

FILE

## IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Buckeye  
Wind LLC for a Certificate to Construct a  
Wind-Powered Electric Generation Facility  
in Champaign County

In the Matter of the Application of Buckeye  
Wind, LLC to Amend its Certificate Issued  
in Case No. 08-666-EL-BGN

)  
) Case No. 15-1715  
)  
) On Appeal from the Ohio Power Siting  
) Board, Case Nos. 08-666-EL-BGN and  
) 13-360-EL-BGA  
)  
) Appellee: Ohio Power Siting Board

**NOTICE OF APPEAL OF APPELLANTS UNION NEIGHBORS UNITED (UNU),  
ROBERT McCONNELL, DIANE McCONNELL, AND JULIA F. JOHNSON**

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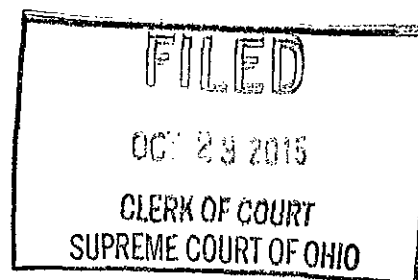
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Appellants Union Neighbors United, Robert McConnell, Diane McConnell, and Julia Johnson (collectively “Appellants”) hereby give notice of their appeal pursuant to R.C. 4903.11, 4903.13, and R.C. 4906.12 to the Ohio Supreme Court from the following attached orders of the Ohio Power Siting Board in Case Nos. 08-666-EL-BGN and 13-360-EL-BGA (hereinafter referred to as the “Orders”): (1) Entry entered on August 25, 2014; and (2) Entry on Rehearing entered on August 27, 2015. Appellants are and were parties of record in Case Nos. 08-666-EL-BGN and 13-360-EL-BGA and timely filed their Application for Rehearing of the Board’s August 25, 2014 Entry on September 24, 2014 pursuant to R.C. 4903.10. The Orders are unlawful and unreasonable in at least the following respects:

The Board’s Orders amended its certificate (the “Certificate”) issued to Buckeye Wind, LLC (“Buckeye Wind”), thereby extending the Certificate’s five-year deadline by three years for initiating construction of its wind-powered electric generating facility in order to avoid the Certificate’s termination. These Orders are unlawful and/or unreasonable for the following reasons:

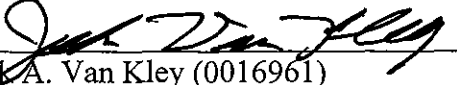
1. The Board amended the Certificate even though Buckeye Wind failed to submit an application for a certificate amendment as required by Ohio law and the Board’s rules, including R.C. 4906.06(E), R.C. 4906.07(C), and Ohio Admin. Code § 4906-5-10;
2. The Board’s Orders unlawfully waived or otherwise unlawfully altered the legally-mandated procedures applicable to amendment of the Certificate;
3. Whereas the Board’s Orders represent that the Board extended the Certificate in response to a motion submitted by Buckeye Wind under Ohio Admin. Code § 4906-1-05, Buckeye Wind failed to demonstrate show good cause for granting the motion

as required by that rule, and the Board lacked the factual foundation necessary to find that such good cause existed;

4. The Board failed to conduct an investigation or prepare an investigation report on Buckeye Wind's request for the extension that complied with R.C. 4906.07(C), Ohio Admin. Code § 4906-5-10(B), and Ohio Admin. Code § 4906-5-05;
5. While R.C. 4906.07(B) requires an evidentiary hearing on an application for a certificate amendment if the amendment would result in any material increase in any environmental impact of the facility, the Board failed to conduct the investigation or make the findings necessary to determine whether Buckeye Wind's request for extension would result in any material increase in any environmental impact of the facility;
6. The Board failed to hold the evidentiary hearing required by R.C. 4906.07(B);
7. The Board failed to conduct the investigation or make the findings necessary to determine whether Buckeye Wind's request for extension satisfies the criteria in R.C. 4906.10(A). These criteria include the nature of the probable environmental impact, whether the facility represents the minimum adverse environmental impact, and whether the facility will serve the public interest, convenience, and necessity;
8. The Board's Orders are unreasonable, because the Board failed to investigate or make findings on whether the Certificate's extension will harm the Appellants; and
9. The Board's Orders issuing the extension relied on administrative rules, such as Ohio Admin. Code § 4906-1-05, that had been rescinded and had not yet been replaced with new rules promulgated in accordance with the procedural requirements of R.C. Chapter 111.15.

Accordingly, Appellants request that the Court remand the Orders to the Ohio Power Siting Board with instructions to correct the errors identified herein.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2015, a copy of the foregoing Notice of Appeal was served by hand delivery on the Chairman of the Public Utilities Commission/Ohio Power Siting Board at 180 East Broad Street, Columbus, OH 43215, upon Gene Park by regular U.S. mail, and upon the remainder of the following persons by e-mail:

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**CERTIFICATE OF FILING**

I hereby certify that, on October 23, 2015, a copy of the foregoing Notice of Appeal was filed with the Docketing Division of the Public Utilities Commission and the Power Siting Board at 180 East Broad Street, Columbus, Ohio 43215 pursuant to R.C. 4903.13, OAC 4901-1-02(A), OAC 4901-1-36, and OAC 4906-7-18.

  
Jack A. Van Kley  
Counsel for Appellants

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Buckeye )  
Wind, LLC, for a Certificate to Construct ) Case No. 08-666-EL-BGN  
Wind-powered Electric Generation )  
Facilities in Champaign County, Ohio. )

In the Matter of the Application of Buckeye )  
Wind, LLC, to Amend its Certificate Issued ) Case No. 13-360-EL-BGA  
in Case No. 08-666-EL-BGN. )

ENTRY

The Board finds:

- (1) On March 22, 2010, the Board issued its Opinion, Order, and Certificate granting the application of Buckeye Wind, LLC (Buckeye) for a certificate to construct a wind-powered electric generation facility in Champaign County, Ohio. *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN (*Buckeye I*). The Order in *Buckeye I*, provided that the certificate shall become invalid if Buckeye has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate. *Buckeye I*, Order (Mar. 22, 2010) at 92. Accordingly, the Board required Buckeye to commence a continuous course of construction by March 22, 2015. The Board affirmed its Order by Entry on Rehearing issued July 15, 2010. On March 6, 2012, the Ohio Supreme Court affirmed the Board's Order.
- (2) On March 19, 2013, Buckeye filed an application to amend the *Buckeye I* certificate. *In re Buckeye Wind, LLC*, Case No. 13-360-EL-BGA (*Buckeye I Amendment*). In the amendment application, Buckeye requested authority to revise the design of the facility to adjust the construction staging areas; shift the project substation by 1,000 feet; add a new access road; modify four previously approved access roads; and move the electric collection line system underground. By Order on Certificate Amendment issued February 18, 2014, the Board approved Buckeye's application to amend its certificate, which was affirmed by the Board's Entry on Rehearing issued May 19, 2014.



- (3) On July 14, 2014, as corrected on July 15, 2014, in the *Buckeye I* and *Buckeye I Amendment* cases, Buckeye filed a motion for an extension of the term of the certificate from March 22, 2015, to May 28, 2018. Buckeye states that it has continued to develop this project, however, it has experienced delays as a result of the appeal of the *Buckeye I* decision, which was not decided by the Ohio Supreme Court until March 6, 2012, and ongoing litigation related to securing a required Incidental Take Permit (ITP) from the United States (U.S.) Fish and Wildlife Service's (USFWS). With regard to the ITP, Buckeye explains that Union Neighbors United, an intervenor in these cases, is appealing the issuance of the ITP to the U.S. Court of Appeals, D.C. District Circuit, and Buckeye cannot commence construction until the ITP appeal is resolved. Buckeye also anticipates that the intervenors in the *Buckeye I Amendment* case will file an appeal disputing the amendment with the Ohio Supreme Court; if the amendment is appealed, Buckeye anticipates that it is unlikely the Court will resolve the appeal prior to March 22, 2015, which is the date by which construction must commence on *Buckeye I*.<sup>1</sup> Buckeye submits that the litigation delays are beyond its control, have hampered Buckeye's ability to move forward with construction of the project, and constitute good cause to grant an extension of the certificate. Despite these litigation delays, Buckeye asserts that it continues to develop the project, as evidenced by the fact that it: developed a habitat conservation plan; obtained an ITP from USFWS in 2013; improved the project design by relocating collection lines in the *Buckeye I Amendment* case to locations that will be shared by the project approved in *In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Order (May 28, 2013) (*Buckeye II*); and pursued its interconnection to the PJM Interconnection regional transmission grid.
- (4) In addition, Buckeye requests an extension of the term of the certificate to align the term of the *Buckeye I* certificate with the term of the adjacent wind project in *Buckeye II*, which must commence construction before May 28, 2018, in accordance with the Board's Order in *Buckeye II*. The *Buckeye II* Order is currently on appeal at the Ohio Supreme Court. According to

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<sup>1</sup> On July 16, 2014, intervenors in the *Buckeye I Amendment* case filed an appeal of the Board's Order with the Ohio Supreme Court.

Buckeye, the *Buckeye I* and *Buckeye II* projects will use some of the same laydown yards and underground transmission lines, as well as the same electric substation.

- (5) In further support of its motion, Buckeye states that its extension request is consistent with other certificate extension motions which the Board has routinely granted for good cause shown. See *In re FDS Coke Plant, LLC*, Case No. 07-703-EL-BGN, Entry (Sept. 30, 2013); *In re American Municipal Power Ohio, Inc.*, Case No. 06-1358-EL-BGN, Entry (Dec. 17, 2012).
- (6) On July 29, 2014, Union Neighbors United, Julia Johnson, and Robert and Diane McConnell (collectively, UNU) filed a memorandum contra, and Champaign County Board of Commissioners (Champaign County) and Urbana Township Trustees (Urbana Township) (jointly, Champaign/Urbana) jointly filed a memorandum contra Buckeye's motion for an extension.
- (7) On July 29, 2014, Goshen Township Trustees (Goshen Township) and Union Township Trustees (Union Township) (jointly, Goshen/Union) filed a joint motion for an extension of time to respond to Buckeye's motion for an extension of the certificate. Goshen Township states that it received notice of Buckeye's motion after its regularly scheduled meeting on July 15, 2014, and its next meeting was scheduled for August 5, 2014. Union Township states that it received notice of Buckeye's motion after its regularly scheduled meeting on July 7, 2014, and its next scheduled meeting was August 5, 2014. Goshen/Union argue that they were unable to secure a quorum and comply with statutory notice requirements to hold a special meeting before the due date for memoranda contra. Goshen/Union request until August 8, 2014, to file a reply.<sup>2</sup> The Board finds Goshen/Unions' motion for an extension of time to file a reply is reasonable and should be granted.
- (8) On August 8, 2014, Goshen/Union filed a letter indicating that they join in the memorandum contra filed by

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<sup>2</sup> On August 1, 2014, Buckeye filed a memorandum contra Goshen/Unions' request for an extension, but subsequently withdrew the memorandum contra on August 6, 2014.

Champaign/Urbana opposing Buckeye's motion for an extension of the *Buckeye I* certificate.

- (9) In their respective memoranda contra, UNU and Champaign/Urbana contest the request for an extension of the *Buckeye I* certificate. Champaign/Urbana argue that Buckeye has, throughout these proceedings, maintained that *Buckeye I* and *Buckeye II* are separate projects. Champaign/Urbana contend that, to extend the *Buckeye I* certificate based on the term of the *Buckeye II* certificate, undermines the application and hearing process, and the requirement to protect the public interest, particularly as to impacts. Champaign/Urbana argue Buckeye's request for an extension should be reviewed by an amendment to the application and the conditions of the *Buckeye I* certificate should be supplemented to include a Road Use Maintenance Agreement.
- (10) UNU argues that Buckeye's request for an extension of the certificate should be reviewed pursuant to the application amendment process set forth in Ohio Adm.Code 4906-5-10(B). UNU acknowledges that Ohio Adm.Code 4906-1-05 allows time limits to be extended by motion; however, UNU reasons that, based on the principles of statutory construction, Ohio Adm.Code 4906-5-10, which is the amendment application process, is an exception to Ohio Adm.Code 4906-1-05. Therefore, UNU submits that Buckeye's extension request must comply with all the requirements of an application, notice, staff investigation and report, public comments, and, if appropriate, a hearing. UNU also contends that Buckeye could have included its request for a certificate extension in its application for an amendment in *Buckeye I* and the Board could have heard evidence on the issue at that time. UNU offers that, in rulings on past requests for certificate extensions, the Board has cautioned that it routinely includes deadlines for starting construction to make sure that the information on which the Board relied in granting the certificates is still valid. See *In re Lima Energy Co.*, Case No. 00-513-EL-BGN, Entry (July 30, 2012); *In re Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN, Entry (Sept. 30, 2013). Therefore, since the certificate in *Buckeye I* was issued more than four years ago, UNU submits the Board should require Buckeye to submit an application that deals with this question. In addition, UNU asserts the Board's

rulings in *Lima Energy* and *Norton Energy Storage* also advise that certificate deadlines for starting construction are designed to avoid the indefinite encumbering of land. UNU claims that extending the certificate for another three years will harm the community by creating more uncertainty for development in the area.

- (11) On August 5, 2014, and August 12, 2014, Buckeye filed replies to the memoranda contra filed by UNU, Champaign/Urbana, and Goshen/Union regarding its motion for an extension of the certificate. With respect to the claim that it should have filed an application to amend its certificate and may not use a motion to apply for a certificate extension, Buckeye submits that, in accordance with R.C. 4906.06(A) and Ohio Adm.Code 4906-7-19(B), precedent shows that the Board has a practice of approving certificate extensions through motions. See *Norton Energy Storage*, Entry (June 2, 2008); *In re Lawrence Co. Energy Center, LLC*, Case No. 01-369-EL-BGN, Entry (July 13, 2009); *Lima Energy*. Buckeye retorts that the only issue before the Board is an extension of the term of the certificate. As such, UNU's assertion that Buckeye must submit an amendment application that demonstrates that the information on which the Board relied to grant the certificate is, according to Buckeye, at odds with itself. Buckeye notes that UNU does not state specifically what information needs to be considered as part of an amendment application. Further, Buckeye contends that the intervenors' claims that extending the *Buckeye I* certificate encumbers the land of leaseholders and nonparticipating neighbors is not well made, as this argument overlooks the fact that the *Buckeye II* project is in the same general vicinity and the *Buckeye II* certificate term continues through May 28, 2018. Buckeye also notes that all service and notice requirements in R.C. 4906.06 and Ohio Adm.Code 4906-5-06 and 4906-5-10 were followed, and intervenors have had the opportunity to comment on the motion, no hearing is required, and no party or member of the public has been or will be prejudiced through the Board's consideration of Buckeye's request for extension. Finally, Buckeye contends there is no basis for the claim that the request for an extension of the certificate should have been included in the *Buckeye I Amendment* application filed on March 19, 2013, when, at the

time that case was filed, there were two years remaining on the certificate to commence construction.

- (12) Initially, the Board notes that, as argued by Buckeye and acknowledged by UNU, it is the Board's longstanding practice to consider requests to extend the term of a certificate pursuant to a motion. See *Norton Energy Storage*, Entry (June 2, 2008); *Lawrence Co. Energy*; *American Municipal Power*, Entries (Dec. 17, 2012 and Aug. 25, 2014). In response to UNU's concern that various information, which was considered by the Board in its issuance of the certificate in *Buckeye I*, may need to be updated, the Board points out that, throughout the term of all certificates, the Board tracks the progress of the projects. Based on this tracking process, if there is a need for an amendment, the Board would require an applicant to file an appropriate application. Therefore, the Board finds that UNU's assertions are without merit. In determining whether Buckeye's motion for extension should be granted, the Board finds it instructive that Buckeye has continued to pursue the development of the generation facility and that certain delays have been beyond Buckeye's control. Accordingly, the Board concludes that Buckeye's motion to extend the term of the *Buckeye I* certificate, as amended in *Buckeye I Amendment*, is reasonable and should be granted.
- (13) On August 4, 2014, Buckeye filed a motion for waiver of Ohio Adm.Code 4906-5-10(B), and certain provisions thereunder, and other provisions the Board deems appropriate, to the extent that the rules require an application for an amendment to a certificate to be submitted in the same manner as if it was an application for a certificate. Buckeye requests this waiver to eliminate any procedural dispute as to whether the extension may be requested by motion or only pursuant to an application for certificate amendment. Buckeye avers that the motion for waiver, as well as the motion for extension, should be addressed expeditiously in keeping with the Board's stated policy to secure just, efficient, and inexpensive determination of the issues presented in matters considered under R.C. Chapter 4906.
- (14) On August 11, 2014, UNU, as well as Champaign County and Goshen, Union, and Urbana townships (jointly

County/Townships) filed memoranda contra Buckeye's motion for waivers. UNU reiterates that the request for an extension of the certificate should have been addressed as part of the *Buckeye I Amendment*. UNU argues the Board should investigate the assumptions underlying the *Buckeye I* certificate before granting an extension. The County/Townships allege Buckeye is circumventing the requirements of the amendment process and disagree with Buckeye's contention that adequate public notice has been given. The County/Townships assert that, while the statutory notice was given and a hearing is not required for an amendment application, inadequate time for review and response was given to the parties and the public.

- (15) The Board finds that, in keeping with the statutory requirements and the Board's past precedent, a request for an extension of the term of a certificate is properly filed as a motion for extension. We view Buckeye's August 4, 2014 request for waivers as an alternative, to be considered by the Board in the event the request for extension was not deemed appropriate. Therefore, the Board finds that it is unnecessary for us to rule on Buckeye's alternative motion for waivers, as the motion for extension is the appropriate procedural mechanism, thus, the only issue before us is whether good cause has been shown to grant Buckeye's requested motion for extension of the certificate.

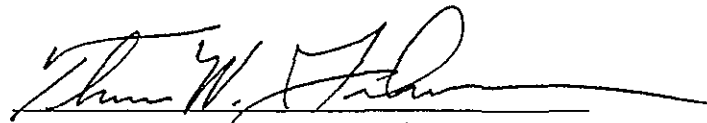
It is, therefore,

ORDERED, That the motion for an extension of time until August 8, 2014, to file a reply to Buckeye's motion for extension of the term of the certificate filed by Goshen/Union is granted. It is, further,

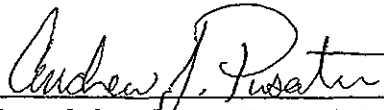
ORDERED, That Buckeye's motion to extend the term of the *Buckeye I* certificate to May 28, 2018, is granted. It is, further,

ORDERED, That a copy of this Entry be served upon all interested persons of record.

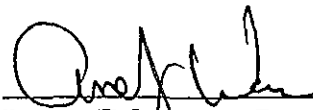
THE OHIO POWER SITING BOARD



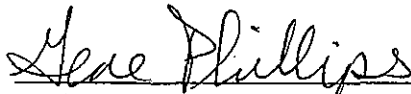
Thomas W. Johnson, Chairman  
Public Utilities Commission of Ohio



David Goodman, Board Member  
and Director of the Ohio  
Development Services Agency



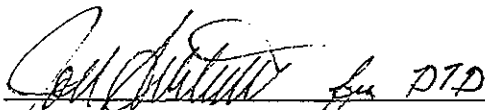
James Zehringer, Board Member  
and Director of the Ohio  
Department of Natural Resources



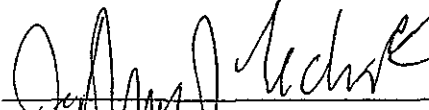
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Department of Health



Craig Butler, Board Member  
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David Daniels, Board Member  
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Department of Agriculture

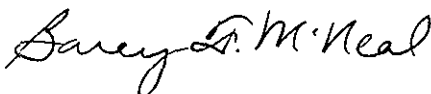


Jeffrey J. Lechak, Board Member  
and Public Member

GNS/vrm

Entered in the Journal

**AUG 25 2014**



Barcy F. McNeal  
Secretary

BEFORE

THE OHIO POWER SITING BOARD

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in Case No. 08-666-EL-BGN. )

ENTRY ON REHEARING

The Ohio Power Siting Board, in considering the application for rehearing filed by Union Neighbors United, Julia Johnson, and Robert and Diane McConnell, denies the application for rehearing of the Board's August 25, 2014 Entry granting Buckeye Wind, LLC's motion to extend the certificate to May 28, 2018. Accordingly, the Board finds:

- (1) All proceedings before the Board are conducted in accordance with the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

History of the Proceedings

- (2) On March 22, 2010, the Board issued its Opinion, Order, and Certificate granting the application of Buckeye Wind, LLC (Buckeye) for a certificate to construct a wind-powered electric generation facility in Champaign County, Ohio. *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN (*Buckeye I Case*). The Order in the *Buckeye I Case* provided that the certificate shall become invalid if Buckeye has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate. Therefore, Buckeye was to commence a continuous course of construction by March 22, 2015. The Board affirmed its Order by Entry on Rehearing issued July 15, 2010. On March 6, 2012, the Ohio Supreme Court affirmed the Board's Order. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869.
- (3) On March 19, 2013, Buckeye filed an application to amend the certificate issued in the *Buckeye I Case*. *In re Buckeye Wind, LLC*, Case No. 13-360-EL-BGA (*Buckeye I Amendment Case*). In the amendment application, Buckeye requested authority to revise the



design of the facility to adjust the construction staging areas; shift the project substation by 1,000 feet; add a new access road; modify four previously approved access roads; and move the electric collection line system underground. By Order on Certificate Amendment issued February 18, 2014, in the *Buckeye I Amendment Case*, the Board approved Buckeye's application to amend its certificate, which was affirmed by the Board's Entry on Rehearing issued May 19, 2014. An appeal of the Board's decision in the *Buckeye I Amendment Case* is currently pending at the Ohio Supreme Court.

- (4) By Entry issued August 25, 2014, in the *Buckeye I Case* and the *Buckeye I Amendment Case*, the Board granted Buckeye's motion to extend the term of the certificate from March 22, 2015, to May 28, 2018.

#### Application for Rehearing

- (5) R.C. 4906.12 states, in relevant part, that R.C. 4903.02 to 4903.16 and R.C. 4903.20 to 4903.23, apply to a proceeding or order of the Board as if the Board were the Public Utilities Commission of Ohio (Commission).
- (6) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.
- (7) Further, Ohio Adm.Code 4906-7-17(D) states, in relevant part, that any party or affected person may file an application for rehearing within 30 days after the issuance of a Board order in the manner, form, and under the circumstances set forth in R.C. 4903.10.
- (8) Ohio Adm.Code 4906-7-17(I) provides that the administrative law judge (ALJ) may issue an order granting rehearing for the limited purpose of affording the Board more time to consider the issues raised in an application for rehearing.
- (9) On September 24, 2014, Union Neighbors United, Julia Johnson, and Robert and Diane McConnell (collectively, UNU) filed an application for rehearing of the Board's August 25, 2014 Entry. In

the application for rehearing, UNU argues five grounds for rehearing as being unlawful and unreasonable:

- (a) the Board did not comply with the legally-mandated procedure for certificate amendments;
  - (b) the Board lacks the legal authority to waive legally-mandated procedures;
  - (c) Buckeye has not shown good cause to extend the certificate;
  - (d) there are compelling reasons to conduct an investigation before granting the extension; and
  - (e) the Board's rules by which the Entry was issued are invalid.
- (10) On October 6, 2014, Buckeye filed a memorandum contra the application for rehearing.
- (11) By Entry issued October 23, 2014, UNU's application for rehearing was granted, for the limited purpose of affording the Board additional time to consider the arguments raised by UNU in its application for rehearing, without addressing the merits of any arguments raised.
- (12) The Board has reviewed and considered all of the arguments raised in the application for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and should be denied.

UNU First Assignment of Error – Procedures for Certificate Amendment

- (13) In its first assignment of error, UNU argues that the August 25, 2014 Entry is unlawful and unreasonable because it purports to amend an express term of the March 22, 2010 certificate issued to Buckeye without complying with the legally-mandated procedures for certificate amendments. According to UNU, Condition 52 of the certificate directed that Buckeye commence a continuous course of construction on or before March 22, 2015; however, no construction has begun on this facility. In addition, UNU maintains that, while Buckeye has claimed it has pursued the development at the

generation facility, development is not construction. UNU also contends that the legally-mandated requirements would necessarily include a Staff investigation of the application and a Staff report, as well as a hearing, if the proposed change would result in any significant adverse environmental impact of the facility or would include a substantial change in the location of all or a portion of such certified facility. UNU also asserts that Buckeye tacitly conceded that its request for an extension was a certificate amendment when it provided statutory notice of its motion for extension pursuant to the procedures for amendments in R.C. 4906.06.

- (14) In its memorandum contra, Buckeye contends that the Board's rules permit extensions of time to be sought and granted upon motion, and the Ohio Supreme Court may defer and rely on an agency's interpretation of a law or rule as long as it is reasonable. See *Sunoco, Inc. v. Toledo Edison, Co. et al.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285; *State Ex. Rel. Richmond v. Indus. Comm.*, 139 Ohio St.3d 157, 2014-Ohio-1604, 10 N.E.3d 683. Buckeye notes that Ohio Adm.Code 4906-1-05 provides that any request for the extension or waiver of a time limit shall be made by motion and this comports with the Board's long standing practice of granting extensions of certificates to be requested by motion instead of by application, which is entirely reasonable and lawful. Buckeye also claims that the Board correctly determined that the extension of a certificate is not an amendment within the meaning of R.C. Chapter 4906. Buckeye notes that the term "amendment" is not specifically defined in R.C. Chapter 4906, but that the term is used in conjunction with other parts of the code section related to changes in the facility. Buckeye notes that, under R.C. 4906.07(B), a change in the facility is a prerequisite to an application for amendment of a certificate. Buckeye claims that, because the proposed extension of a certificate deadline is not a proposed change in the facility, it does not seek an amendment within the meaning of R.C. Chapter 4906. Buckeye also asserts that UNU's position assumes that an application is required to extend a certificate and then assumes that the application must be investigated and a report issued to the Board. However, neither of those assumptions is reasonable because an extension of a certificate is not an amendment within the meaning of R.C. Chapter 4906. In addition, Buckeye claims that litigation involving UNU's appeal of the U.S. Fish and Wildlife Services' Incidental Take Permit (ITP) remains ongoing before the

U.S. Court of Appeals D.C. Circuit and that litigation has further delayed Buckeye's ability to proceed with the project approved in the *Buckeye I Case*. Also, Champaign County and Urbana, Union, and Goshen townships are currently litigating the Board's decision in the *Buckeye I Amendment Case* before the Supreme Court of Ohio. According to Buckeye, these litigation delays constitute good cause for the Board's decision to extend the certificate.

- (15) The Board finds UNU's first assignment of error is unfounded and should be denied. As to UNU's contention that modification of the expiration date constitutes amendment of the certificate, we find no merit. While the five-year time frame for the commencement of construction was listed among the 70 conditions in the Board's March 22, 2010 Opinion, Order, and Certificate in the *Buckeye I Case*, that directive has historically been included within every Board order and is a function of when construction work on the project is expected to begin. Also, there is no statutory requirement dictating that applicants commence a continuous course of construction by a date certain. Further, requests for extension of that directive do not constitute an amendment that would require a hearing pursuant to R.C. 4906.07, as a hearing is only required when there is a change in the certificated facility that results in an environmental impact or change in the location of the facility, which are changes associated with amendment applications. Rather, R.C. 4906.06 provides that an application shall be filed no more than five years before the planned date of commencement of construction and that the Board may waive this time period for good cause shown. While the Board's rules contemplate that the Board may authorize extensions of time for a variety of procedural issues in the certificate application process, the rules also allow applicants to seek extensions of time frames associated with a project. Ohio Adm.Code 4906-1-05 provides that the Board or the ALJ may extend or waive any time limit prescribed or allowed by Chapters 4906-1 to 4906-17, except where prohibited by statute. This rule also provides that any request for an extension or waiver of a time period shall be made by motion. Simply because the statute provides a procedure to be followed for amendments to certificates, and Buckeye gave notice of the application, does not, in and of itself, transform a procedural motion for an extension of a time frame into an amendment application. In addition, as noted by Buckeye, litigation involving its certificate, both at the Supreme Court of Ohio and the U.S. Court of Appeals has created additional

delays in Buckeye's commencement of construction of this project. Such litigation delays support granting the motion for extension of the certificate.

Furthermore, the Board notes that the directive regarding the commencement of construction is similar to several other procedural directives included with other conditions set forth in the certificate. For example, Condition 50 provides that Buckeye shall submit a copy of the as-built plans and specifications to Staff within 30 days after completion of construction. Condition 51 directs Buckeye to provide Staff information as it becomes known related to the date on which construction will begin, when construction was completed and the date on which the facility began commercial operation. Similarly, Condition 52 relates to when Buckeye should commence the construction of the project, not how it will construct, operate, or maintain the project. Clearly, revisions to these time frames do not equate to an amendment to the certificate.

UNU Second Assignment of Error - Authority to Waive Amendment Procedures

- (16) In its second assignment of error, UNU argues that the Entry is unlawful and unreasonable because the Board lacks the legal authority to waive or otherwise alter legally-mandated procedures applicable to an amendment of a certificate. UNU contends that, even though the Board has in the past allowed a request for an extension of the term of a certificate to be filed as a motion, there is no statutory requirement authorizing such a practice and none was identified in the Board's August 24, 2014 Entry. UNU also claims that, while the Board's rules contain general provisions for extensions of time limits by motion, those rules do not authorize the Board's practice in this case. UNU claims the Board cannot waive statutory requirements, unless specifically authorized by statute, and UNU argues that nothing in R.C. 4906.07 allows for such a waiver. UNU also submits that, because there is a specific procedure governing certificate amendments in Ohio Adm. Code 4906-5-10, that provision must be applied.
- (17) In its memorandum contra, Buckeye contends that, under R.C. 4906.06, the Board has discretion to determine the form and content of applications to amend a certificate and that Ohio Adm. Code

4906-7-19(B) permits the Board to prescribe different practices or procedures to be followed in a case. Buckeye notes that, when an amendment involves a proposed change in the facility, a staff investigation, written report, and a public hearing may be required; however, there is no such requirement and no reason for such requirement when an "amendment" merely seeks to reserve the status quo for an additional period of time. Buckeye notes that the Board has a long-standing practice for requiring and reviewing requests to extend certificates upon motion. See *In re Norton Energy Storage*, Case No. 99-1626-EL-BGN, Entry (June 2, 2008); *In re Lawrence Cty. Energy Ctr., LLC*, Case No. 01-369-EL-BGN, Entry (July 31, 2009); *In re Lima Energy Co.*, Case No. 00-513-EL-BGN, Entry (July 30, 2012). Buckeye also argues that Ohio Adm.Code 4906-7-19(B) permits the Board to prescribe different practices or procedures to be followed in a case and Ohio Adm.Code 4906-1-05 allows extensions of time to be sought and granted upon motion. Buckeye argues the Board acted within its authority in granting the motion for an extension.

- (18) We find UNU's second assignment of error to be without merit; therefore, the request for rehearing should be denied. UNU's argument relies on the assumption that the filing by Buckeye requesting an extension of the term of the certificate is an amendment application. A request for an extension of a certificate is not an amendment to a certificate because it does not fall within the statutory requirements of R.C. Chapter 4906 that necessitate the filing of an amendment application. The Board has not waived or otherwise altered any legally-mandated procedures applicable to an amendment of the certificate, because this is not an amendment application. In addition, R.C. 4906.03(B) provides that the Board shall conduct any studies or investigations that it considers necessary or appropriate to carry out its responsibility under this chapter. The Board found that no such studies or investigations provided for in R.C. 4906.03(B) were applicable for a request for an extension. In addition, Buckeye's request for an extension for the certificate did not change the location of all or part of the facility and did not create any environmental impact. As Buckeye's request for an extension is the proper procedural mechanism to request an extension for the term of the certificate, there are no statutory duties to be waived by the Board.

UNU Third Assignment of Error - Good Cause to Extend the Certificate

- (19) In its third assignment of error, UNU argues the Entry is unlawful and unreasonable because Buckeye has not shown good cause to extend the certificate by motion or otherwise. UNU claims that Buckeye has provided no specific evidence to demonstrate that litigation has prevented it from beginning a continuous course of construction during the original five-year term of the certificate. UNU maintains that the extension request is an attempt to avoid new statutory setback requirements in House Bill 483 which provide that any amendment made to an existing certificate after September 15, 2014, shall be subject to a setback of at least 1,125 feet in horizontal distance from the tip of the turbine's nearest blade to the property line of the nearest adjacent property. The minimum statutory setback in effect in 2009, when the Buckeye certificate was issued, used the nearest residential structure as the point of reference. UNU argues Buckeye could and should have raised its extension request in the proceedings that involved its application for an amendment of its certificate. UNU maintains the Ohio Supreme Court issued its decision addressing the *Buckeye I Case* in March 2012, and there was sufficient time to file a request for an extension. UNU claims that, while Buckeye cites to the litigation delays in the Board proceeding in *In re Champaign Wind, LLC.*, Case No. 12-160-EL-BGN (*Buckeye II Case*), Opinion, Order, and Certificate (Mar. 22, 2010) and as affirmed in the Entry on Rehearing issued July 15, 2010, as a cause for delay, that appeal is irrelevant to the project in the *Buckeye I Case* because it is a separate project. In further response to Buckeye's reasoning for delay, UNU also notes that the appeal before the U.S. Court of Appeals D.C. Circuit of the U.S. Fish and Wildlife Service's ITP was filed before the Board's January 6, 2014 hearing in the *Buckeye I Amendment Case*.
- (20) In its memorandum contra, Buckeye contends the Board acknowledged that nearly two years passed between the time the Board issued its decision in the *Buckeye I Case* in 2010 and when the Supreme Court of Ohio affirmed the Board's decision on March 6, 2012. Buckeye reiterates that this litigation, as well as the litigation involving the ITP proceeding before the U.S. Court of Appeals, has further delayed its ability to proceed with the project and creates the risk that the decision to issue the ITP could be reversed. Further, Buckeye argues that Champaign County and Urbana,

Union, and Goshen townships are currently litigating the Board's decision in the *Buckeye II Case* before the Supreme Court of Ohio, and this could create additional delays project financiers will not tolerate. Buckeye contends that UNU only responds to the litigation delays by blaming Buckeye for not including an extension request with its prior amendment application; however, UNU asserts no legal basis that required Buckeye to include the extension request within its amendment application.

- (21) The Board concludes that UNU's third assignment of error is groundless and should be denied. As we noted in the August 25, 2014 Entry, certain delays were beyond the control of Buckeye, because these delays included litigation. As to the argument that Buckeye should have included its extension request in its amendment, we find no merit. The information related to an extension request, which only involves the timing of when the construction on the project will commence, is separate and distinct from an application to amend a certificate. There is no legal requirement that a motion for extension be filed with, or as a part of, an application for an amendment.

#### UNU Fourth Assignment of Error - Investigation of the Request for Extension

- (22) In its fourth assignment of error, UNU argues that the August 25, 2014 Entry is unlawful and unreasonable because there are compelling reasons why the Board should conduct a full investigation and consider the need for a public hearing before deciding whether to extend the certificate. UNU contends that the Board's own past practice indicates that it is appropriate to investigate the extension request. See *In re Lima Energy Co.*, Case No. 00-513-EL-BGN (*Lima Case*), Entry (July 30, 2012) at 7. UNU argues that Staff reviewed and requested a broad range of information relating to the status of the facility in relation to Lima Energy Company's (Lima) request for an extension of the term of the facility. UNU argues that a similar inquiry is necessary in this case because it has been four years since the certificate was issued and much has changed regarding the actual and potential impacts of the project. Additionally, UNU contends that there have been significant advances in the understanding of wind turbine noise and ice throw since the Board issued the Buckeye certificate in 2010; noting that wind setbacks have been modified necessitating reevaluation of the turbine sites approved by the Board. According



to UNU, extending the minimum duration of the certificate would increase the impacts on property owners.

- (23) In its memorandum contra, Buckeye contends that the Board appropriately rejected UNU's argument in its August 25, 2014 Entry finding that, throughout the term of all certificates, the Board tracks the progress of projects. If there is a need for an amendment, the Board would require an applicant to file an appropriate application. Buckeye cites to various conditions included within the certificate issued in the *Buckeye I Case*, including: Condition 3 that requires Buckeye to obtain and comply with all applicable permits and authorizations required by federal and state entities prior to the commencement of construction and operation; Condition 56 that requires Buckeye to provide a road bond; Condition 25 that requires Buckeye to repair roads and bridges following construction; Condition 8 that requires Buckeye to obtain Staff review of a variety of plans; and Condition 11 requiring Buckeye to employ best management practices. According to Buckeye, these conditions provide a process for the Board to monitor progress of the facility. Buckeye asserts that UNU simply wants to reopen the initial certificate proceeding to challenge the Board's decisions of noise and ice throw, but that is not a valid basis to deny a certificate extension. Buckeye also argues that UNU's claim regarding property rights was previously addressed by the Board in both the *Buckeye I Case* and the August 25, 2014 Entry, as well as in the *Buckeye II Case*. In addition, Buckeye claims that this argument is at odds with the fact that the project in the *Buckeye II Case* is located in the same general area as the project in the *Buckeye I Case* and the certificate in the *Buckeye II Case* extends to May 28, 2018. According to Buckeye, even if the Board had denied the extension request in the *Buckeye I Case*, the project in the *Buckeye II Case* is still certificated in the same area, leaving UNU with the same concern about the marketability of property. Buckeye further claims that UNU's attempt to align the marketability of property with environmental impacts is contrary to the plain language of R.C. 4906.07(B), which only requires the Board to hold a hearing when there is a change in a facility that would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility, and none of that is changing as a result of the request for an extension of the date for the commencement of construction.

The Board finds no merit to UNU's fourth assignment of error; therefore, it should be denied. The facts of the *Lima Energy Case* are unique and not analogous to this case. We note that the *Lima Energy Case*, cited to by UNU, involved a certificated electricity generation project that occurred over a ten-year period and with a vastly different energy development process than the time period and energy process involved with Buckeye's wind project. Some of these differences are detailed below. The certificate in the *Lima Energy Case* was initially issued on May 20, 2002, and the Board directed that a continuous course of construction begin by May 20, 2007. Subsequently, the Board granted an amendment of the certificate on November 22, 2004, in *In re Lima Energy Co.*, Case No. 04-1011-EL-BGA (*Lima Amendment Case*), but did not extend the May 20, 2007 date. There then was a five-year time frame after the May 20, 2007 date set by the Board during which Lima had not been engaged in a continuous course of construction. On January 25, 2012, an ALJ directed that, unless Lima files a request to extend the certificate, the ALJ would recommend the certificate be found invalid. On February 6, 2012, Lima filed a motion requesting the extension. The Board and the ALJ directed Lima to provide additional information regarding the project for the Board's consideration. The facts and precedent of the *Lima Energy Case* are dissimilar and distinguishable from what is before the Board in these cases. In the *Lima Energy Case*, ten years had elapsed between the issuance of the certificate and the request for an extension; whereas here, only four years have elapsed. In addition, the two projects involve vastly different methods of electricity generation. The *Lima Energy Case* involved a large complex project for the generation of electricity from synthesis gas produced from solid fuel briquettes, conversion of briquettes from solid fuel to synthesis gas, purification of the syngas, and production of electricity in a combined-cycle combustion turbine power facility; whereas, the project at issue here is a turbine generating electricity from wind currents.

With respect to UNU's claim that new evidence exists regarding noise impacts of wind turbines, this is not a basis on which the Board could reevaluate the project when the sole issue is the extension of a date on which the project construction should begin. Further, as noted by Buckeye, UNU has raised nothing new in its argument regarding encumbrance of land as this issue was previously addressed by the Board.

UNU Fifth Assignment of Error - Rule Processing Requirements

- (24) In its fifth assignment of error, UNU argues that the August 25, 2014 Entry is unlawful and unreasonable to the extent it was issued pursuant to the Board's rules because the rules are invalid due to the Board's failure to comply with the procedural requirements of R.C. Chapter 111.15. UNU argues that, on February 18, 2014, the Board rescinded its former rules set forth in Ohio Adm. Code Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 (OPSB Rules); however, the Board failed to file with the Joint Committee on Agency Rule Review (JCARR) and the Legislative Service Commission (LSC). See *In re the Ohio Power Siting Board's Review of Chapters 4906-1, et al., of the Ohio Administrative Code*, Case No. 12-1981-GE-BRO (*Board Rules Proceeding*), Finding and Order (Feb. 18, 2014). UNU claims that R.C. 111.15(B)(1) requires new rules to be filed with both JCARR and LSC at least 65 days prior to their proposed adoption and that rules not adopted in accordance with R.C. 111.15 are deemed invalid. According to UNU, because the Board's February 18, 2014 rule package is invalid and unenforceable, the Board's reliance on the OPSB Rules in granting the motion for extension is unlawful and unreasonable.
- (25) In its memorandum contra, Buckeye contends that the Board made it clear in the *Board Rules Proceeding* the OPSB Rules "should" be rescinded and replaced by new Ohio Adm.Code Chapters 4906-1 through 4906-7. *Board Rules Proceeding*, Finding and Order (Feb. 18, 2014) ¶138. Buckeye argues that the Board never stated that the current rules "are" rescinded and common sense dictates that the current rules remain in effect until the new rules take effect.
- (26) The Board finds no merit to UNU's fifth assignment of error; therefore, the request for rehearing should be denied. In the *Board Rules Proceeding*, the Board conducted its five-year review of the OPSB Rules pursuant to R.C. 119.032. Under this review, the Board, after considerable due process, determined that certain of its rules should be rescinded and replaced by new rules; determined that certain of its rules should be amended; directed that the adopted rules be filed with the JCARR and LSC; and directed that the final rules be effective on the earliest date permitted. *Board Rules Proceeding*, Finding and Order (Feb. 18, 2014); Entry on Rehearing (May 19, 2014).

However, simply because the Board issues an entry ordering that one or more rules should be rescinded and new rules adopted, does not immediately make the proposed new rules effective or negate the current rules. Rules go into effect when the rules leave JCARR jurisdiction and when the agency files the rules in final form with JCARR, LSC, and the Secretary of State. Until such time as administrative rules complete the rulemaking process, including leaving JCARR jurisdiction, or become invalidated through a concurrent resolution, existing rules remain in effect. Thus, because the Board's rules have not completed the JCARR process nor have the rules been invalidated, the existing Board's rules were in effect, and not rescinded, at the time the Board issued its August 25, 2014 Entry.

In addition, there is no merit to UNU's cited timeframe to R.C. 111.15(B)(1), as this is applicable to final filing after the 65-day JCARR review and invalidation period, which had not occurred because the Board's rules had not been filed with JCARR. Accordingly, the application for rehearing should be denied.

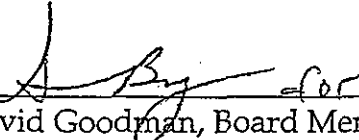
It is, therefore,


ORDERED, That the application for rehearing filed by UNU is denied. It is, further,

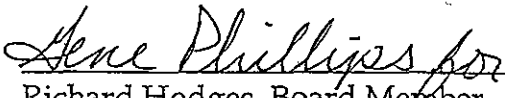
ORDERED, That a copy of this Entry on Rehearing be served upon all parties and all interested persons of record in these proceedings.

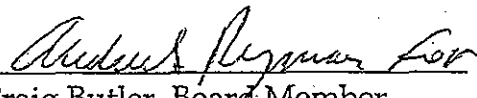
THE OHIO POWER SITING BOARD

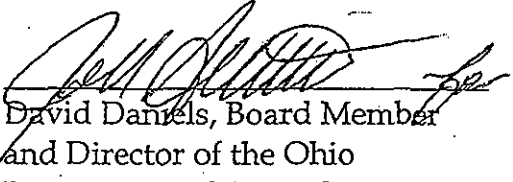
  
Andre T. Porter, Chairman  
Public Utilities Commission of Ohio

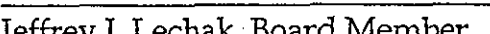
  
David Goodman, Board Member  
and Director of the Ohio  
Development Services Agency

  
James Zehringer, Board Member  
and Director of the Ohio  
Department of Natural Resources

  
Richard Hodges, Board Member  
and Director of the Ohio  
Department of Health

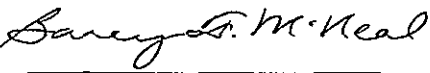
  
Craig Butler, Board Member  
and Director of the Ohio  
Environmental Protection Agency

  
David Daniels, Board Member  
and Director of the Ohio  
Department of Agriculture

  
Jeffrey J. Lechak, Board Member  
and Public Member

SEF/dah/vrm

Entered in the Journal AUG 27 2015

  
Barcy F. McNeal  
Secretary