

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. 12-0160-EL-BGN
Generating Facility in Champaign)	
County, Ohio)	

MOTION IN LIMINE OF CHAMPAIGN WIND LLC

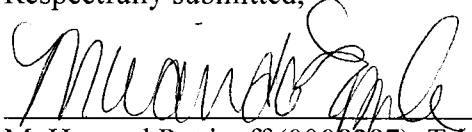
Champaign Wind LLC (“Champaign Wind”) files this Motion in Limine, requesting that certain issues identified by Union Neighbors United Inc., Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively “UNU”) not be addressed or introduced at the evidentiary hearing in this matter. UNU filed a list of issues on October 15, 2012, pursuant to the directive of the Administrative Law Judge. UNU’s list reflects that it “may be interested in pursuing cross-examination of witnesses” regarding issues that are not relevant and/or issues that are collaterally estopped. The Board should not permit the exploration of irrelevant issues or the re-litigation of issues previously considered by the Board.

As detailed in the attached Memorandum in Support, UNU raises many irrelevant issues regarding other wind facilities in the U.S. and around the world, the lack of a proposed alternative site, the viability of the facility, the location of land available as an alternate site, and the terms of lease agreements with landowners. Moreover, UNU raises several issues that were directly litigated by the Board in prior matters. Those previously litigated issues are the timing of the development of a complaint resolution process, the need for an applicant to present an alternative site, the need for an applicant to select the turbine model to be installed, the need to compensate non-participating property owners or residents, and the propriety of post-certification submissions.

The Board should not address irrelevant issues. Similarly, the Board should not address issues that it has decided already, particularly when UNU litigated those very issues in the prior Board matters. Accordingly, it is appropriate for the Board to focus the hearing on the true issues raised in this proceeding, and preclude UNU from exploring irrelevant issues and re-litigating issues.

WHEREFORE, Champaign Wind respectfully requests that the Board grant this Motion in Limine and preclude the admission of evidence related to the issues set forth herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Howard Petricoff", is written over a horizontal line.

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**MEMORANDUM IN SUPPORT
OF CHAMPAIGN WIND LLC'S MOTION IN LIMINE**

I. Introduction

By Entry filed on August 2, 2012, the Administrative Law Judge established a procedural schedule for this proceeding. Among other things, the Administrative Law Judge determined that, “[o]n 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.” A number of parties filed issue lists on October 15, 2012, including Union Neighbors United Inc., Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively (“UNU”). UNU’s issue list contained 62 issues, plus a reservation of “the option to add more concerns to this list as they are identified.”

Pursuant to Rule 4906-7-12, Ohio Administrative Code, Champaign Wind LLC (“Champaign Wind”) files this Motion in Limine, requesting a ruling that certain issues identified by UNU, and evidence related thereto, not be addressed or introduced at the evidentiary hearing. Champaign Wind contends that the issues identified below are irrelevant and/or collaterally estopped.

II. The Law

A. Relevant Evidence

It is axiomatic that parties are expected to present evidence relevant to the subject matter involved in a pending action in order to reach a just determination. Although not strictly binding in Commission proceedings, the Ohio Rules of Evidence are useful guidance for administrative matters. Ohio R. Evid. 401 defines “relevant evidence” as “evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

B. Collateral Estoppel

The law also provides that not all relevant evidence is admissible at all times. The doctrine of collateral estoppel precludes the re-litigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. *Office of Consumers' Counsel v. Public Utilities Comm.*, 16 Ohio St. 3d 9, 10, 475 N.E.2d 782 (1985). Moreover, “[t]he Ohio Supreme Court has confirmed that ‘where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.’” *In re Matter of the Complaint of Warren Jay Yerian*, Pub. Util. Comm. No. 05-886-EL-CSS, 2005 Ohio PUC LEXIS 456, Entry (Aug. 24, 2005), quoting *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St. 2d 133, 403 N.E.2d 996 (1980) (syllabus).¹

Under the doctrine of collateral estoppel, also called issue preclusion, “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Yerian*, quoting Restatement of the Law, Second, Judgments, Section 27. Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court

¹On a related note, the Ohio Supreme Court has found that the doctrine of res judicata also applies to bar re-litigation of issues in a second administrative proceeding. 2005 Ohio PUC LEXIS 456 *6. The doctrine of res judicata, also called claim preclusion, stands for the position that “a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Yerian, supra*, quoting *Grava v. Parksman Tshp.*, 73 Ohio St. 3d 379 (1995) (syllabus).

of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action. *State ex rel. Davis v. Public Emples. Ret. Bd.*, 120 Ohio St. 3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 28, quoting *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994). Privity pertains to the connection or relationship between two parties, each having a legally recognized interest in the subject matter (such as, a transaction, proceeding, or piece of property). Black’s Law Dictionary at 1320 (9th Ed. 2009).

III. Argument

A. The Elements of Collateral Estoppel are Met

Collateral estoppel applies in this matter to preclude re-litigation of a number of UNU’s issues because UNU and a party in privity with Champaign Wind (namely, Buckeye Wind LLC) were both parties in two prior Board matters in which many of these issues were actually and directly litigated previously. First, UNU participated in a certificate application proceeding that was proposed by an affiliate of Champaign Wind. *In re Application of Buckeye Wind LLC for a Certificate to Construct Wind-Powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN (“*Buckeye Wind I*”), Opinion, Order & Certificate (“OO&C”) issued March 22, 2010, and Entry on Rehearing (“EOR”) issued July 15, 2010. In *Buckeye Wind I*, the Power Siting Board (“Board”) evaluated numerous issues of concern to the parties, including health and safety issues. The Board granted a certificate to Buckeye Wind LLC (“Buckeye Wind”) so that it could construct 53 wind turbines and other associated electric generation facilities in Champaign County, Ohio, subject to 70 conditions. In March 2012, the Ohio Supreme Court approved the Board’s decision. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St. 3d 449, 2012-Ohio-8978, 966 N.E.2d 869 (“*Buckeye Appeal*”). Second, both UNU and Buckeye Wind participated in a rulemaking docket, in which the Board established specific certification

requirements for electric-generating wind facilities. *In re Matter of the Power Siting Board's Adoption of Chapter 4906-7-17 of the Ohio Administrative Code and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-7-17 of the Ohio Administrative Code*, Case No. 08-1024-EL-ORD, Opinion and Order ("O&O") issued October 28, 2008, and EOR issued January 26, 2009 ("*Adoption of Chapter 4906-7-17*").

Champaign Wind now requests a certificate to construct and operate up to 56 wind turbines and associated electric generation facilities within the same townships as the *Buckeye Wind I* turbines will be located. Additionally, Champaign Wind's proposed turbines have the same maximum height of 492 feet as the turbines approved in *Buckeye Wind I*. Moreover, two of the turbine models proposed by Champaign Wind are the same models that were authorized in *Buckeye Wind I*.²

Although Champaign Wind did not participate in *Buckeye Wind I* or *Adoption of Chapter 4906-7-17*, Champaign Wind's sister company actively participated and litigated numerous issues in those Board proceedings. Champaign Wind and Buckeye Wind may be considered the same party for purposes of the application of collateral estoppel because they are sister companies. *See Trautwein v. Sorgenfrei*, 58 Ohio St. 2d 493, 500, 391 N.E.2d 326 (1979) ("[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.") Moreover, those prior Board matters involved standards, requirements and policy decisions associated with construction and operation of wind-powered electric generation facilities in Ohio, which will have a significant impact on Champaign Wind's pending application. Accordingly, the Board

²Compare Buckeye Wind's Application at 10 and OO&C at 4, with Champaign Wind's Application at 10-11 and the Staff Report at 6.

should find that Champaign Wind is in privity with Buckeye Wind for purposes of evaluating whether issues raised in this pending proceeding are collaterally stopped.

B. Specific UNU Issues are Irrelevant and/or were Previously Litigated

Below, Champaign Wind challenges a number of UNU issues.

UNU Issue 6: Whether the design, location, and characteristics of wind energy facilities constructed and/or operated by the Applicant and its affiliates in the United States or abroad, including but not limited to the number and design of turbines, characteristics of the landscape, demographics of the host community, setbacks from nonparticipating property lines and other geographic features, and mandatory or voluntary measures to mitigate the impacts of said facilities on humans and/or the environment, should be considered by the Board for the purpose of adequately protecting the public and the environment from adverse impacts of the proposed Facility.

UNU Issue 7: Whether Applicant or any affiliate of the Applicant has received any complaints concerning noise, shadow flicker, wildlife impacts, adverse health impacts, ice throw, blade throw, or any other impacts or effects of any wind energy facility owned or operated by the Applicant or any affiliate of the Applicant that justify additional or different conditions for the Facility than recommended in the Staff Report, and, if so, the process employed for the resolution of each such complaint, the outcome of said resolution process, and the findings of any investigations in response to said complaints.

Neither of UNU Issues 6 or 7 is relevant to the pending matter. Information related to other wind turbines owned by Champaign Wind and its affiliates throughout the world and information about any complaints related thereto are beyond the scope of this proceeding. The Administrative Law Judge ruled on October 22, 2012, that information related to turbines not selected for the pending project was irrelevant to the current proceeding. Similarly, the Administrative Law Judge ruled that discovery related to wind turbines around the world (including complaints) should be quashed. Entry at 10-11. UNU's Issues 6 and 7 reflect that UNU is seeking information that is not tailored adequately to the proposed project. These issues

seek to expand the scope of this proceeding and are irrelevant. UNU should be precluded from addressing them during the hearing.

UNU Issue 9: The Staff Report fails to describe the complaint resolution process that must be used by the Applicant, but instead allows the Applicant to design this process after the Certificate is issued without input from the parties during the hearing process.

A post-certificate, complaint resolution process was litigated by Champaign Wind's affiliate and UNU in *Buckeye Wind I*. The Staff had recommended that Buckeye Wind submit a two-tiered, complaint resolution procedure prior to the preconstruction conference. UNU argued that the procedure should have been proposed as part of the application so that the public could address the procedure. The Board accepted the Staff's recommendation. OO&C at 78-80; EOR at 11-13. Moreover, the Ohio Supreme Court accepted this approach for developing a complaint resolution process. *Buckeye Appeal* at ¶¶18, 19. Thus, the prior decisions expressly determined that it is acceptable for Buckeye Wind to design the complaint resolution process after the certificate is issued. UNU Issue 9 is collaterally estopped from re-litigating this issue.

UNU Issue 14: The Applicant failed to identify and evaluate an alternative site for the proposed Facility or alternative sites for individual turbines in the proposed Facility.

The Board has considered the necessity of presenting alternative sites before. First, in *Adoption of Chapter 4906-7-17*, the Board established a rule that permits an applicant to propose an alternate site for a wind-powered electric generation facility, but does not mandate an alternative site. Rule 4906-17-03(A)(1), Ohio Administrative Code ("O.A.C."). Champaign Wind acted within its discretion as allowed by the Board's rule.

Second, in *Buckeye Wind I*, this same issue was presented because Buckeye Wind requested authority to not present site alternatives. UNU argued at that time that it was improper for Buckeye Wind to not present site alternatives. The Administrative Law Judge rejected

UNU's argument, finding that the applicant was not required to file information for an alternative site; rather, the filing of information for an alternative site is within the applicant's discretion.

Buckeye Wind I, Entry issued July 31, 2009, at 9-12. Later, the Board also reviewed and rejected UNU's argument. OO&C at 6-8. UNU Issue 14 is an attempt to re-litigate a point of law already decided by the Board in its rulemaking, and ruled on a second time by the Board, after the arguments were repeated, in *Buckeye Wind I*.

Additionally, it is not relevant that Champaign Wind chose not to present site alternatives for the pending project. Champaign Wind was not required to include such information and it elected not to do so. That decision is not relevant to the question of whether the *proposed facility* should be granted a certificate. UNU Issue 14 should be precluded.

UNU Issue 15: The Applicant fails to identify the turbine model that will be installed in the Facility, and fails to adequately justify the Applicant's failure to do so. These failures prevent the Board from identifying the conditions necessary to protect the public.

In *Buckeye Wind I*, Buckeye Wind did not select the turbine model; it identified three turbine models that were representative turbine models for the project. The Board did not reject the proposal because the turbine model was not selected. Rather, the Board granted a certificate for the project but imposed a condition on the certificate to require Buckeye Wind to identify, prior to construction, which turbine model was selected. OO&C at 92, 99. UNU argued on rehearing and on appeal that the failure to identify the specific turbine model that would be installed at the facility was improper. The Board and the Ohio Supreme Court rejected UNU's argument. EOR at 31; *Buckeye Appeal*, at ¶¶24 and 25. This issue should be collaterally estopped.

UNU Issue 16: Whether the Facility is economically viable without receiving governmental funding or incentives, such as tax abatement.

UNU's Issue 16 is not relevant to this proceeding. It is not related to any of the determinations required of the Board for issuing a decision related to a certificate request. *See*, Section 4906.10, Ohio Revised Code. UNU Issue 16 should be precluded.

UNU Issue 25: Whether the Applicant and Staff have adequately assessed the potential shadow flicker impacts * * * associated with any other constructed or proposed wind energy facility in Ohio.

Via the above-quoted portion of UNU Issue 25, UNU seeks to address at hearing the potential shadow flicker impacts from other wind energy facilities in Ohio. The shadow flicker from other facilities is not relevant to Champaign Wind's proposed application. On October 22, 2012, the Administrative Law Judge ruled that information related to other wind energy facilities is not tailored to this pending case and that such non-tailored discovery requests should be precluded. Likewise, UNU should be precluded from pursuing that overbroad issue at hearing.

UNU Issue 38: The Applicant has failed to offer or provide for compensation to non-participating property owners or residents who suffer damages or the diminution in property value as a result of the installation or operation of the Facility.

In *Buckeye Wind I*, the Board heard UNU's argument that compensation must be provided to non-participating property owners or residents. The Board did not accept UNU's contention that conceptually compensation must be provided to non-participating property owners or residents in that proceeding. OO&C at 37-40; EOR at 34-35. UNU cannot re-litigate this issue, especially with respect to the same, non-participating property owners or residents.

UNU Issue 40: The Applicant has failed to identify the location and acreage of parcels under lease with the Applicant or any affiliate that may be available as alternate sites for the turbine sites listed in the Application.

Similar to what was argued with regard to UNU Issue 14, it is not relevant that Champaign Wind chose not to present site alternatives for the pending project, or may have other lands available for wind turbines. Champaign Wind was not required to include alternative site information and it elected not to do so. Rule 4906-17-03, O.A.C. Champaign Wind's decision to not include such information is not relevant to the question of whether the *proposed facility* should be granted a certificate. UNU Issue 40 should be precluded.

UNU Issue 48: The Staff Report makes recommendations that the Applicant conduct evaluations or studies, or submit information to the Staff, after issuance of a Certificate by the Board, whereas these submissions should be subjected to cross-examination during the hearing on the Certificate.

UNU complained in *Buckeye Wind I* about post-certificate submissions and the review process associated therewith. The Board twice rejected UNU's position. OO&C at 81-82; EOR at 30-31. Moreover, the Ohio Supreme Court concluded that the process was acceptable. *In re Application of Buckeye Wind, L.L.C.* (2012) 131 Ohio St. 3d 449 at ¶¶19, 31, 32, 2012-Ohio-8978. UNU cannot raise this issue again.

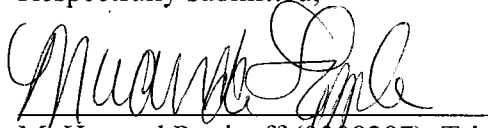
UNU Issue 54: The landowners' lease or lease options may contain any provisions contrary to the public interest, such as prohibitions against making complaints to the Board about the installation or operation of the turbines.

The Board does not need to evaluate those documents for purposes of making the determinations required by R.C. 4906.10, and those documents are not relevant to the determinations required by R.C. 4906.10. UNU Issue 54 should be precluded.

IV. Conclusion

For the foregoing reasons, UNU should not be permitted to present irrelevant issues. Additionally, UNU must be precluded from re-litigating the many, many issues previously considered by the Board in prior cases. Champaign Wind's Motion in Limine is reasonable and should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Howard Petricoff", is written over a horizontal line.

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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 31st day of October, 2012.

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Summary: Motion in Limine of Champaign Wind LLC electronically filed by Ms. Miranda R
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