

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 ) Case No. 12-160-EL-BGN  
Generating Facility in Champaign )  
County, Ohio. )

ENTRY

The administrative law judge finds:

- (1) On January 6, 2012, Champaign Wind, LLC (Champaign or Applicant) filed, with the Ohio Power Siting Board (Board), a preapplication notification letter pursuant to Rule 4906-5-08(A), Ohio Administrative Code (O.A.C.), regarding its intent to file an application for a certificate to site a wind-powered electric generation facility in Champaign County, Ohio.
- (2) On March 5, 2012, pursuant to Rule 4906-7-04(A)(2), O.A.C., Diane McConnell, Robert McConnell, Julia Johnson, and United Neighbors United, Inc. (UNU), an Ohio nonprofit corporation (collectively, Petitioners), filed a collective petition for leave to intervene.
- (3) Thereafter, on March 20, 2012, Champaign filed a memorandum contra Petitioners' motion to intervene.
- (4) On March 27, 2012, Petitioners filed a reply to Champaign's memorandum contra.
- (5) On May 9, 2012, Applicant filed a motion for waivers of the one-year notice period required by Section 4906.06(A)(6), Revised Code, the requirement that it provide certain cross-sectional views and locations of borings, pursuant to Rule 4906-17-05(A)(4), O.A.C., and the requirement that it submit a map of the proposed electric power generating site showing the grade elevations where modified during construction, pursuant to Rule 4906-17-05(B)(2)(h), O.A.C.
- (6) On May 15, 2012, Champaign filed its application. The application was filed pursuant to the provisions of Chapter

4906-17, O.A.C., which encompass the certificate application requirements for wind-powered electric generation facilities. The proposed project consists of up to 56 wind turbine generators, access roads, electrical interconnection, construction staging areas, an operations and maintenance facility, substation, and up to four meteorological towers (Buckeye Wind II project). Each turbine will have a nameplate capacity of 1.6 to 2.5 megawatts (MW), for a total generating capacity of 89.6 to 140 MW. The Buckeye Wind II project is expected to operate at an annual capacity factor of 30 to 35 percent, to collectively generate approximately 235,000 to 429,000 megawatt hours (MWh) of electricity each year. As proposed, the Buckeye Wind II project will be located on approximately 13,500 acres of leased private land in Goshen, Rush, Salem, Union, Urbana, and Wayne Townships. In conjunction with the application, Champaign filed a motion for protective order.

- (7) On May 17, 2012, Staff filed a memorandum stating that it does not object to Champaign's motion for waivers of Section 4906.06(A)(6), Revised Code, and Rules 4906-17-05(A)(4) and 4906-17-05(B)(2)(h), O.A.C.
- (8) On May 24, 2012, Petitioners filed a memorandum contra Champaign's motion for waiver of Section 4906.06(A), Revised Code.
- (9) Thereafter, on May 30, 2012, Petitioners filed a memorandum in response to Champaign's motion for protective order.
- (10) On May 31, 2012, Champaign filed a reply to Petitioners' memorandum contra Champaign's motion for waiver.
- (11) On June 6, 2012, Champaign also filed a response to Petitioners' memorandum in response to Champaign's motion for protective order.
- (12) On June 8, 2012, Petitioners filed an amended petition for leave to intervene. Also on June 8, 2012, the Ohio Farm Bureau Federation (Farm Federation) filed a motion to intervene.
- (13) On June 25, 2012, Champaign filed a response to Petitioners' amended petition for leave to intervene.

- (14) On June 29, 2012, Champaign filed an amended motion for protective order.
- (15) On July 2, 2012, Petitioners filed a reply in support of their amended petition for leave to intervene.
- (16) Pursuant to Rule 4906-5-05(A), O.A.C., within 60 days after receipt of an application for a major utility facility, the chairman of the Board shall notify the applicant of the acceptance or rejection of the application as complete. Accordingly, on July 13, 2012, the Board notified Champaign that its application was sufficiently complete to permit the Board's Staff (Staff) to commence its review and investigation of the application. Further, the July 13, 2012, letter directed Champaign to serve appropriate government officials and public agencies with copies of the complete, certified application.
- (17) On July 20, 2012, Champaign filed a certificate of service of its accepted and complete application, in accordance with the requirements of Rule 4906-5-07, O.A.C. The effective date of the filing of the application shall be August 1, 2012.

#### Motions to Intervene

- (18) Initially, the administrative law judge (ALJ) will address the pending motions to intervene.
- (19) In their original motion to intervene, Petitioners state that UNU is a nonprofit Ohio corporation formed for the purpose of addressing issues related to the placement of wind turbines in Champaign County, Ohio. Petitioners further state that UNU's members are property owners who own real estate and reside within the footprint of the Buckeye Wind II project. Among UNU's members are Julia Johnson, Robert and Diane McConnell, Larry and Irene Peace, Samuel and Glenda Rodriguez, James and Anita Bartlett, and Larry and Linda Gordon, who Petitioners assert reside within the footprint of the project. Accordingly, Petitioners argue that they have a direct and substantial interest in this matter, in light of the potential visual, aesthetic, safety, and nuisance impacts of the wind project on their residences, land, and community. Further, Petitioners state that no other party can represent their interests and that granting intervenor status to

Petitioners will not unduly delay the proceedings or cause unjust prejudice to Champaign as the applicant. Finally, Petitioners assert that, as a result of their substantial knowledge of the environmental and community impacts of commercial scale wind projects, their participation in this case will contribute to a balanced assessment of the Buckeye Wind II project and to a just and expeditious resolution of the proceeding.

- (20) In its initial memorandum contra Petitioners' original motion to intervene, Champaign argues that Petitioners' motion provides no specific grounds for intervention in the proceedings due to the fact that Champaign had not yet filed its application in the proceedings. In its reply to Champaign's memorandum contra, Petitioners argue that Rule 4906-7-04(A)(2), O.A.C., does not prohibit petitions prior to the filing of the application and that, further, prohibiting petitions before the application is filed would allow an applicant to file unopposed procedural motions prior to filing its application.
- (21) Thereafter, in their amended motion to intervene, Petitioners state that they intend to incorporate relevant information from the application that was not available at the time they filed their initial petition. More specifically, Petitioners aver that all of UNU's members live or own property within 1.25 miles of a proposed Champaign turbine site.
- (22) In its response to Petitioners' amended motion to intervene, Champaign contends that it is not opposed to Petitioners' participation in the proceeding; however, Champaign argues that Petitioners' participation should be limited to the issues for which Petitioners have claimed an interest—including noise, shadow flicker, visual impacts, and property values, associated with the proposed certification of 56 turbines in Champaign County. Champaign contends that Petitioners should not be permitted to litigate the general policy issues they raised and fully litigated in *In re Buckeye Wind LLC*, Case No. 08-666-EL-BGN (*Buckeye I*), including emission issues, health issues, and low-frequency noise standards. Champaign argues that, to allow relitigation of these issues would permit a collateral attack on the valid order of the Board in *Buckeye I* that has been affirmed by the Supreme

Court of Ohio in *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869.

- (23) In their reply to Champaign's collateral estoppel argument, Petitioners respond that Champaign has failed to demonstrate all of the elements of collateral estoppel required to restrict intervention. Specifically, Petitioners argue that Champaign has failed to demonstrate that the precluded issue is identical to the issue involved in the prior suit, as required by *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 197, 443 N.E.2d 978 (1983). Petitioners argue that this element cannot be demonstrated because *Buckeye I* involved approval for 52 wind turbines, and the current application for the Buckeye Wind II project seeks approval for construction of 56 more turbines that were not proposed, litigated, or approved in *Buckeye I*. Additionally, Petitioners stress that, while the proposed 56 turbines are located in the same vicinity as the turbines in *Buckeye I*, they are proposed to be located on different sites that were not, and could not have been, evaluated in the *Buckeye I* proceeding.
- (24) In its request for intervention, the Farm Federation contends that it is a state-wide, nonprofit organization with over 1,400 families in Champaign County. Its members include residents, farms, and small businesses in Champaign County. Further, the Farm Federation states that many of its members are in farm and agribusiness activities, with some in large industries and manufacturers, and some in small business enterprises. The Farm Federation states that its members have an interest in effective wind energy development, wind leasing agreements, and assurances that project construction activities adhere to applicable soil and water conservation and air quality standards, as well as other environmental considerations. Finally, the Farm Federation states that its participation will not cause undue delay, will not unjustly prejudice any existing party, and will contribute to a just and quick resolution of the issues and concerns raised in this case. No party opposed the Farm Federation's request to intervene.
- (25) The ALJ finds that, pursuant to Rule 4906-7-04, O.A.C., Petitioners and the Farm Federation have substantial and direct interests in the proposed project. Additionally, the ALJ finds that Petitioners and the Farm Federation will contribute

to the just and expeditious resolution of the issues in this matter. Accordingly, Petitioners' and the Farm Federation's motions for intervention should be granted.

Further, the ALJ declines to limit Petitioners' participation as requested by Champaign at this time. The Supreme Court of Ohio has held that a party "may not invoke collateral estoppel without showing that precisely the same issue was litigated in the prior action." *Goodson*, 2 Ohio St.3d at 197. Here, as argued by Petitioners, Champaign's application for the Buckeye Wind II project involves 56 new turbines and sites that were not evaluated in *Buckeye I*. Consequently, the ALJ finds that it is not appropriate to limit Petitioners' participation by the doctrine of collateral estoppel, at this time. However, the ALJ is mindful of the issues raised by Champaign and notes that Champaign is free to renew its collateral estoppel argument as to specific issues that may arise during this proceeding.

#### Motion for Protective Order

- (26) Next, the ALJ will discuss Champaign's motion for protective order. In its initial motion for protective order, Champaign requests that the Board protect from public disclosure portions of pages 53 to 56 of the application. Champaign explains that the information redacted from these pages includes financial data representing estimated capital and intangible costs, present worth and annualized capital costs, operation and maintenance costs, and the estimated monthly loss due to one month's delay in construction. In addition, Champaign requests that the Board protect from public disclosure the safety manual for a Gamesa wind turbine being considered for the project. Champaign explains that Gamesa provided the safety manual to Champaign on a confidential basis. Champaign asserts that public disclosure of this confidential and sensitive information will have a deleterious effect on competition. Champaign argues that the information fits within the definition of a "trade secret" pursuant to Section 1333.61(D), Revised Code. Further, Champaign notes that, where state or federal law prohibits the release of information and where nondisclosure is not inconsistent with the purpose of Title 49 of the Revised Code, the Board may issue an order to protect the confidentiality of

the filed information, and that the Board and Staff have full access to the unredacted information. Finally, Champaign contends that no purpose would be served by public disclosure of the redacted information.

- (27) In its amended motion for protective order, Champaign states that it received Gamesa's permission to file a redacted copy of the turbine manual in the public docket. Champaign specifies that the information redacted from the manual consists of drawings of turbine components, figures 2-6, 8-9, and 20-21. Champaign contends that this redacted information constitutes trade secrets and public disclosure of this confidential and sensitive information would be detrimental to Gamesa's ability to compete.
- (28) The ALJ has reviewed the information Champaign filed under seal, including, specifically, the redacted financial data portions of pages 53 to 56 of the application, as well as portions of the Gamesa turbine safety manual filed under seal, specifically figures 2-6, 8-9, and 20-21. After reviewing the information filed under seal, the ALJ finds that the redacted information constitutes trade secret information pursuant to Section 1333.61, Revised Code. Accordingly, Champaign's request for a protective order is reasonable and should be granted. Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry or February 1, 2014. Until that date, the docketing division should maintain, under seal, the information filed confidentially, including the redacted portions of pages 53 to 56 of the application, as well as the redacted figures 2-6, 8-9, and 20-21, of the Gamesa turbine safety manual.
- (29) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Champaign wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Board may release this information without prior notice to Champaign.

Motion for Waivers

- (30) Next, the ALJ will turn to Champaign's waiver requests. As stated above, Petitioners filed a memorandum contra Champaign's motion for various waivers of filing requirements. Champaign argues in its reply to the memorandum contra that Petitioners, as intervenors, lack standing to argue against the applicant's request for waiver of the standard filing requirements. The Board has previously found that an intervenor in a Board proceeding lacks standing to oppose the grant or denial of a waiver request, as that decision is in the sole discretion of the Board. *Buckeye I*, Case No. 08-666-EL-BGN, Entry (July 31, 2009) at 8. However, in *Buckeye I*, the Board acknowledged that it has been the Board's practice to consider an intervenor's arguments in opposition to a motion for waivers. *Id.* at 8-9. Accordingly, the ALJ will consider Petitioners' arguments in consideration of Champaign's waiver request.
- (31) Among the requests for waivers filed by Champaign, the applicant requests that the one-year advance filing requirement be waived. Champaign contends that the one-year requirement was established with regard to electric generation facilities of public utilities where the financial risk of such facilities is determined under Section 4909.18, Revised Code. However, in this case, Champaign argues that the proposed facility is a merchant generation facility, where the financial risk rests with the nonutility owner; and, therefore, the reasoning behind the one-year time frame does not apply. Further, Champaign states that it intends to begin construction of the wind-powered electric generation facility as soon as it is authorized by the Board. Without waiver of the one-year requirement, Champaign states that it would not be authorized to commence construction as soon as possible. Finally, Champaign notes that the Board has routinely waived the one-year notice requirement for merchant facilities.
- (32) Staff does not contest the waiver of the one-year advance filing requirement.
- (33) In its memorandum contra, Petitioners contend that the Board should deny Champaign's motion for waiver of Section 4906.06(A), Revised Code, because Champaign has failed to



demonstrate good cause. Specifically, Petitioners argue that Champaign's argument that failure to grant the waivers could impair attainment of the state's alternative energy portfolio standards (AEPS) lacks merit, because, according to Petitioners, the current status of the AEPS indicates that there is no urgent need for additional generating capacity to satisfy immediate requirements and because current supply for renewable energy credits is greater than demand. Further, Petitioners argue that Champaign cites no cases in support of its assertion that the one-year notice requirement is not relevant to applications by independent power producers. Finally, Petitioners contend that granting Champaign's request for waiver would defeat the important benefit of the one-year requirement by allowing Champaign to complete or substantially complete construction before the Ohio Supreme Court considers any appeal that Petitioners might take from the Board's decision.

- (34) In its reply to Petitioners' memorandum contra, Champaign initially argues that Petitioners lack standing to oppose Champaign's motion for waiver pursuant to *Buckeye I*, Case No. 08-666-EL-BGN, Entry (July 31, 2010). Further, Champaign argues that, even if Petitioners had standing, their opposition to the one year-notice requirement waiver request is unfounded as the Board has a long history of granting these waivers in order to allow applicants to commence construction as soon as possible. See *In re AEP Ohio Transmission Company*, Case No. 11-1313-EL-BSB, Entry (September 27, 2011); *In re Heartland Wind LLC*, Case No. 09-1066-EL-BGN, Entry (December 11, 2009); *In re Sun Coke Company*, Case No. 04-1254-EL-BGN, Entry (April 26, 2005); *In re Paulding Wind Farm LLC*, Case No. 09-980-EL-BGN, Entry (February 23, 2010). Additionally, Champaign contends that, although Petitioners state that Ohio exceeded its in-state, nonsolar obligations under the AEPS for 2010, the project is not scheduled to be constructed until 2013, and there is no evidence that a sufficient source of renewable energy credits exists for 2013 and beyond. Next, Champaign responds to Petitioners' claim that no legal authority exists supporting Champaign's claim that the one-year requirement is inapplicable to independent power producers by noting that the notice requirement was to ensure review of projects that

could put ratepayers at financial risk, but that the financial risk of this project lies with the company, not the public.

- (35) Section 4906.06(A)(6), Revised Code, requires the application for a certificate to construct a facility to be filed with the Board not less than one year nor more than five years prior to the planned date of commencement construction. The statute further provides that either period may be waived for good cause shown. The ALJ finds that Petitioners' argument that Champaign's request for the waiver should be denied on the basis that there is no urgent need for additional generating capacity to satisfy immediate requirements because current supply for renewable energy credits is greater than demand is misguided. As Champaign points out, the Buckeye Wind II project is not scheduled to be constructed until 2013. As there is no evidence that supply for renewable energy credits will be greater than demand in 2013, the ALJ cannot find that there is no urgent need for additional generating capacity. Further, Rule 4906-1-03, O.A.C., provides that, where good cause is shown, the Board or ALJ may permit departure from Chapters 4906-01 to 4906-17, O.A.C., unless prohibited by statute. Section 4906.06(A)(6), Revised Code, specifically allows waiver of the one-year notice requirement. Therefore, as to Champaign's request to waive the one-year advance notice requirement, the ALJ finds that the request for waiver is reasonable. Accordingly, Champaign's request to waive that aspect of Section 4906.06(A), Revised Code, should be granted.
- (36) Next, Champaign requests a waiver from certain aspects of Rule 4906-17-05(A)(4), O.A.C., to the extent that the rule requires provision of certain cross-sectional views and locations of borings. Champaign states that it will provide responsive information to this requirement when final selection of ground and road borings are made.
- (37) Staff does not oppose the waiver of the specified aspects of Rule 4906-17-05(A)(4), O.A.C., as long as Staff is provided with both cross-sectional views and test boring data for review prior to the determination of final locations for turbine foundations and other project-related features. Petitioners' memorandum contra does not address this waiver request of Champaign.

- (38) Unlike the siting process for a traditional generation facility, a commercial-scale wind facility includes specific siting for numerous turbines. Accordingly, the ALJ finds that, given that the applicant has proposed to include, as a part of this project, 56 wind turbines, it would be more efficient to require Champaign to provide the cross-sectional views and test boring information once the locations for the turbines have been determined. Accordingly, Champaign's request for a waiver of Rule 4906-17-04(A)(4), O.A.C., should be granted.
- (39) Applicant requests a waiver of the requirement, pursuant to Rule 4906-17-05(B)(2)(h), O.A.C., that it submit a map of the proposed electric power generating site showing the grade elevations where modified during construction, on the basis that a wind turbine sits on a small base and the impact of grading will be minimal and possibly unknown until after construction of the pedestal. In lieu of compliance with the rule, Champaign agrees to generate proposed contours/grade modifications during preparation of the facility construction drawings, which will be provided to Staff when available.
- (40) Staff states that it does not oppose Champaign's waiver of the requirements in Rule 4906-17-05(B)(2)(h), O.A.C. Staff states that, rather than provide a detailed map, Champaign may provide a description of the standard grade elevations that will occur across the project when constructing all project components. Petitioners' memorandum contra does not address this portion of Champaign's request for waivers.
- (41) The ALJ acknowledges that, in some cases, it is more efficient for the applicant to file information regarding the modification of grade elevation to construct some of the specific turbines after siting for the project has been approved and the turbine locations have been more definitively determined. In light of this, the ALJ finds that Champaign's request for waiver of the requirement to submit grade elevation layout information pursuant to Rule 4906-17-05(B)(2)(h), O.A.C., should be granted, contingent upon the submission of the grade elevation modification information to Staff during preparation of the facility construction drawings.
- (42) The ALJ clarifies that, although certain of Champaign's request for waivers from the above-specified filing

requirements are being granted in this entry, this waiver ruling does not preclude Staff from requesting the waived information during its review or thorough discovery in this proceeding.

- (43) At this time, the ALJ finds that a local public hearing in this matter shall be held on October 25, 2012, at 6:00 p.m., at Triad High School Auditoria, 8099 Brush Lake Road, North Lewisburg, Ohio 43060. The adjudicatory hearing shall commence on November 8, 2012, at 10:00 a.m., in Hearing Room 11-C, at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793.
- (44) Additionally, the ALJ finds that petitions to intervene in this proceeding will be accepted by the Board up to 30 days following publication of the notice required by Rule 4906-5-08(C)(1), O.A.C., or by September 17, 2012, whichever is later.
- (45) Champaign should issue public notices of the application and the hearings, in accordance with Rule 4906-5-08, O.A.C. As part of the information to be included in the notices, as required by Rule 4906-5-08, O.A.C., Champaign shall include a statement that the public hearing in this case shall consist of two parts:
  - (a) A local public hearing, pursuant to Section 4906.08(C), Revised Code, where the Board shall accept written or oral testimony from any person on October 25, 2012, at 6:00 p.m., Triad High School Auditoria, 8099 Brush Lake Road, North Lewisburg, Ohio 43060.
  - (b) An evidentiary hearing commencing on November 8, 2012, at 10:00 a.m. at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Hearing Room 11-C, Columbus, Ohio 43215-3793.
- (46) Further, regarding the initial public notice required under Rule 4906-5-08(C)(1), O.A.C., Champaign shall include the following statement as part of the public notice:

Petitions to intervene in the adjudicatory hearing will be accepted by the Board up to 30

days following publication of the notice required by Rule 4906-5-08(C)(1), O.A.C., or by September 17, 2012, whichever is later. However, the Board strongly encourages interested persons who wish to intervene in the adjudicatory hearing to file their petitions as soon as possible. Petitions should be addressed to the Ohio Power Siting Board, Docketing Division, 180 East Broad Street, Columbus, Ohio 43215-3793, and cite the above-listed case number.

- (47) Rule 4906-7-01, O.A.C., provides that the ALJ shall regulate the course of the hearing including requiring that testimony to be offered in the Board proceedings be reduced to writing and filed with the Board, according to a schedule established by the ALJ. Accordingly, the ALJ finds that the following process shall be implemented.
- (a) Pursuant to Rule 4906-5-05(D), O.A.C., Staff shall file its report of investigation (Staff Report) on or before October 10, 2012.
  - (b) On or before October 15, 2012, each party shall file a list of issue(s) citing specific concern(s) about which they may be interested in pursuing cross-examination of witnesses at the evidentiary hearing.
  - (c) All testimony to be offered by Champaign shall be filed by October 29, 2012.
  - (d) All testimony to be offered by intervenors and Staff shall be filed by November 5, 2012.
  - (e) The parties are encouraged to arrange for electronic service of testimony and other pleadings among themselves. If electronic service is agreed to, the parties are also directed to provide electronic copies to the ALJ.

It is, therefore,

ORDERED, That Petitioners' and the Farm Federation's requests for intervention are granted. It is, further,

ORDERED, That Champaign's motion for a protective order is granted, as specified in Finding (28). It is, further,

ORDERED, That Champaign's waiver requests are granted as discussed herein. It is, further,

ORDERED, That the hearings in this matter be scheduled at the times and places designated in Finding (43). It is, further,

ORDERED, That notices of the application and hearings be published by Champaign in accordance with Findings (45) and (46). It is, further,

ORDERED, That Staff file its Staff Report in accordance with Finding (47). It is, further,

ORDERED, That the parties file their issue lists and testimony in accordance with Finding (47). It is, further,

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

THE OHIO POWER SITING BOARD

s/Mandy Willey

By: Mandy L. Willey  
Administrative Law Judge

SEF/sc

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Summary: Entry by Administrative Law Judge granting motions to intervene, granting waivers, granting protective orders, and establishing a procedural schedule. - electronically filed by Ms. Sandra M. Coffey on behalf of Mandy Willey, Attorney Examiner, Public Utilities Commission of Ohio