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-GBN**

REPLY MEMORANDUM OF GAMESA WIND US, LLC TO MEMORANDUM FILED BY UNITED NEIGHBORS UNITED, INC. ET AL. IN OPPOSITION TO THE MOTIONS OF EDP RENEWABLES NORTH AMERICA LLC, GAMESA WIND US, LLC, INVENERGY LLC, AND CHAMPAIGN WIND LLC TO QUASH THE BOARD'S SUBPOENA DUCES TECUM

The Memorandum of Intervenors United Neighbors United, Inc., et al. ("UNU") in Opposition to the Motions of EDP Renewables North America LLC, Gamesa Wind US, LLC, Invenergy LLC, and Champaign Wind LLC to Quash the Board's Subpoena Duces Tecum ("Memorandum in Opposition") fails to articulate a valid reason why the Subpoena is not oppressive and burdensome. UNU continues to ask Gamesa, a party named in the Champaign application as a *potential supplier* of turbines, for items well beyond the scope of discovery provided in Rule 4906-7-07(A)(2) of the Ohio Administrative Code. The Subpoena suffers from the same flaws that Gamesa previously set forth in its Motion to Quash and remains unreasonable and oppressive because it: (1) demands information already in UNU's possession

or readily accessible to UNU in the public domain, including a draft Environmental Impact Statement *prepared specifically for the Champaign project* (the "Project"); (2) compels an overbroad body of information that is largely irrelevant to the Project, with an apparent intention to deflect the Ohio Power Siting Board's ("Board") review from relevant issues; and (3) imposes a real and substantial burden on Gamesa to scour the decentralized records of its global operations for responsive documents.[1]

In addition, we note that UNU's counsel and Gamesa's counsel have discussed tailoring the Subpoena. To date the parties have been unsuccessful in reaching a compromise. Even assuming that the parties could agree on an acceptable scope for the Subpoena, the parties have not agreed upon measures to protect the confidentiality of Gamesa's proprietary information. Moreover, given the rhetoric and speculation in UNU's motions about the "dangers" posed by the wind industry, Gamesa has serious reservations about UNU's ability to keep this vital business information confidential.

This proceeding on Champaign Wind LLC's application is not the appropriate forum for UNU to pursue a universal indictment of the wind industry. The rules of discovery do not allow UNU to commandeer resources of third parties to do UNU's research. A discovery request looking for data on blade failure, blade throw, etc. on every model of wind turbine ever manufactured is per se oppressive. Accordingly, Gamesa respectfully asks the Board to grant its Motion to Quash the Subpoena.

[1] As set forth in Gamesa's Motion to Quash, these factors are considered by Ohio courts and the Ohio Public Utilities Commission in evaluating whether a subpoena is unreasonable and oppressive. *See* Gamesa Mot. Quash, citing *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 100 Ohio St. 3d 97, 100 (Ohio 2003); *In the Matter of the Complaint of Brenda Fitzgerald and Gerard Fitzgerald, Complainant, v. Duke Energy Ohio, Inc., Respondent.*, 2011 WL 1682213 (Ohio P.U.C., 2011); *Ping v. Payne*, 1999 WL 1267023, 4 (Ohio App. 2 Dist., 1999); *City of Toledo v. Enis*, 1987 WL 19477, 2 (Ohio App. 6 Dist., 1987).

I. UNU's Memorandum Reveals that UNU is Well Aware that the Information it Wants is in the Public Domain.

UNU demands an expansive range of information, the vast majority of which is not only irrelevant to the Board's evaluation of the Champaign application, but is accessible in the public domain. UNU is clearly familiar with the publicly available information on the Subpoena topics because UNU cites an array of incidents, studies, reports and data related to blade failures that UNU identified through basic searches of the Internet. *See* Memorandum in Opposition 3-9, Exhibits B-G. There are a wealth of similar resources available for UNU's review in the public domain.[2] In fact, after a cursory Internet search, Gamesa's counsel found a comprehensive draft Environmental Impact Statement *prepared specifically for the Project*, which exhaustively analyzes the spectrum of issues with which UNU expresses concern and proposes measures to minimize any adverse consequences. The roughly 400 page draft is complete with approximately 1200 pages of appendices and twenty-seven pages of additional publicly available references.[3] The information that UNU has already located and the abundance of additional information that is readily accessible covers the requests in Subpoena Items 1, 2, 5, 7, 8, 9, and 4, albeit, Gamesa submits, the relevance of much of this information is highly questionable.

Moreover, UNU disregards its obligation to avoid making frivolous requests for readily accessible information. *See In re Subpoena Duces Tecum Served Upon Attny. Potts*, 100 Ohio

[2] Gamesa's counsel directs UNU's attention, for example to a few informative sources: U.S. DEP'T OF ENERGY, *Office of NEPA Policy and Compliance: NEPA Documents*, ENERGY.GOV, http://energy.gov/nepa/nepa-documents (last visited October 18, 2012) (extensive documentation of environmental impact statements and other reports for U.S wind projects; Karen Rideout et al., *Wind Turbines and Health* (January 2010), http://www.ncceh.ca/sites/default/files/Wind_Turbines_January_2010.pdf (analyzing potential hazards of turbines to humans and recommending mitigating measures, providing numerous supporting resources); CHATHAM-KENT PUBLIC HEALTH UNIT, *The Health Impact of Wind Turbines: A Review of the Current White, Gray and Published Literature* (June 2008), http://www.harvestingwindsupport.com/blog/wp-content/uploads/2011/03/Chatham-KentHealth-and-Wind-.pdf (same).

[3] The Environmental Impact Statement may be located at: http://www.fws.gov/midwest/endangered/permits/hcp/buckeyewind/index.html (last visited October 18, 2012).

St. 3d 97, 100 (Ohio 2003) (establishing that a subpoena is unreasonable and oppressive if, *inter alia*, the information is "otherwise procurable . . . by exercise of due diligence."). Respectfully, the Board must refrain from endorsing UNU's unreasonable and oppressive attempt to abuse the discovery process by sending Gamesa on a search for superfluous information that UNU can locate for itself.

II. UNU Continues to Pursue Information that is Irrelevant to the Board's Review and Beyond the Scope of Discovery.

UNU's position that the broad range of information it seeks from Gamesa is essential to the Board's review of the Champaign application is not supportable. *See* Mem. Opp'n 8, 9. UNU seeks information on blade failures, ice throw etc. on turbines that the applicant is not considering for the Project. UNU underscores the oppressive and burdensome nature of this request by insisting that it needs information on blade throw, poor maintenance, lightning strikes and human error in operation that is not specific to any particular turbine model.[4] As justification for a search for incidents involving any turbine at any time period, UNU provides a colorful, but extraneous narrative of a blade malfunction in the Timber Road II project. The 55 Vestas V100 turbines in use at Timber Road II are not under consideration for the Project, and cannot be compared to a Gamesa G97 turbine. Nor does UNU succeed in describing a nexus between any of the other turbine information it requests and the Project. UNU uses the Timber Road II discussion as a build-up to its creative theme that the wind industry is concealing its "dirty secrets," Mem. Opp'n 8, however, the Subpoena's request for extraneous information will not generate data on issues germane to Champaign's application.

[4] "[E]quipment malfunctions are not uniquely attributable to particular turbine models, but are an industry-wide problem. The other three causes or turbine failure – poor maintenance, lightning strikes, and human error in operation – are not a function of turbine design but instead are problems that can afflict any turbine model." Mot. Opp'n 10. "[T]here is no evidence that the blade throw distance for . . . any other model used or manufactured by the subpoenaed companies[] will be any different than the other model candidates." *Id.* at 11.

Where UNU does raise specific issues about actual Gamesa turbines, UNU makes no attempt to show why those incidents are relevant to these proceedings. For the incidents in 2000 and 2007 involving actual Gamesa turbines, Mem. Opp'n 6, UNU makes no attempt to show that these turbine models have any relevance to the turbines being evaluated for the Project. The 2000 occurrence involved the G-47 model, Mem. Opp'n 6, Exhibit D-3, which Gamesa has not produced for several years. The 2007 Pennsylvania incident, *id.*, involved a G87 model. The G87 design differs significantly from that of the G97 for a variety of reasons, including the fact that the blades for the turbines for the G87 were manufactured by a different company than the blades for the G97. In addition, Gamesa would have started the design of a model in use in 2000 or 2007 five or six years before deploying it. Turbine design, engineering and manufacturing techniques of ten to fifteen years ago are irrelevant to the Project. As is necessary to support the growth of turbines to sizes approximately one-hundred times the size of those produced twenty years ago, Gamesa has improved its turbine design, manufacturing, construction, and maintenance practices considerably over that time period. Accordingly, UNU's assertion that the risks possibly posed by older turbine models which are not being considered for the Project are relevant is simply wrong. Where is the relationship between what UNU seeks and circumstances of the Project? *See* Mem. Opp'n 7, 9, 10, 12. Such a comparison is no more accurate than using a 1978 Ford Pinto as a proxy for the risk of explosion posed by a 2012 Ford Focus. Neither the Gamesa incidents discussed above, nor UNU's dubious conclusion that all manufacturers have recently taken detrimental design and manufacturing shortcuts, *see* Mem. Opp'n 6-7, Exh. E, G, enable the Board to draw conclusions regarding the G97 model proposed for the Project.

UNU has outlined what it considers a less oppressive request than that contained language of the original Subpoena. This proposal does not narrow the subpoena sufficiently to

cure its unreasonable and oppressive nature. Instead, UNU's counsel proposes modest modifications that still compel the production of documents, records and reports (1) that are completely unrelated to what Gamesa manufactures and (2) that are completely unrelated to the one Gamesa model, the G97 turbine, which *may* be used in the Project. Any reduction in scope which UNU perceives is illusory, as it will require the same burdensome investigation of localized company records and the production of materials not germane to the Project.

III. The Subpoena is Oppressive because it Demands that Gamesa Scour its Worldwide Records for Responsive Information Regardless of the Volume of Responsive Documents.

Finally, the real and onerous burden imposed by UNU's requests solidify the unreasonable and oppressive characteristics of the Subpoena. UNU attempts to distort Gamesa's credible objection to this burden by framing the objection as an inappropriate concealment of relevant records from the public. Contrary to UNU's presumption, Mem. Opp'n 15, Gamesa does not have a central safety or compliance department to track world-wide incidents and compile safety records and reports from turbines around the globe, regardless of whether they are manufactured by Gamesa. Its recordkeeping is highly localized, and production in accordance with UNU's broad request would force employees at its world-wide offices to scour their records for responsive documents. The burden is not a product of the anticipated volume of responsive documents. The burden is in the fishing expedition demanded by UNU's inappropriate and cumbersome request, which exists regardless of the ultimate volume of responsive documents. This burden is indefensible considering that Gamesa is only implicated in this proceeding as a named *potential vendor*, and the Subpoena does not limit the records requested to the relevant Gamesa turbine. The Subpoena is unreasonable and oppressive, and should be quashed.

IV. The Subpoena Remains Procedurally Deficient.

UNU's Subpoena continues to suffer from a fundamental procedural deficiency due to its failure to designate the subjects of examination with reasonable particularity. It misinterprets this obligation as permissive, Mem. Opp'n 17, which is clearly contrary to the operation of the rule. The rule states "[a] party may . . . name a [business entity] and designate with reasonable particularity the matters on which examination is requested." O.A.C. Rule 4906-7-07(E)(5). UNU's naming Gamesa as a deponent is optional. However, as a consequence of naming Gamesa, UNU *must* designate the subjects of the examination with reasonable particularity. UNU attempts to overcome this flaw by stating that its intention behind the requested deposition was to compel the production of documents. Mem. Opp'n 17. This attempt does not eliminate its obligation to specify the matters on which the deposition that it requests will be conducted. In fact, it only serves to highlight UNU's abuse of the subpoena process to force third parties to research many of the irrelevant matters that it wishes to introduce into the Board's review of the Project. We respectfully submit that the Board should quash the Subpoena on this basis.

V. Conclusion

Gamesa respectfully requests that the Board stop UNU's misguided attempts to search for and produce the irrelevant information responsive to UNU's unreasonable and oppressive Subpoena. Any records produced under this overbroad request will not further inform the Board's evaluation of Champaign's application.

For these and the foregoing reasons, Gamesa requests that the Board quash UNU's Subpoena Duces Tecum and any discovery requests sent to any Gamesa affiliate that request the same information from Gamesa. In the alternative, Gamesa requests that the Board issue appropriate protective orders as outlined in its previously filed Motion to Quash.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 19, 2012, a copy of the foregoing was served electronically on Jack A. Van Kley (jvankley@vankleywalker.com), Christopher A. Walker (cwalker@vanlkeywalker.com), M. Howard Petricoff (mhpetricoff@vorys.com), Michael J. Settineri (mjsettineri@vorys.com), Miranda Leppla (mrleppla@vorys.com), Chad Endsley (cendsley@ofbf.org), Jane Napier (jnapier@champaignprosecutor.com), G.S. Weithman (diroflaw@ctcn.net), Stephen Reilly(Stephen.Reilly@puc.state.oh.us), Devin Parram (Devin.Parram@puc.state.oh.us), Kurt P. Helfrich (Kurt.Helfrich@ThompsonHine.com), Philip B. Sineneng (Philip.Sineneng@ThompsonHine.com), Ann B. Zallocco Ann.Zallocco@ThompsonHine.com), G.S. Weithman (diroflaw@ctcn.net), Sally Bloomfield (sbloomfield@bricker.com), Stephen Howard (smhoward@vorys.com), and Gretchen Petrucci (glpetrucci@vorys.com).

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Summary: Reply to the Memorandum in Opposition of United Neighbors United, Inc. et al. electronically filed by Mr. George R Skupski on behalf of Gamesa Wind US, LLC