity recommendations, and (c) foreign local and state entity financial assurance recommendations.

There was some dispute between the parties whether the corporate executive was ever qualified as an expert witness to give expert testimony on the varied reports submitted as exhibits in support of the Application.

To be clear, the undersigned is not alleging that the Applicant sought to mislead the parties or present less-than-truthful information.

However, given (a) the controversial debate on the emerging industry of wind energy development, (b) the less-than-comprehensive approach taken by the Staff to evaluate the Application and (c) Staff testimony developed at the adjudicatory hearing that caused at least one Staff member to acknowledge that his recommendation needed to be amended, it is not unreasonable to conclude that further examination of the individuals/entities that specifically prepared the debatable reports contained in the Application should have prompted Staff to either determine that they needed to re-examine other areas that they may have overlooked or modify certain recommendations previously made. To date, however, there has been no known re-examination or modification of recommendations filed by the Staff.

II. PROCEDURAL HISTORY

Buckeye Wind, LLC filed its Application for a Certificate of Environmental Compatibility and Public Need on April 24, 2009. On June 23, 2009, the Chairman of the Ohio Power Siting Board notified the Applicant that the Application complied with O.A.C. Chapter 4906-01. Thereafter, on July 31, 2009, Administrative Law Judge Greta See (“ALJ See”) by entry directed Buckeye Wind, LLC, to file additional information which Applicant complied with on August 28, 2009.

On August 7, 2009, the undersigned petitioned to intervene on behalf of the Boards of Champaign County Commissioners and Union Township Trustees. Those Boards were granted intervenor status by entry on September 1, 2009. Also by entry of September 1, 2009, ALJ See scheduled a local public hearing to be held in North

Lewisburg, Ohio at Triad High School on Wednesday October 28, 2009, with the adjudicatory hearing to begin on Tuesday, October 27, 2009.

On October 1, 2009, the undersigned petitioned to intervene on behalf of the Boards of Trustees of Goshen, Rush, Salem, Urbana and Wayne Townships. On October 13, 2009, the Staff filed its Report of Investigation in this case. The Staff, in preparing its report and recommendations set forth certain recommended findings and fifty-three (53) recommended conditions for certification therein.

By Entry of October 20, 2009, the adjudicatory entry for October 27, 2009 was called and continued until November 9, 2009 and the Boards of Trustees of Goshen, Rush, Salem, Urbana and Wayne Townships were granted intervenor status.

Upon commencement of the adjudicatory hearing and at the conclusion of the testimony of the Applicant's "sponsor," ALJs Greta See and Katie Stenman admitted the Application, along with all its exhibits, over evidentiary and foundational objections of the undersigned and other intervenors' counsels.

During the November 20, 2009 portion of the adjudicatory hearing, the Staff recognized an omission in its initial Report of Investigation as filed on October 13, 2009 and amended its decommissioning conditions for certification by adding an additional condition regarding decommissioning bonds and procedure.

The adjudicatory hearing concluded on December 2, 2009. The undersigned timely file this Post-Hearing Brief outlining the concerns of the local governmental entities represented.

III. LAW AND ARGUMENT

R.C. 4906.10(A) requires that, in order to grant a Certificate, the Ohio Power Siting Board must make each of the following findings:

(1) The basis of the need for the facility if the facility is an electric transmission line or gas or natural gas transmission line;

(2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric system serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704, 3734, and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.” *R.C. 4906.10(A)*

(Emphasis added).

Applicant bears the burden of proving that the statutory criteria set forth in R.C. 4906.10 for certification have been satisfied. *O.A.C. §4906-7-09(F)*.

The Ohio Power Siting Board may deny, grant, or grant upon such terms, conditions, or modifications as the board considers appropriate for a certification application for a major utility facility, pursuant to the requirements set forth in R.C. §4906.10 of the Revised Code. *OAC §4906-17-01(C)*.

The Ohio Power Siting Board has the authority to modify Applicant's proposal in order protect the public interest. *R.C. §4906.10(A)*. In order to protect the public interest, it is proper for the Ohio Power Siting Board to require an evaluation of the impacts of the proposed wind facility as set forth, and to deny certification or modify the proposal if the identified need could be satisfied with fewer adverse impacts. *City of Columbus v. Ohio Power Siting Commission*, 58 Ohio St. 2d 435 (1979); *City of Columbus v. Teater*, 53 Ohio St. 2d 253, 260-61 (1978).

The Ohio Power Siting Board has well recognized authority to deny certification where the statutory standards for certification have not been satisfied. *R.C. § 4906.03(D)*; *Ohio Edison Co. v. Power Siting Commission*, 56 Ohio St. 2d 212,214-215 (1978) (upholding denial of certification due to adverse recreational impacts).

In order to serve the “public interest, convenience, and necessity” as required by R.C. 4906.10 (A)(6), the Ohio Power Siting Board must address the following areas of county and township Board concern before issuing the Certificate:

A. Unless the Ohio Power Siting Board sets forth a condition of the Certificate that prior to the commencement of the initial construction of the Project, Applicant post financial assurance sufficient for repair of roadways and bridges during the initial construction phase and decommissioning phase of the Project in an amount determined by the Champaign County Engineer and the Director of the Ohio Department of Transportation, the Project will not serve the public interest, convenience, and necessity as required by R.C. 4906.10 (A)(6).

Applicant confirms that “[s]tate and local roads in the vicinity of the Project Area will experience increased traffic during Facility construction due to the delivery of materials and equipment” (Exhibit 1, Buckeye Wind, LLC’s Application, P. 196). Applicant further states that upon completion of construction, all roadways will be returned to their “preconstruction” condition and that pavement or structures damaged during construction will be replaced. (Exhibit 1, Buckeye Wind, LLC’s Application, P. 196).

In the event that Applicant is for whatever reason unable or unwilling to repair the damage resulting from construction, then the local governmental entities will be obligated to repair such roadways in a timely manner. Applicant’s own rebuttal witness, Leon R. Cyr, who is a county commissioner in Indiana where wind turbines have been sited and welcomed, stressed in his testimony that a bond was necessary for road repair. (Transcript for Rebuttal Hearing, Volume 2, P. 2472, lines 17-25, P. 2473, lines 1-12, P. 2474, lines 4-14)

Staff, in its *Report of Investigation*, concurs with Applicant that the roads within Champaign County will be damaged. (Staff *Report of Investigation*, Staff’s Exhibit 2, P. 51). Staff further finds that certain portions of the right-of-ways will need to be improved prior to any construction taking place. This finding is in opposition to the finding in the Application, which states that the roads will be repaired only after construction. (Staff *Report of Investigation*, Staff’s Exhibit 2, P. 51).

Moreover, the Boards are troubled by the fact that Staff inexplicably does not recommend in its Report of Investigation that financial assurance be posted by Applicant to cover any damage to the roads in the event that Applicant is unwilling or financially unable to repair after construction.

Testifying witness John R. Whitis, who was the Staff member responsible for investigating and reporting on portions of the report regarding roads, indicated

in his initial testimony that a bond was not a necessary requirement. Yet, before completing his testimony, his opinion changed. (Transcript 8, P. 1948, lines 13-17, and Transcript 9, P. 2243, lines 1-10). Additionally, Mr. Whitis confirmed that the Staff report, in his opinion, did not address the damage to roads at the time of decommissioning of the Project. (Transcript 9, P. 2240, lines 4-15.)

It is the position of each Board that Staff's conditions with regard to roads and bridges should be modified to include financial assurance for roadways for construction and for decommissioning in light of the subsequent acknowledgments made by Mr. Whitis. (Transcript 9, P. 2243, lines 1-18.)

It is also the position of each Board that as the local governmental official responsible for maintenance of the county roads, the County Engineer would have the expertise to establish an amount of the financial assurance sufficient to cover the cost of the damage to the roads due to the construction and the decommissioning associated with the Project.

Since (a) the Applicant and all the witnesses admit that there will be damage to the roads and (b) such damage is foreseeable, it is the position of each Board that sufficient financial assurance should be made a condition to the certificate issued in an amount determined by the Champaign County Engineer and the Director of the Ohio Department of Transportation. The Boards do not want to be faced with litigating responsibility between contractors and subcontractors for either damage causation or valuation of repair.

In order to serve the "public interest, convenience and necessity" for the maintenance of the roads and bridges within Champaign County during construction and upon decommissioning of the Project, each Board strongly emphasizes that the Ohio Power Siting Board should set a condition requiring the Applicant to post financial assurance upon commencement of the Project that would cover initial construction damage to Champaign County's roadways and bridges

through any construction-related damage to those same roadways and bridges during the decommissioning phase.

B. Unless the Ohio Power Siting Board sets forth a condition of the Certificate that upon the commencement of initial Project construction, Applicant is required to post financial assurance for decommissioning the Project (separate and apart from decommissioning roadway financial assurance) in an amount sufficient to cover the costs be made, the Project will not serve the public interest, convenience, and necessity as required by R.C. 4906.10 (A)(6).

Applicant sets forth in its Application that a decommissioning bond will be posted on the fifth anniversary of operation. (Buckeye Wind, LLC's Application, Exhibit 1, P. 199) Applicant specifically states therein that:

"[b]y the 5th anniversary of the commercial operation date, Buckeye Wind will provide a surety bond, letter of credit, or other security in a form reasonably acceptable to landowner, and in an amount sufficient to cover the costs of removal and disposal of the Facility improvements, net of salvage value, and costs of restoration as set forth above. The initial amount of such bond or undertaking will be based on a study undertaken by an Independent certified engineer that will determine the estimated costs of removal and decommissioning, and the salvage value of the improvements.

(Buckeye Wind, LLC's Application, Exhibit 1, P. 199)

Applicant gives no rationale for the delay of posting of financial assurance. Contrary to the Applicant's timeline, the Staff, in its *Report of Investigation*, recommends the posting of financial assurance after one year of operation. (Staff *Report of Investigation*, Staff's Exhibit 2A.)

Testifying witness, Nick Doss, who was the Staff member responsible for investigating and reporting on the portions of the Staff report dealing with decommissioning, acknowledged that the main reason for financial assurance for

decommissioning is to carry out the decommissioning activities at the end of the useful life of the turbines. (Transcript 9, P. 2092, lines 17-19).

However, it is clear from his testimony that Mr. Doss' sole reasoning for the timing of the posting of financial assurance was not for the protection of Champaign County's governmental entities in seeing that decommissioning costs are covered, but to allow the Applicant time to generate revenue to use for such financial assurance. (Transcript 9, P. 2094, lines 24-25 and P. 2095, lines 1-4, P. 2097, lines 5-25).

The testimony gleaned at hearing does not support the delay of the posting of financial assurance to be consistent with the statutory criteria. Therefore, it is the position of each Board that the Ohio Power Siting Board require the positing of financial assurance for decommissioning the Project (separate and apart from decommissioning roadway financial assurance) in an amount sufficient to cover the costs of decommissioning from the commencement of initial construction through the end of the Project's decommissioning phase.

C. If granted, the Certificate should be conditioned upon requiring the Staff to address its investigative inadequacies and permit the intervenors to engage in further examination into any subsequent Staff modification of an amended *Report of Investigation* evaluation or recommendation.

The Staff's Report of Investigation was filed approximately 28 days before the adjudicatory hearing. During several phases of the adjudicatory hearing, testimony presented by Staff members gave the intervenors the impression that their published report was no more than an "executive summary" of the Application. Some Board members are concerned with this "less-than-comprehensive" approach taken by the Staff in its merit review of the Application.

This concern for lack of comprehensive study is demonstrated by examining examples of issues raised by multiple intervenors: (1) the adverse economic impact to the continued viability of public airports within the Project footprint and (2) (a) the impact of noise or shadow flicker on current residential use of land within the Project footprint and (b) the likelihood that future economic development of lands owned by non-participating landowners will be foreclosed by the siting of turbines at minimum setback areas adverse to turbine manufacturer specifications.

The basis for these concerns can be best illustrated through the following testimonial examples:

(1) Staff members testified that, upon learning from other witnesses that several of their recommendations were based upon inaccurate or incomplete information, stated that they were under “no obligation” to revise the Staff recommendations. (In general-Transcript 7, P. 1766, lines 10-20), (as example, regarding Decommissioning Bond Funding – Transcript 9, P. 2107, lines 10-24.)

(2) Staff members indicated that they did not have adequate resources to conduct their own study regarding contested issues in the field of wind energy development, nor did they express the belief that additional resources would have made a difference in their recommendation (as example, Noise - Transcript 8, P. 1852, line 1- P. 1853, line 16; Shadow Flicker -Transcript 9, P. 2079, line 7 – P. 2085, line 11.)

(3) Because each Staff member chose to limit their review of the Application to only their individually assigned portions, significant information relevant to the public interest was not cross-referenced by the Staff “reviewing team,” resulting in the awkward omission of Project impact analysis to airport services and airport cultural events. (as example, Careflight – Transcript 9, P. 2068, line 3 – P. 2071, line 4, and P. 2073, lines 8-16).

(4) Staff member Nick Doss, who was responsible for investigating and reporting on aviation concerns, testified that prior to submission of the Staff's Report of Investigation he failed to recognize that the Grimes Airport had an emergency helicopter service at the airport called "CareFlight". (Transcript 9, P. 2063, lines 8-25, and P. 2064, lines 1-3). The following testimonial exchange between Staff Member Doss and Champaign County Prosecutor Nick Selvaggio is indicative of the process being used by Staff members when evaluating on-site information in project areas:

"Q. When -- Mr. Doss, in response to the question just a few minutes ago you indicated that when you wrote your aviation portion of the report that you did not know that there were emergency flight services that flew out of that airport; is that correct?"

A. That's correct.

Q. And you indicated that you went to Grimes Field on two occasions? Approximately?"

A. Yes.

Q. When you went out there did you have --did you just merely observe the area or did you go in and talk to people?"

A. Did a windshield tour, so to speak. Drive by, pull in the parking lot and look around.

Q. What is a windshield tour?"

A. That's a generic term of doing a quick tour. We are limited in our time that we can spend in different places, so we wanted to tour the whole area and I wanted to go look at the airport so we did kind of a drive-by view of the airport."

(Transcript 9, P. 2063, lines 8-25, and P. 2064, lines 1-3)

Moreover, the failure to cross-reference evaluation responsibilities is highlighted by the testimony of Stuart Siegfried, the Staff member responsible for compiling and editing the *Staff Report of Investigation* as well as investigating and reporting on the various portions thereof:

"I can tell you that there have been issues raised in an aviation context, technically on the, I think, on the CareFlight which, to my knowledge, was not considered at the time the Staff Report was prepared."

(Transcript 7, P. 1721, lines 10-13)

(5) Staff failed to use independent analysis to confirm or corroborate scientific results as set forth in portions of the Application. (as example, Shadow Flicker – Transcript Volume 9, P. 2080, lines 2-25).

(6) Staff refused to meet with other intervenors to obtain additional information for the investigation into the Application. (Transcript 8, P. 1816, lines 2-16).

(7) Staff failed to review turbine manufacturer's specifications regarding recommended setbacks even though the manufacturer of the Applicant's proposed turbines had a greater setback recommendation than the setback mandated under Ohio law. (Transcript 7, P. 1745, lines 14-25, P. 1746, lines 1-25, P. 1747, lines 1-25)

(8) Staff disregarded other state agencies' recommendations, such as from the Ohio Department of Health, for "larger than minimum" setbacks without providing justifying rationale. (Transcript 7, P. 1751, lines 10-25, P. 1752, lines 1-25, P. 1753, lines 1-11).

From the examination of the aforementioned examples, it is reasonable to conclude that Staff operated in a culture where they did not take, nor did they feel the need to take, into consideration other available information necessary to be thorough and comprehensive in its evaluation of the Application.

Due to such incomplete and inadequate review of the Application by Staff, the undersigned recommend that if granted, the Certificate should be conditioned upon requiring the Staff to address its investigative inadequacies and permit the intervenors to engage in further examination into any subsequent Staff modification of an amended *Report of Investigation*. The Boards should have the opportunity for further examination should the Boards themselves conclude that the Staff's modified recommendations adversely affect its local political subdivisions or do not serve the "public interest, convenience or necessity" as required by R.C. §4906.10 (A).

D. Anticipated tax revenue should not be a determining factor in deciding whether the "public interest" is served or whether the Application should be granted.

The matter of taxation at the state and local level is still unsettled to date. Recently, there have been efforts in the General Assembly to reduce the taxation level for utility personal property and the wind industry has been a proponent of such legislation. (Transcript 7, P. 1660, lines 12-22)

In his testimony, Stanley Bialczak, Division Counsel to the Excise, Motor Fuel, and Public Utility Tax Division of the Ohio Department of Taxation, stated that although there may be taxes generated from the Project payable to the taxing districts within the County, the Project could be subject to tax exemptions.

As example, Applicant could enter into an Enterprise Zone Agreement with the local taxing districts and the local taxing districts would have input in the terms thereof. (Transcript 7, P. 1677, lines 6-16) Or, Applicant could obtain financing through the Ohio Air Quality Development Authority ("OAQDA") (Transcript 7, P. 1676, lines 21-25, P. 1677, line 1)

Financing through the OAQDA is especially problematic for the local taxing districts. Such financing would essentially exempt any property financed through

the issuance of such bonds from all state taxation, including taxes to the county taxing districts, for the duration of the bonds and such bonds can be in effect for up to forty years. (Champaign County and Townships, Exhibit 2, P. 5-6). As the life of the bond may last as long or longer than that life of the Project, the result may be that no taxes are paid to the local taxing districts on the property financed.

In addition, Staff member Andrew Conway suggested that local political subdivisions *might actually have to pass additional tax levies* to generate the necessary revenue to purchase equipment capable of providing safe and effective emergency firefighting services to the Project's facility site. (Transcript 8, P. 1981, lines 3-21).

Mr. Conway also indicated that Staff chose not to make it a condition of the Application that the Applicant be required to provide the necessary equipment to the local political subdivisions. (Transcript 8, P. 1980, lines 17-22)

Therefore, the Ohio Power Siting Board should not embrace the perception that just by constructing and operating the Project, Champaign County will automatically enjoy an "economic windfall" through tax revenues.

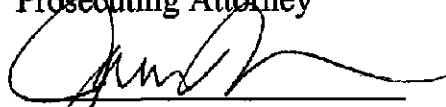
IV. CONCLUSION

For the reasons set forth herein, Intervenor Boards of Champaign County Commissioners and the Townships Trustees of Goshen, Rush, Salem, Union, Urbana and Wayne request that the Ohio Power Siting Board mandate that the issues presented by the aforementioned Boards be addressed and conditionally met before it determines that the "public interest, convenience and necessity" will be served by the granting of the Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County.

Respectfully submitted,



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I hereby certify that a copy of the foregoing Post-Hearing Brief was served upon the following parties of record via electronic mail on this 20th day of January, 2010:

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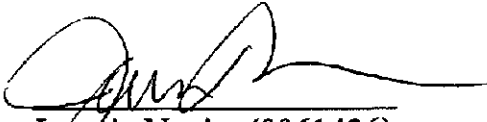
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