

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)	

**REPLY OF CHAMPAIGN WIND LLC
TO THE MEMORANDUM CONTRA OF UNION NEIGHBORS UNITED INC.,
ROBERT McCONNELL, DIANE McCONNELL AND JULIA JOHNSON**

Champaign Wind LLC (“Champaign Wind”) files this Reply to the Memorandum Contra filed by Union Neighbors United Inc., Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively “UNU”) on November 5, 2012. On October 31, 2012, Champaign Wind filed a motion in limine, requesting that 11 of UNU’s 62 issues identified on October 15, 2012 not be addressed or introduced at the evidentiary hearing in this matter. Champaign Wind contends that those 11 issues are not relevant and/or are issues that are collaterally estopped.

UNU contends that none of the issues identified by Champaign Wind is precluded by collateral estoppel, and that all of its issues are relevant. UNU even boldly argues that Champaign Wind is seeking to have all of the turbines approved “under the rulings of the Buckeye [Wind] I review process, which was applicable to a much smaller project.” Champaign Wind is making no such arguments.

Simply put, some of UNU’s issues are simply not relevant to this proceeding and other issues are collaterally estopped because they were addressed directly by the Ohio Power Siting Board (“Board”). *See, In re Application of Buckeye Wind LLC for a Certificate to Construct Wind-Powered Electric Generation Facilities in Champaign County*, Case No. 08-666-EL-BGN

(“*Buckeye Wind I*”); and *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 (“*Adoption of Chapter 4906-7-17*”).

The pending application includes turbines that were not proposed or approved in *Buckeye Wind I*. Even so, this Board decided issues that are not unique to *Buckeye Wind I*, and collateral estoppel has legitimate application in this matter to preclude re-litigation of those very specific issues. UNU cited to *Portage Cty. Bd. of Commrs. v. Akron* (2006), 190 Ohio St. 3d 106, 2006-Ohio-954, but that case is simply an example of a case in which issue preclusion did not apply because the issues were not raised in earlier litigation. *Portage* has no bearing on whether issues in this proceeding were previously litigated and decided by parties in privity.

Champaign Wind stands by its earlier arguments. Several issues raised by UNU in this proceeding are irrelevant – namely, UNU Issues 6, 7, 14, 16, a portion of 25, 40, and 54. Moreover, Champaign Wind urges the Board to conclude that several issues raised by UNU herein (UNU Issues 9, 14, 15, 38, and 48) were actually and directly litigated in a prior action, were passed on by the Board, and the parties involved therein are in privity with those in this proceeding. Champaign Wind will not reiterate all of its earlier arguments. Instead, Champaign Wind has opted to address a few of UNU’s points in its Memorandum Contra because UNU attempts to “reshape” its issues in order to support its argument that it is presenting relevant issues and/or it is presenting issues that have not been decided previously.

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 need for an applicant to identify and evaluate alternative sites was litigated and decided by the Board previously in *Adoption of Chapter 4906-7-17*. The Board decided that applicants need not present alternative sites.

Moreover, in *Buckeye Wind I*, UNU argued that it was improper for Buckeye Wind to not present site alternatives. UNU raised that argument in the context of the propriety of Buckeye Wind's waiver requests, but the issue that was litigated was whether it was improper for Buckeye Wind to not present site alternatives. The argument was rejected.

UNU Issue 14 is the same issue, raised again in this proceeding. UNU Issue 14 presumes that Champaign Wind was required to identify and evaluate an alternative site for the Proposed Facility or alternative sites for individual turbines in the proposed Facility. Moreover, UNU contends that, in order to not present site alternatives, Champaign Wind was required to seek a waiver of Rule 4906-17-04(A), Ohio Administrative Code. The Board has faced the policy question and concluded that an applicant has the discretion to present site alternatives. For these reasons, UNU Issue 14 should be precluded.

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.

UNU argues that the parties addressed a "similar" issue in *Buckeye Wind I*, but that the Board did not rule on it. UNU cites to the Opinion, Order and Certificate for support. However, as Champaign Wind pointed out in the Motion in Limine, UNU raised the same issue in *Buckeye Wind I* and the Board did not accept it. *Buckeye Wind I*, OO&C at 37-40; EOR at 34-35.

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.

The Board decided in *Buckeye Wind I* that, conceptually, it was not improper for evaluations, studies, and information to be submitted to the staff after issuance of the certificate. Buckeye Wind I, OO&C at 81-82; EOR at 30-33. Moreover, the Board rejected the arguments that it was improper for specific conditions in *Buckeye Wind I* that required certain evaluations, studies and information to be submitted to the staff after issuance of the certificate. UNU Issue 48 questions the concept of post-certificate submissions and UNU should not be permitted to re-litigate the concept. Additionally, in its Memorandum Contra UNU points specifically to Staff-Recommended Condition 11, wherein Champaign Wind would be required prior to the preconstruction conference to identify the turbine model selected for the project. The Board approved that same requirement for Buckeye Wind (in Condition 49), concluding that it was not improper for the turbine model selection to be submitted to the staff after the issuance of the certificate. The Board should preclude UNU for re-litigating prior decisions.

UNU 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.

UNU argues that the landowner leases and lease options are “important to the protection of the public and the effectiveness of any complaint resolution process that the Board may require.” In order to determine whether the requested certificate should be granted, the Board need not evaluate the individual landowner leases or lease options. Moreover, the Board need not evaluate the individual landowner leases or lease options in order to determine measures to

protect the public and have an effective any complaint resolution process. UNU Issue 54 is irrelevant to the determinations that that Board will be making in this proceeding.

IV. Conclusion

For the foregoing reasons, UNU should be precluded from presenting irrelevant issues and from re-litigating issues previously considered by the Board previously. More specifically, the Board should preclude UNU Issues 6, 7, 9, 14, 15, 16, a portion of 25, 38, 40, 48, and 54. Champaign Wind's Motion in Limine is appropriate and should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Reply Reply of Champaign Wind LLC to the Memorandum Contra of Union Neighbors United Inc., Robert McConnell, Diane McConnell and Julia Johnson electronically filed by Mrs. Gretchen L. Petrucci on behalf of Champaign Wind LLC