

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
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**EDP RENEWABLES NORTH AMERICA’S REPLY TO THE
MEMORANDUM IN OPPOSITION OF UNION NEIGHBORS UNITED,
INC., JULIE JOHNSON, ROBERT MCCONNELL, AND DIANE
MCCONNELL**

I. Introduction

Julie Johnson, Robert McConnell, Diane McConnell and Union Neighbors United, Inc. (collectively “UNU”) take 29 pages in their memorandum contra to the pending motions to quash to make one point; that they believe the wind industry is an unsafe industry. UNU provides a stack of charts and documents that it has collected about alleged wind turbine incidents in its attempt to convince all readers that the industry is unsafe and that ultimately wind power should not be allowed. This is not an appropriate forum for debating the merits of a legal business activity nor for embarking on a mission to indict the entire wind industry.

Nevertheless, UNU’s overly broad subpoena to EDP Renewables North America LLC (“EDPR NA”), which it defined as including EDPR NA, its parent company, and its worldwide affiliates, is before this Board along with EDPR NA’s motion to quash the subpoena. UNU steadfastly refuses to acknowledge what is obvious from the face of the subpoena; that its subpoena is procedurally deficient, overly broad and unduly burdensome. In particular, the subpoena (1) is not in compliance with Rule 4906-7-07(E)(5), O.A.C. because it failed to designate the matters on which the examination is requested; (2) improperly requires information that is outside the scope of permitted discovery and not likely to lead to discovery of admissible evidence in this

proceeding; and (3) is unreasonable and oppressive. Additionally, as EDPR NA pointed out previously, some of the documents requested in the subpoena were already provided to the Ohio Power Siting Board (“Board”) and can be obtained from the Board, which UNU is already pursuing. Furthermore, Champaign Wind’s decision to drop the Vestas V100 turbine from its application renders information about that turbine irrelevant to this proceeding, including information regarding EDPR NA’s use of the Vestas V100 turbine at the Timber Road II Wind Farm.

Faced with the potential that its subpoena will be quashed, UNU claims that it is willing to limit the scope of some of the subpoena requests. The Board, however, must rule on the subpoena as UNU drafted it, not UNU’s promises. Serving overly broad document requests through a deposition subpoena that seeks information from a company, its ultimate parent company (a diversified energy and utility company headquartered in Portugal whose principal subsidiaries own or operate assets in Portugal, Spain, France, Belgium, Poland, Romania, Italy, and the United Kingdom, as well as in Brazil, the United States, and Canada), and its affiliates is not reasonable and violates the Board’s discovery rules. UNU should face the consequences of its approach to discovery, which is the quashing of its subpoena to EDPR NA. Otherwise, a dangerous precedent will have been set for future Board proceedings.

II. Argument

A. The Subpoenas are not Essential to Discover Evidence for This Proceeding

UNU spends the first 13 pages of its opposition brief arguing that the subpoenas are “essential” for crafting conditions to protect the public from wind turbine hazards. UNU’s arguments reveal what EDPR NA pointed out in its motion to quash, that UNU’s intention is to investigate, via the subpoenas, every incident or hazard associated with wind turbines, regardless

of the time period, model, or location. Moreover, the issue is not whether the subpoenas are “essential”, but whether the subpoenas are oppressive or unreasonable.

UNU’s first document request to EDPR NA make clear that the requests are both oppressive and unreasonable: “*All documents relating to any turbine blade failure or damage at any wind turbine project* operated by or on behalf of EDP” (emphasis added). Asking a company and all of its worldwide affiliates to scour all records for any turbine blade failure or any damage at a wind turbine project anywhere in the world is oppressive and unreasonable. Again, UNU bears responsibility for the broad nature of its discovery requests given the Board’s rule that discovery be reasonable.

Another example of why the subpoena is unreasonable is UNU’s bold statement that the subpoena to EDPR NA is intended “to fill in the gaps of missing information on [the] serious incident” that occurred on April 24, 2012 at the Timber Road II Wind Farm (“Timber Road II”) and “to reveal whether EDP’s report to [the] OPSB was complete and truthful.” Memorandum in Opposition p. 2, 11. UNU is not seeking discovery related to Champaign Wind’s application. Rather it is using the Champaign Wind proceeding to investigate the Timber Road II incident, a role reserved for the Board and not UNU. As well, it is using the Champaign Wind proceeding to look for information that it can then spin to damage the wind industry. In fact, it is more likely that any information UNU collects through its subpoenas will be used for other purposes and not in the Champaign Wind proceeding. Moreover, half of the documents that UNU requires EDPR NA to produce, via this subpoena, were documents that UNU had *already* requested from the Board, via a public records request. It is unreasonable to require EDPR NA to respond when the information is being obtained through the Board. The subpoena is not “essential.”

B. EDPR NA's Objection to the Subpoenas as Being Overbroad, Unreasonable, and Oppressive is Sufficient to Quash the Subpoenas

UNU repeatedly contends that the wind turbine industry is hiding vital evidence and, without the subpoenas, UNU has “no means to obtain the information being hidden by the subpoenaed companies.” Memorandum In Opposition pp. 13-16, 18, 27-28. This unfounded conjecture should not be accepted as an excuse for UNU's disregard of this Board's rules and abuse of the discovery process. As evidenced by the many attachments to its Memorandum In Opposition, UNU has gathered much information about the wind turbine industry through multiple sources. Improper subpoenas and conjecture should not be accepted to allow UNU to try and further its cause against the wind industry.

Moreover, UNU missed the point raised by EDPR NA when EDPR NA argued that it was burdensome to produce *all* documents related to any blade failure or damage at all of its operating wind projects. The burden of this one aspect of the subpoena is associated with the time and extent of the search needed to be done in order to comply – it will be necessary to look through years of documents that are in multiple office locations of EDPR NA and its affiliates located all over the world. The number of pages that may be responsive to this one part of the subpoena was not mentioned by EDPR NA, and not the basis for it arguing that this part of the subpoena was burdensome. It is the act of the search that will be burdensome.

Next, UNU's alleges that it “should be relatively simple to collect the required information.” Memorandum in Opposition p. 15. That statement is supposition, without any basis. UNU does not know EDPR NA's structure or recordkeeping processes. As noted earlier, UNU's subpoena is not directed to only EDPR NA; it includes EDPR NA, its parent company, its affiliates and its subsidiaries around the world. EDPR NA provided an affidavit with its motion to quash, and its Associate General Counsel evaluated the eight document requests. She estimated that over 90

employees in the EDP family of companies will have to review records in order to comply with just one part of the subpoena, and numerous others will have to review records to comply with another part of the subpoena.

Moreover, UNU basically conceded that the subpoena is overbroad and burdensome because its counsel recently “offered to narrow the scope of the requests.” For that simple reason the subpoena should be quashed and not limited in scope. UNU drafted the subpoena knowing it was overly broad and would be unduly burdensome. It should not be rewarded for using the Board’s discovery process as a way to negotiate the production of documents from third parties. EDPR NA has demonstrated how the subpoena directed to it is noncompliant, overbroad, unreasonable, and oppressive. If UNU was genuinely interested in legally appropriate subpoenas, it would withdraw the subpoena and/or release EDPR NA and the other subpoenaed companies. Rather, UNU continues on its pursuit of damaging the wind industry.

C. The Subpoena Fails to Designate the Matters on Which the Examination is Requested

UNU’s subpoena remains procedurally deficient even though UNU has stated that “the deponent is only expected to produce the documents as exhibits to the deposition.” Rule 4906-7-7(E)(5), O.A.C., states “[a] party may, in the notice and in a subpoena, name a corporation, partnership, association, government agency, or municipal corporation and *designate with reasonable particularity* the matters on which examination is requested” (emphasis added). As EDPR NA pointed out in its motion to quash, an entity responding to a corporate deposition subpoena is unable to designate the appropriate employees to appear and give testimony at the deposition.

UNU claims that the designation in the rule is optional. What is optional is the use of a subpoena to depose a corporate entity. UNU exercised this option after it made the initial

mistake in its first motion for subpoenas of seeking to depose the chief executive officer of each company in their individual capacities. UNU corrected this mistake in its second motion for subpoenas by naming the corporate entities as the subject of its subpoenas. By doing so, UNU triggered the requirement of Rule 4906-7-07(E)(5) that UNU designate with reasonable particularity the matters on which it wished to depose EDPR NA and the other corporate entities. UNU did not do so in its subpoena, rendering it unreasonable.

UNU attempts to correct its error by now claiming that it only wants the corporate representative to travel to Ohio to simply give the documents to UNU's counsel. This claim is very revealing, as it shows that UNU decided to use a deposition subpoena as a way to force the production of the documents rather than issuing a subpoena only for document production. UNU's abuse of the subpoena process reinforces why it should not be excused from following the Board's rule requiring UNU to designate the matters on which the deposition will be conducted. For this simple reason, the Board may quash UNU's subpoenas.

D. UNU's Document Requests in the Subpoena are not Narrowly Tailored

UNU spends a number of pages in its opposition brief telling this Board why it wants information from the Timber Road II facility. EDPR NA does not dispute that UNU wants access to all records of the facility in its search to back up its claims that the public is in danger from wind turbines. What EDPR NA disputes is the overly broad nature and unduly burdensome requests that UNU included in its subpoena.

UNU acknowledges the broad nature of its requests. UNU notes at page 18 of its opposition brief that it expects EDPR NA to produce all internal communications, including emails. UNU presumes that EDPR NA personnel can somehow find and print emails without searching their email files. Memorandum in Opposition, p. 18. That presumption is wrong as

EDPR NA's counsel's affidavit clearly states that just reviewing emails back to April 2012 will take over 540 hours of employees' time.

It is also worthwhile to review the language of the document requests that UNU believes are not overly broad and unduly burdensome.

1. "*All documents relating to any turbine blade failure or damage at any wind turbine project operated by or on behalf of EDP.*"
2. "*All documents relating to the turbine blade failure occurring on or around April 24, 2012 on the Timber Road II Wind Farm.*"
3. "*All telephone memoranda, correspondence, and other documents relating to the telephone discussion between Gabriel Alonso and Kim Wissman on May 1, 2012 about turbine blade failure at the Timber Road II Wind Farm.*"
4. "*All memoranda, correspondence, and other documents relating to any other communication between EDP and the Ohio Power Siting Board about turbine blade failure.*"
5. "*All studies, reports, and other documents relating to the distance that turbine blades can fly when released from wind turbines.*"
6. "*All records relating or referring to shadow flicker produced by any wind turbines in the Timber Road II Wind Farm.*"
7. "*All records relating or referring to noise produced by any wind turbines in the Timber Road II Wind Farm, including but not limited to noise measurements.*"
8. "*All records relating or referring to complaints about the Timber Road II Wind Farm.*"

(Emphasis added.)

EDPR NA stands behind its earlier arguments. These requests are not limited in scope and seek numerous materials over varying periods of time. Importantly, the requests are not limited to the North American operations of EDPR NA. UNU defined EDP in its subpoena request to include not only EDPR NA but all of its worldwide affiliates and its parent company. UNU's global search for documents and its broad requests are certainly unreasonable and

oppressive. Moreover, the Timber Road II records are for a separate project in a different area of Ohio and for a turbine model that is not being used in the Champaign Wind project. These requests are, in addition to being oppressive and unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence in Champaign Wind's proceeding. Lastly, as noted earlier, UNU previously has requested the Board for the documents sought in half of the subpoena (paragraphs 2, 6, 7, and 8). EDPR NA should not be required to produce them as well.

III. Conclusion

For the reasons set forth in EDPR NA's motion to quash and the foregoing reasons, EDPR NA's motion to quash the subpoena *duces tecum* should be granted. The subpoena should be quashed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties of record via e-mail this 17th day of October, 2012.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/17/2012 5:00:06 PM

in

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

Summary: Reply to the Memorandum in Opposition of Union Neighbors United Inc., July Johnson, Robert McConnell, and Diane McConnell electronically filed by Mrs. Gretchen L. Petrucci on behalf of EDP Renewables North America LLC