

BEFORE

OHIO POWER SITING BOARD

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

ENTRY

The Administrative Law Judge finds:

- (1) In its October 7, 2009 motion, as supplemented by motion filed October 14, 2009, Union Neighbors United (UNU) requests that the deposition of Dr. Nissenbaum be admitted as evidence in lieu of live testimony at the hearing. UNU states that Dr. Nissenbaum is a practicing physician with the Northern Maine Medical Center in Fort Kent, Maine and will testify to the health impacts of wind turbine noise. UNU asserts that, as a result of Dr. Nissenbaum's medical duties as the only radiologist with the hospital, he is unable to travel to Ohio to testify. Further, Dr. Nissenbaum has informed UNU's counsel that he cannot and will not travel to Ohio. Counsel for UNU states that a replacement physician must be hired for Dr. Nissenbaum to cover Dr. Nissenbaum's duties and Dr. Nissenbaum is unable to hire a replacement physician for periods of less than 1 week (UNU Ex. A). UNU argues that, pursuant to Rule 4906-7-07(E)(13), Ohio Administrative Code (O.A.C.), depositions may be used in Board hearings as permitted in civil actions in courts. UNU argues that, pursuant to Rule 32(A)(3)(b) or (d), Ohio Rule of Civil Procedure (ORCP), UNU is entitled to use Dr. Nissenbaum's deposition at the hearing and cites three cases in support of its position. Further, UNU requests a ruling that any party be permitted to attend Dr. Nissenbaum's deposition by telephone.
- (2) On October 14, 2009, Buckeye Wind LLC, (Buckeye or applicant), the certificate applicant, filed a memorandum contra UNU's requests to admit the deposition of Dr. Nissenbaum in lieu of live testimony. Buckeye contends that UNU is offering Dr. Nissenbaum as its expert, not as a hostile witness, and, as such, UNU's reliance on Rule 32(A)(3), ORCP, is misplaced. Buckeye argues that there is no need to require Dr. Nissenbaum's attendance at the hearing by subpoena as

UNU is voluntarily offering his expert witness testimony. The applicant argues that UNU has the burden to show why Dr. Nissenbaum cannot testify in-person and the only reason offered is UNU's refusal to pay the cost of a replacement physician for one week. Buckeye notes that Dr. Nissenbaum will, however, be available for a deposition and telephonic cross-examination without arranging for a replacement physician.

- (3) By entry issued October 20, 2009, the parties to this proceeding were informed that the Administrative Law Judge (ALJ) required additional information before ruling on UNU's requests for clarification that no party is required to obtain written direct testimony from witnesses who are not within the calling party's control and in regards to the admission of Dr. Nissenbaum's deposition in lieu of live testimony. Accordingly, a telephone conference was conducted on Wednesday, October 21, 2009¹.
- (4) At the conference call, counsel for UNU stated that Dr. Nissenbaum is not its only witness on the health effects of noise from wind turbines. Counsel also stated that Dr. Nissenbaum is not under contract with UNU as an expert witness or consultant but volunteered to offer the testimony provided he would not be required to travel to Ohio to offer the testimony in-person.
- (5) At the conference call, counsel for Buckeye reiterated its position stated in its memorandum contra. Counsel for Buckeye also stated that the applicant did not plan to file a memorandum contra the motions to intervene filed by Champaign Telephone Company or the Piqua Shawnee Tribe.
- (6) Rule 4906-7-7(E)(13), O.A.C., states that depositions *may* be used in Board hearings to the same extent permitted in civil actions. The Board, however, as an administrative agency is not subject to strict compliance with the ORCP. Given that Dr. Nissenbaum is UNU's witness, although a voluntary expert witness, it is incumbent upon UNU to make the witness available for cross-examination at the

¹ The parties participating on the conference call were Buckeye, UNU (including counsel on behalf of the McConnells and Ms. Johnson jointly, UNU), Ohio Farm Bureau Federation, Urbana Country Club, Champaign County Commissioners and the townships of Goshen, Rush, Salem, Union, Urbana, and Wayne, the City of Urbana and Champaign Telephone Company. The representative for the Piqua Shawnee Tribe was notified of the conference call but did not call in to participate.

hearing, in-person. As such, the Board's subpoena powers are not applicable or necessary for a party's own expert witness. Following this reasoning, subsection (A)(3)(b) and (A)(3)(d) of Rule 32, ORCP, are not applicable as UNU argues. Nonetheless, to be fair to UNU the ALJ will consider Rule 32(A)(3)(g), ORCP, in this instance. Rule 32(A)(3), ORCP, states, in pertinent part:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: ...

(g) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

- (7) The ALJ finds that it is unreasonable to admit the deposition of Dr. Nissenbaum in lieu of live testimony at the hearing. As UNU admits, Dr. Nissenbaum is not UNU's only witness to offer testimony as to the health affect of wind turbines, but rather an additional witness who offered to provide testimony under the condition that he not be required to travel to the hear in Ohio to present live testimony. All other witnesses will be required to be available during the hearing. Given that Dr. Nissenbaum is not UNU's only witness on the health effects of wind turbines and the extra obligations that would be placed on the other parties to this proceeding, as well as the Board, to accommodate Dr. Nissenbaum, it is unreasonable to accept Dr. Nissenbaum's deposition in lieu of live testimony in this proceeding as UNU request. Dr. Nissenbaum must, like the other expert witnesses in this case, file his direct written testimony with the Board by no later than November 2, 2009, and be available for cross-examination during the hearing. Accordingly, UNU's request should be denied.
- (8) In its October 14, 2009 filing, UNU also requests clarification that no party be required to obtain written direct testimony from witnesses who are not within the calling party's control such that the witness was subpoenaed for hearing. UNU is correct that no party is required to file written testimony for its non-expert

witnesses that are not under the offering party's control. In such case, the parties are reminded that all motions for a subpoena must be filed with the Board no later than five days prior to the commencement of the hearing, Rule 4906-7-08, O.A.C. Further, the ALJ directs that any party who intends to call a witness, for whom direct written testimony will not be filed, file notice with the docketing division by October 27, 2009. The notice shall include the name of the witness, contact information and subject matter on which the witness will offer testimony.

It is, therefore,

ORDERED, That UNU's motion for the admission of Dr. Nissenbaum's deposition in lieu of live testimony be denied. It is, further,

ORDERED, That the parties comply with directives in Finding (8). It is, further,

ORDERED, That a copy of this entry be served upon Buckeye and its counsel, and all other interested persons of record.

THE OHIO POWER SITING BOARD




By: Greta See
Administrative Law Judge

GRJ
/ct

Entered in the Journal

OCT 21 2009



Renee J. Jenkins
Secretary