BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Install Electricity Generating Wind Turbines in Champaign County	)))))	Case No. 12-0160-EL-BGN

MEMORANDUM OF UNION NEIGHBORS UNITED, INC., ROBERT McCONNELL, DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO APPLICANT'S MOTION FOR WAIVER

Pursuant to O.A.C. § 4906-7-12(B)(1), Union Neighbors United, Inc., Robert McConnell, Diane McConnell, and Julia F. Johnson ("Prospective Intervenors") submit this memorandum in opposition to Applicant Champaign Wind, LLC's motion for a waiver of the one-year notice provision of R.C. § 4906.06(A)(6). Prospective Intervenors filed a Petition for Leave to Intervene in this matter on March 5, 2012, which petition is pending. Therefore, Prospective Intervenors are "parties" entitled to file a memorandum opposing Applicant's motion. O.A.C. § 4906-7-12(E).

Ohio Revised Code § 4906.06(A)(6) requires all applications for power siting certificates to be filed with the Board not less than one year before the planned date of commencement of construction. The Board may only waive this requirement "for good cause shown."

The crux of Applicant's waiver motion is that Champaign Wind wants to construct its facility sooner than the law allows:

> The Applicant intends to begin construction of the Facility as soon as it is authorized by the Power Siting Board. Without the waiver of the one-year notice provision, Champaign Wind will not be permitted to commence construction at that time.

Motion for Waiver at 4. This is the logical equivalent of a party requesting waiver of a filing deadline "because we want to file later." To argue for a waiver "because we want to construct as soon as possible," without more, is hardly the showing of good cause required by the statute. The United States Supreme Court has held that the requirement of good cause is not a mere formality, but is a "plainly expressed limitation" on a tribunal's authority. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) (interpreting Rule 34 of the Federal Rules of Civil Procedure). To fulfill the requirement of good cause demands a showing of specific facts justifying the relief sought. *Schultz v. Midtown Supermarket, Inc.*, 49 F.R.D. 94 (N.D. Ohio 1969). *See also Alltmont v. U.S.*, 177 F.2d 971, 978 (requiring showing of "special circumstances").

Applicant surmises that "failure to grant waivers of the one-year minimum [notice requirement] for this and similar projects *could impair*" attainment of the State's goals under its Alternative Energy Portfolio Standard (AEPS). Motion for Waiver at 4 (emphasis added). Applicant does offer any facts to bolster such speculation. To the contrary, the current status of the AEPS indicates there is no urgent need for additional generating capacity to satisfy immediate requirements.[1] According to recent testimony of Iberdrola Renewables, Inc. before the Ohio Senate, current supply for renewable energy credits is greater than demand "in most REC markets in the country, including Ohio's." Testimony of Eric Thumma, Iberdrola Renewables, at 2 (April 24, 2012) (attached as Exhibit A). In fact, a recent draft report from the Public Utilities Commission of Ohio states that Ohio actually exceeded its in-state, non-solar obligations under the AEPS through 2010. Public Utilities Commission, *Alternative Energy Portfolio Standard Report*, Case No. 12-1100-EL-ACP at 11 (Draft April 12, 2012). Therefore, contrary to Applicant's speculative assertion, requiring Applicant to comply with the one-year

[1] Although Applicant cites the 12.5% renewable energy goal applicable in 2025, the goal for 2013 is only 2%, half of which may be obtained from generators outside of Ohio. O.A.C. § 4901:1-40-03.

minimum notice requirement of R.C. § 4906.06(A) will not threaten the State's attainment of the AEPS goals.

Finally, Applicant suggests (at 4) that the one-year notice requirement is not relevant to applications by independent power producers. However, none of the cases cited by Applicant hold that the one-year notice requirement is inapplicable to independent power producers,[2] nor does the statute make any distinction between independent power producers and public utilities. Applicant's unsupported assertions as to the rationale for the one-year notice requirement are irrelevant.

Moreover, granting Applicant's request would defeat an important benefit of the one-year requirement by allowing Applicant to complete or substantially complete construction before the Ohio Supreme Court considers any appeal that the Prospective Intervenors may take from the decision of the Board. R.C. § 4906.04 provides that no person may "commence to construct" a major utility facility without "first" having obtained a certificate. Implicit in this requirement is the understanding that the potential harmful impacts of a major new facility must be adequately evaluated *before* construction, when adequate protective features can be most effectively incorporated into the project's design. Because Ohio Supreme Court review could result in design changes, such as the disapproval of some or all turbine sites, Applicant should not be allowed to start construction early in an attempt to circumvent or complicate the Court's review. The Prospective Intervenors would contend that early construction does not justify any limitation on the Court's review. However, Applicant may attempt to persuade the Court to limit its review on the grounds that it had already commenced construction pursuant to a waiver and Certificate granted by the Board, and that subsequent alteration of the Certificate on appeal or

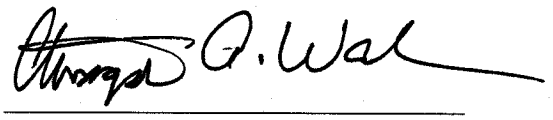
[2] In *In Re Buckeye Wind LLC*, the ALJ acknowledged identical arguments of Applicant's counsel supporting a waiver. Case No. 08-666-EL-BGN (Entry July 31, 2009). However, the ALJ did not adopt those arguments as the basis for her ruling in that case.

reconsideration would impair Applicant's capital investment. The Board should not grant a waiver that encourages Applicant to try to circumvent an effective review of the Certificate.

If Applicant wished to start construction earlier, it should have submitted its application earlier. The Board should not grant a waiver prejudicing the public interest in order to compensate for Applicant's lack of diligence.

In essence, Applicant is seeking a waiver of the timing requirement of R.C. § 4906.06(A) simply because it wants to get an early start on construction. That is not the showing of specific facts and special circumstances necessary to demonstrate good cause for a waiver. For the Power Siting Board to grant a waiver without justification would render the one-year notice requirement a mere formality and would, as a practical matter, eliminate the requirement altogether. Because Applicant has failed to demonstrate good cause, its motion for waiver should be denied.

Respectfully submitted,



Christopher A. Walker (0040696)
Van Kley & Walker, LLC
137 North Main Street, Suite 316
Dayton, Ohio 45402
(937) 226-9000 (telephone)
(937) 226-9002 (facsimile)
Email: cwalker@vankleywalker.com

Jack A. Van Kley (0016961)
Van Kley & Walker, LLC
132 Northwoods Blvd., Suite C-1
Columbus, Ohio 43235
(614) 431-8900 (telephone)
(614) 431-8905 (facsimile)
Email: jvankley@vankleywalker.com

CERTIFICATE OF SERVICE

I hereby certify that, on May 24, 2012, a copy of the foregoing Memorandum in Opposition to Motion for Waiver was served by electronic mail on Howard Petricoff, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43215, mhpetricoff@vorys.com, and Michael J. Settineri, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43215, mjsettineri@vorys.com.

Christopher A. Walker

EXHIBIT A

Ohio General Assembly
Ohio Senate
Energy and Public Utilities Committee
April 24, 2012

Testimony of Eric Thumma
Director, Policy and Regulatory Affairs
Iberdrola Renewables, Inc.

Introduction: Ohio's Alternative Energy Resource Standard ("AERS") has been a tremendous success. In 2011, according to The Cleveland Plain Dealer, the state's two wind energy projects, Blue Creek and Timber Road II, in Van Wert and Paulding Counties, were the largest and sixth largest capital investments in Ohio totaling $775 million. It is understandable that there would be momentum to try to replicate the same massive success with other energy technologies as proposed in Senate Bill 315. Unfortunately, as we have learned from our experience in renewable energy markets across the country, energy resource standards are designed to achieve a very specific purpose: to encourage a discreet set of resources, mostly always renewables, and when changes, particularly large unanticipated changes, are proposed to these standards, they fail. The purpose of this presentation is to demonstrate why this is the case and why SB 315, while undoubtedly well intentioned, will not achieve its objective of encouraging investments in combined heat and power and waste energy recovery systems.

Slide One: To start, we will do a quick review of how the AERS market functions, focusing on the means of trading and tracking a renewable energy credit or REC. One megawatt-hour ("MWh") of eligible generation earns one REC. To be in compliance with the AERS, Ohio load-serving entities must purchase RECs up to their statutory requirements based on their share of Ohio customers. This is tracked through a system called PJM Generator Attributes Tracking System or GATS and is monitored by the PUCO. Most importantly, for this presentation's purpose, RECS provide an incremental revenue stream, in addition to the value of wholesale

energy and federal tax credits, which is necessary to make renewable energy projects economical. **We would assume that there is a view that the resources endorsed by SB 315 also need an incremental revenue stream in order to be economical and, as such, will only benefit from SB 315 if Ohio's REC market functions successfully to create meaningful REC value.**

Slide 2: Why does any project need RECs? New electricity projects, including renewable energy projects, must recover their fixed capital costs and their variable fuel and operating and maintenance costs and achieve a return on their investment. Existing electricity projects revenues must recover only their fuel costs (if any) and operating maintenance costs. The key point is that for most existing power plants, fixed capital costs have been recovered directly from rate-payers through government-guaranteed rates of return for investor owned utilities. RECs are necessary for new renewable energy projects because these projects do not have access to government guaranteed rates-of-return, but like all power plants, must still have a mechanism to recover their fixed capital costs. Today's wholesale electricity prices are not high enough for **any new** electric generator to recover their costs. In an efficient market, a RECs value will compensate a new renewable energy project for the difference between that new project's total costs and the amount of value it can recover through the wholesale value of energy.

Slide 3: I have tried to demonstrate this visually on slide 3. RECs are necessary to support the economics of new projects because: (1) Wholesale power prices are now set competitively by existing power plants which had the advantage of being financed through guaranteed rate-payer returns. To reiterate, RECs fill the funding gap between new project cost and the wholesale price of power. (Description of visual example)

Slide 4: The value of a REC is determined by short-term supply and demand. Demand is fixed. It is set by the percentage requirements that are part of SB 221. Each load serving entity must acquire the required percentage of RECs based on its share of retail electricity customers. As a result, REC prices respond largely to changes in supply and can be volatile. When demand is greater than supply REC prices will rise and tend to move towards the value of the alternative compliance payment. When supply is greater than demand, REC prices decline and tend to fall rapidly towards zero. This is the current condition of most REC markets in the country including Ohio's. As mentioned, an efficient REC market will achieve a long-term price that is equal to the incremental cost of a new renewable energy project. In a market which largely relies on short-term REC procurement, like Ohio, that means that average prices over time must balance and so today's low prices must be made-up by higher prices in the future and vice-versa. The challenge as it relates to SB 315 is that large infusions of unanticipated supply immediately upset this balance and cause REC prices in the short-term and potentially for much longer to fall even faster towards zero. This creates a "lose-lose" situation in which neither new renewable energy or co-gen and CHP projects are encouraged.

Slide 5: (Description of the Chart)

Slide 6: To reiterate some of the key takeaways from this presentation: (1) Stable, reliable, REC revenues are required for new renewable energy projects to be economical. Regulatory certainty is essential for REC markets to function effectively and efficiently and for investors to be willing to participate in the market; (2) In a balanced market, REC value will be equal to the difference between project costs and the wholesale price of power; (3) In the short term, supply and demand fundamentals determine REC prices; (4) Supply surpluses, particularly unexpected supply surpluses, will depress prices and investment, and; (5) An oversupplied REC market with unnaturally low prices will not support investment in new renewables or combined heat and power and waste heat recovery projects.

Conclusion: SB 315, while undoubtedly well intentioned, will fundamentally disrupt the supply-demand in Ohio's REC market. As a result, we would expect disruption in future investments like the $775 million that was invested in Northwestern Ohio last year by the wind industry.

The impact of this policy change is very significant. In order to ensure that ***both*** renewables and co-generation are robustly encouraged, we respectfully request you consider pulling this issue out of SB 315 and taking time to fully examine all implications and establish the best course to proceed in a separate piece of legislation.

Tomorrow, my colleague Dayna Baird will present ideas for promoting the continued success of renewable energy investments while positively encouraging investments in combined heat and power and waste heat recovery projects.

Summary: Memorandum in Opposition to Applicant's Motion for Waiver electronically filed by Mr. Jack A Van Kley on behalf of Union Neighbors United and Johnson, Julia Ms. and McConnell, Robert Mr. and McConnell, Diane Ms.