

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of) Champaign Wind LLC, for a Certificate) to Construct a Wind-Powered Electric) Generating Facility in Champaign) County, Ohio)	Case No. 12-0160-EL-BGN
---	--------------------------------

**RESPONSE OF CHAMPAIGN WIND LLC TO THE
AMENDED PETITION TO INTERVENE BY UNION NEIGHBORS UNITED, INC.,
ROBERT McCONNELL, DIANE McCONNELL, AND JULIA JOHNSON**

On June 8, 2012, Union Neighbors United, Inc. along with its members Robert McConnell, Diane McConnell and Julia Johnson (collectively “UNU”) filed an amended petition for leave to intervene in this proceeding. UNU raises a number of concerns about the proposed facility in its amended petition, and states that noise, shadow flicker, visual impacts and property values will have “negative impacts on UNU members and the individual Petitioners.” Amended Petition for Leave to Intervene (“Amended Petition”), at 5. UNU claims these issues warrant its intervention, that no other party represents its interests, that it will contribute to a just and expeditious resolution of the proceeding, and its participation in the case will not present undue delay or unjust prejudice.

Champaign Wind LLC, a wholly owned subsidiary of EverPower Wind Holdings, Inc., is not opposed to UNU’s participation in this proceeding provided UNU’s participation is limited to the issues for which it has claimed an interest. A review of the petition shows the primary issues to be noise, shadow flicker, visual impacts and property values associated with the proposed certification of 56 turbines in Champaign County. *Id.* at 5–7. As stated by UNU, “[f]or all of the above reasons, UNU and the individual Petitioners have a direct and substantial

interest in these proceedings due to the potential aesthetic, safety, health, nuisance, and economic impacts of the wind project on their residences, land, and community.” *Id.* at 7.

Any entry permitting UNU’s participation in this proceeding, however, should not be unlimited so as to permit UNU to litigate the general policy issues it raised and fully litigated in the *Buckeye Wind LLC* proceeding. *See In re Buckeye Wind LLC*, Case No. 08-666-EL-BGN. UNU and the same individual petitioners raised general legal and policy issues in that proceeding, including issues such as whether wind facilities displace higher emission generating facilities; that wind turbines cause discomfort, sleep deprivation and health issues; and that low frequency noise standards should be put in place. *See In re Buckeye Wind LLC*, Case No. 08-0666-EL-BGN, Post Hearing Brief of Intervenors, Jan. 20, 2012, at ii-iv. Allowing UNU to relitigate those policy issues would merely be a collateral attack on a valid order of the Board which has been affirmed by the Supreme Court of Ohio. *See In re Application of Buckeye Wind, L.L.C.*, (2012) 131 Ohio St. 3d 449, 2012-Ohio-8978.

The doctrine of collateral estoppel is intended to prevent the relitigation of issues from undermining the appeal process. As noted by the Supreme Court of Ohio, the doctrine precludes the relitigation of a point of law or fact between the same parties or their privies that has been ruled upon by a court or an administrative agency. *See Office of Consumers’ Counsel v. PUCO et al.*, (1985) 16 Ohio St. 3d 9, 10. The doctrine applies in the matter at bar because the Board ruled on the policy issues advocated by UNU in the *Buckeye Wind* proceeding, such as claims of regulatory takings and the need for low frequency noise standards. The doctrine also applies because Champaign Wind and Buckeye Wind LLC may be considered the same party for purposes of the application of collateral estoppel, as both companies are wholly owned subsidiaries of EverPower. *See Trautwein v. Sorgenfrei*, (1979) 58 Ohio St. 2d 493, 500 (“[i]n

ascertaining whether there is an identity of such parties a court must look behind the nominal parties to the substance of the cause to determine the real parties in interest”).

The Board may also consider Champaign Wind and Buckeye Wind as being in privity when applying the doctrine of collateral estoppel. As stated by the Supreme Court of Ohio, “[w]e have previously stated that ‘what constitutes privity in the context of res judicata is somewhat amorphous.’” *Kirkhart v. Keiper*, (2004) 101 Ohio St. 3d 377, 2004 Ohio 1496, 805 N.E.2d 1089, at ¶8, *quoting Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 2000 Ohio 148, 730 N.E.2d 958. “We have applied a broad definition to determine whether the relationship between the parties is close enough to invoke the doctrine.” *Id.* “Thus, ‘a mutuality of interest, including an identity of desired result,’ may create privity.” *Id.* Considering EverPower’s common ownership of Champaign Wind and Buckeye Wind, there is little doubt that a mutuality of interest exists between all three entities.

The Board may also take note that allowing UNU to relitigate general policy issues from the *Buckeye Wind* case will lead to unnecessary delay and undue prejudice, factors that weigh against intervention. *See* OAC Rule 4906-7-04(B). In *Buckeye Wind*, UNU argued that the facility would not displace higher emission generating facilities; that turbines would cause discomfort, sleep deprivation and health issues; that turbines should be 1.25 miles from nonparticipating residences; that inadequate setbacks result in a taking, that low frequency noise standards should be put in place; that wildlife will be killed; that more bird assessments should be done; that the environmental damage of the project will exceed the environmental benefits; that no evidence existed that the project offers socioeconomic benefits; that property values will be reduced and that more stringent decommissioning standards should be in place. *See In re Buckeye Wind LLC*, Case No. 08-0666-EL-BGN, Post Hearing Brief of Intervenors, Jan. 20,

2012. UNU summarized its arguments in a 115 page initial brief, resulting in a 113 page reply brief by Buckeye Wind, and a 106 page Opinion, Order and Certificate by the Board. *See In re Buckeye Wind LLC*, Case No. 08-0666-EL-BGN (filings of Jan. 20, 2010 and Opinion, Order and Certificate dated March 22, 2010.),

UNU's amended petition presents a more limited attack on the Buckeye Wind II project, listing specific concerns with noise, shadow flicker, visual impacts and property values. Amended Petition, at 5–7. Although Champaign Wind disputes all of UNU's claims on noise, shadow flicker, visual impacts and property values, it is not opposed to UNU's participation in this proceeding on those issues. UNU should not, however, be granted unlimited intervention in this proceeding because as noted above, that will simply open the door for UNU to collaterally attack the Board's decisions on the issues raised in the *Buckeye Wind* case. Witnesses would be forced to return to Columbus to testify on the same topics that were litigated in the *Buckeye Wind* proceeding; the hearing would be extended unnecessarily and all parties involved would incur unnecessary expenses. UNU's full participation in this proceeding would not contribute to a just and expeditious resolution of the proceeding. Instead, it would create unnecessary delay in this proceeding and impose undue prejudice on all of the parties.

Accordingly, Champaign Wind is not opposed to UNU and the individual petitioners' intervention in this proceeding provided the Board or Administrative Law Judge limits their intervention and participation in this case to the matters raised in UNU's amended petition. The order granting UNU conditional intervention and participation should also direct UNU and the

individual petitioners to consolidate discovery, direct testimony and cross examination to avoid undue prejudice and unnecessary delay.

Respectfully submitted,

s/ Michael J. Settineri

M. Howard Petricoff (0008287)

Michael J. Settineri (0073369)

Miranda R. Leppla (0086351)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

P.O. Box 1008

Columbus, Ohio 43216-1008

(614) 464-5462

(614) 719-5146 (fax)

mhpetricoff@vorys.com

mjsettineri@vorys.com

mrleppla@vorys.com

Attorneys for Champaign Wind LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon the following persons this 25th day of June, 2012.

Jack A. Van Kley
Van Kley & Walker, LLC
132 Northwood Blvd., Suite C-1
Columbus, Ohio 43235
jvankley@vankleywalker.com

Christopher A. Walker
Van Kley & Walker, LLC
137 North Main Street, Suite 316
Dayton, Ohio 45402
cwalker@vankleywalker.com

Chad A. Endsley
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendslev@ofbf.org

s/ Michael J. Settineri

Michael J. Settineri

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/25/2012 5:03:21 PM

in

Case No(s). 12-0160-EL-BGN

Summary: Response of Champaign Wind LLC to Amended Petition to Intervene by Union Neighbors United, Inc., Robert McConnell, Diane McConnell, and Julia Johnson electronically filed by Mr. Michael J. Settineri on behalf of Champaign Wind LLC