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-BGN

MEMORANDUM CONTRA MOTION IN LIMINE

Intervenors Union Neighbors United, Inc., Robert and Diane McConnell, and Julia F. Johnson ("Intervenors") oppose the Motion in Limine of Champaign Wind, LLC.

I. Champaign Wind's collateral estoppel argument is both erroneous and manifestly unjust.

In April of 2009, Buckeye Wind, LLC, a subsidiary of EverPower Wind Holdings, Inc., filed an application with the Board for a certificate approving the installation and operation of seventy wind turbines in eastern Champaign County. *Matter of Buckeye Wind, LLC,* Case No. 08-666-EL-BGN ("Buckeye I"). At the evidentiary hearing in that matter, EverPower Vice President Christopher Shears testified that EverPower had no plans for future phases of turbine installations in the community "at the moment," and that any additional phases would be subject to "full due process of the Power Siting Board rules." *Id.*, Transcript I at 105 (Nov. 9, 2009). The Board issued a certificate for the Buckeye I project on March 22, 2011.

Only one year later, in late 2011, EverPower met with the Board's staff about Buckeye Wind Phase II ("Buckeye II") which, as described in the Application, would entail another 56 turbines in the same area of eastern Champaign County. If approved, Buckeye II will double the impact on the community. Instead of the 54 turbines approved by the Board in Buckeye I, the

community is now faced with the prospect of 110. Yet at the same time EverPower seeks to double the scale of its wind project, its subsidiary, Champaign Wind, is now invoking the doctrine of collateral estoppel to bind Intervenors to the decisions rendered by the Board in Buckeye I. In essence, EverPower is seeking to have a 110-turbine project approved under the rulings of the Buckeye I review process, which was applicable to a much smaller project. To do so under these circumstances is contrary to the principles of collateral estoppel and would work a profound injustice to the intervenors in these proceedings.

Collateral estoppel (also known as "issue preclusion") is one aspect of the doctrine of *res judicata*. *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St. 3d 193, 195. Collateral estoppel entails the "preclusion of the relitigation in a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action." *Id*. To successfully assert collateral estoppel, a party must plead and prove the following elements:

> (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;
>
> (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;
>
> (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and
>
> (4) The issue must have been identical to the issue involved in the prior suit.

Balboa Ins. Co. v. S.S.D. Distrib. Sys., Inc., 109 Ohio App. 3d 523, 527-28 (12th Dist. 1996); *Monahan v. Eagle Picher Industries, Inc*., 21 Ohio App.3d 179, 180-81 (1st Dist. 1884).

The essential theme which runs throughout the jurisprudence of *res judicata,* including collateral estoppel, is "the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense." *Goodson*, 2 Ohio St. 3d at 201. Thus, as stated by the Ohio Supreme Court:

> [A party] may not invoke collateral estoppel without showing that precisely the same issue was litigated in the prior action. . . . An absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.

Id. at 197, 201. The Supreme Court has identified the following factors to be considered in determining whether the identical issues are presented in both cases:

(1) The existence of substantial overlap between evidence and argument;

(2) Whether the new evidence or argument requires application of the same rules of law;

(3) Whether pretrial preparation and discovery reasonably could have been expected to cover the new matters in the prior action; and

(4) The closeness of the relationship between the claims involved in the two proceedings.

Id. at 198, *citing* Restatement of Judgments 2d 252.

Because the Buckeye II application includes turbines that were neither proposed nor approved in Buckeye I, this second phase does not pose precisely the same issues litigated in Case No. 08-666-EL-BGN. Simply put, the Board is not considering the same turbines or turbine sites. An analogous example from a decision dealing with *res judicata* illustrates this point. In *Portage Cty. Bd. of Commrs. v. Akron*, the Ohio Supreme Court rejected the argument of defendant City of Akron that plaintiff City of Cuyahoga Falls previously, in 1913, had litigated over whether Akron's dam was unduly restricting the flow of the Cuyahoga River. 2006-Ohio-954, ¶¶ 83-85, 109 Ohio St. 3d 106, 122-23. To determine whether *res judicata* applied, the Court had to decide whether the "second action arising out of the transaction or occurrence . . . was the subject matter of the previous action." Id. at 123, ¶¶ 84-85. The Court held that, because Akron had decreased the river's flow by increasing its water removal at the dam since the first lawsuit, "[n]one of the issues presented in this suit could have been raised in

1913, and therefore, they are not precluded by the judgment entered in 1913." Id. at ¶ 85. Thus, in *Portage County*, the issues were not identical even though the same dam was the offender in both lawsuits, because Akron's increased use of the dam after 1913 could not have been litigated in the earlier lawsuit.

In its Motion in Limine, Champaign Wind argues that specific issues in this matter are identical with those in Buckeye I and thus should be precluded. For the following reasons, none of the specified issues are barred by issue preclusion:

Intervenors' 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.

While Intervenors presented a similar argument in Buckeye I, the Board did not explicitly rule on that issue. Buckeye I, Opinion, Order and Certificate at 80 (March 22, 2010). Therefore, since the issue was not decided by the Board, collateral estoppel does not bar Intervenors from raising the issue in these proceedings.

Intervenors' 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.

This precise issue was not, as Champaign Wind protests, litigated or adjudicated in Buckeye I, nor was it necessary to the final judgment in that case. What was adjudicated in Buckeye I was the propriety of waivers of site selection requirements. In that case, the ALJ waived the requirement of an alternative site analysis under § 4906-13-2(A)(1) of the Board's general siting rules, as well as site selection requirements of O.A.C. § 4906-17-04. Buckeye I, Opinion, Order and Certificate at 6. The ALJs ruled that Intervenors lacked standing to challenge those waivers. *Id.* The Board agreed. *Id.* at 8. Any opinion of the Board relevant to

the alternative site requirements of the rules or R.C. § 4906.10 was *dicta* which was not necessary to its judgment regarding the waivers.

No such waivers have been issued in this case. Therefore, Champaign Wind is subject to O.A.C. § 4906-17-04. Section (A) of that rule provides, "The applicant shall conduct a project area site selection study prior to submitting an application for a wind-powered electric generating facility. The study shall be designed to evaluate all practicable project area sites for the proposed facility." (Emphasis added.) Furthermore, R.C. § 4906.10(A)(3) requires the Board to consider whether "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives. (Emphasis added.) In light of these requirements, the issue of site alternatives is relevant and Intervenors should be allowed to conduct cross-examination regarding that issue.

Intervenors' Issue 15: The Application 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.

Turbine selection for Buckeye II is not the identical issue as in Buckeye I, because different turbine models are at issue. The approved application for Buckeye I considered the potential employment of three turbine models: Nordex N100, Nordex N90, and RePower MM92. The application for Phase II considers the use of not only the Nordex N100 and the RePower MM92, but five other turbine models not considered in Phase I. Application at 11. As testified by David Hessler in the Buckeye I hearing, different models produce different levels of noise. They may also differ with respect to other adverse impacts, such as how far they can throw their blades. Therefore, the turbines being considered in this proceeding may have characteristics that would warrant that the Board dictate a particular turbine be selected for, or

excluded from, the project, as opposed to deferring turbine selection after a certificate is issued. For all of these reasons, this issue is relevant and is not barred by collateral estoppel.

Intervenors' 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 the result of the installation or operation of the Facility.

Although a similar issue was addressed in Buckeye I, the Board did not rule on it. Opinion, Order and Certificate at 40. In addition, the difference in scale between the 54 turbines authorized in Buckeye I and the 110 proposed for the combined projects makes this a different issue for Phase II. The cumulative impact of the two projects presents a greater potential for property devaluation. Furthermore, this issue is not the same as the issue addressed in Buckeye I because there are several important new studies showing significant property devaluation in the midst of wind energy facilities. Because the Board has a statutory obligation to determine whether the facility serves the public interest, convenience, and necessity, R.C. § 4906.10(A)(6), the Board should consider whether property devaluation should be mitigated in light of these new studies.

Intervenors' 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.

Collateral estoppel does not bar Intervenors from pursuing this issue to the extent that the recommended conditions in Buckeye II involve different facts. For example, the Staff's recommended Condition 11 states that Champaign Wind shall notify the Staff as to which turbine model it selected at least 60 days prior to the preconstruction conference. As discussed above, this Application involves different turbine models with different characteristics from those considered in Buckeye I. The Applicant has not yet submitted complete manufacturer safety information for one of the turbine models under consideration, yet proposed Condition 11

would not require that information to be submitted until after the Certificate is issued, thus bypassing the Intervenors' right to cross-examine the Applicant and Staff on the safety characteristics of that turbine. Therefore, Condition 11 presents different issues from those considered in Buckeye I.

Champaign Wind argues that the Supreme Court disposed of this and other issues in its decision in Buckeye I. It did not. While a majority of the Court concurred in the judgment in that case, Justice O'Donnell concurred in the judgment only and did not join in Justice Lanzinger's opinion or in the syllabus. There was, therefore, no majority opinion. A plurality opinion of the Court has no binding precedent. *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240 at {20}.

In the end analysis, the doctrine of *res judicata*—including collateral estoppel—is a rule of justice undergirded by principles of fundamental fairness and due process. *Goodson*, 2 Ohio St. 3d at 202. Thus, collateral estoppel must not be applied so rigidly as to defeat the ends of justice or to work an injustice. *Id.* Champaign Wind and its parent, EverPower, seek to do just that. Though they have applied to double the size of their facility and, consequently, the impacts on the community, they are simultaneously wielding collateral estoppel as an offensive weapon to bind community members to decisions made by the Board in connection with the far-smaller Buckeye I facility. Not only that, they seek to bar Intervenors from pursuing two issues that were not even decided by the Board in Buckeye I. For the reasons discussed above, collateral estoppel does not bind the Intervenors as alleged in the Motion in Limine, and applying that doctrine would violate due process and fundamental fairness.

II. None of the Issues Identified in the Motion in Limine are Irrelevant.

Champaign Wind also seeks to bar Intervenors from pursuing specific issues on the grounds that they are irrelevant. To the contrary, each of those issues is relevant for the following reasons:

Intervenors' 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.

Intervenors' Issue 7: Whether the 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.

The experience of EverPower and its affiliates at other facilities, and the design of those facilities, is certainly relevant to the issues in this case. If EverPower has caused adverse impacts on its neighbors at other facilities, that fact may be relevant to whether Buckeye II will adversely affect the surrounding community in Champaign County. For example, if EverPower has received complaints of ice being thrown from turbines onto neighboring properties, the existence of such complaints would be relevant to whether the setbacks proposed in Buckeye II are adequate to prevent similar hazards. Moreover, the design and characteristics of the other facility—such as its setbacks—would be relevant for the same reason. Furthermore, the effectiveness of any complaint resolution procedures that may have been employed at another EverPower facility is relevant to the evaluation of complaint resolution procedures that should (or should not) be employed by Champaign Wind in these proceedings.

Intervenors' 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.

In its Application, Champaign Wind urges the Board to adopt the same 30-hour exposure standard for shadow flicker that the Board has applied in other wind power cases. Thus, Champaign Wind itself has placed at issue whether the Staff adequately assessed the potential

shadow flicker impacts at those other facilities. If shadow flicker impacts at another Ohio wind energy facility are proving to be excessive, that fact is relevant to the protectiveness of the 30-hour standard urged by Champaign Wind.

Intervenors' 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.

As discussed above, Board Rule 4906-17-04(A) requires the applicant to conduct a project area site selection study designed to evaluate "all practicable project area sites for the proposed facility." In its Application, Champaign Wind states that there are 13,500 acres of leased private land in the Project Area. Information produced to Intervenors by Champaign Wind indicates that Champaign Wind, EverPower, and/or another affiliate hold leases or lease options for three times that acreage. The excess land available to Champaign Wind calls into question whether it has evaluated all of that excess acreage as practicable project area sites for the proposed facility as required by the rule. The location and acreage of parcels under lease with Champaign Wind and its affiliates is directly relevant to the siting of this facility.

Intervenors' Issue 54: The landowners' leases 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 statutory criteria in R.C. § 4906.10(A) apply to every aspect of the proposed Buckeye II facility, including its leases. In fact, the Staff inquired about precisely this issue in their August 29 interrogatories to Champaign Wind:

> 16. Do the leases address impacts from shadow flicker and noise stemming from turbine operation? If so, what language is provided? In signing, are the landowners waiving their right to complain, or file suit against the Applicant/operator? Under what penalty are the landowners held? Does their participation/signing a lease preclude them legally, or in your mind, from being able to complain to the Applicant and OPSB via a complaint resolution procedure?

These issues are important to the protection of the public and the effectiveness of any complaint resolution procedure that the Board may require. They are therefore relevant to these proceedings.

III. Conclusion.

For all of the foregoing reasons, Champaign Wind's Motion in Limine should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 5, 2012, a copy of the foregoing Memorandum Contra Motion in Limine was served by electronic mail on 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), 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); and G.S. Weithman (diroflaw@ctcn.net).

s/Christopher A. Walker
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Summary: Memorandum in Opposition to Motion in Limine electronically filed by Mr. Christopher A Walker on behalf of Union Neighbors United and McConnell, Robert Mr. and McConnell, Diane Mrs. and Johnson, Julia F. Ms.