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. 12-160-EL-BGN

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE OHIO POWER SITING BOARD

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INTRODUCTION

Staff recommended conditions set forth in the Staff Report as modified in Staff's Merit Brief, Attachment A, are comprehensive and ensure the satisfaction of statutory criteria for issuing a certificate. Additionally, Staff believes the record adequately justifies issuing a certificate in this case. The Board should approve the proposed wind project with the recommended conditions.

DISCUSSION

Staff does not intend to address all arguments in the many merit briefs but will limit its comments to those areas where it believes further discussion helpful. Accordingly, Staff's silence about an issue does not signal agreement and means only that Staff believes the existing record adequately treats it.

A. Public Interest, Convenience, and Necessity.[1]

The record demonstrates Champaign Wind serves the public interest, convenience, and necessity.[2] Beyond question, the facility furthers state policy promoting renewable energy. While parties may quibble about the extent of economic benefit local landowners and the community may enjoy, the existence of significant economic benefits flowing from the facility appears clear. The record demonstrates the public process attending Champaign Wind's application.

Nevertheless, the County/townships argue the public interest, convenience, and necessity requires a certificate include certain conditions. The lack of legal authority for such claims and their flimsy foundation in impression and concern show the Board should reject them. Moreover, the sought conditions principally represent hedges against imagined future circumstances with little evidence suggesting probable future existence of such circumstances and discounting causation by existing conditions such as the Buckeye I wind-farm.

The Board should reject the County/township's proposals for those reasons, alone. Nevertheless, the following issues warrant further observations.

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1 R.C. 4906.10 (A)(6).

2 *In re Champaign Wind*, Case No. 12-160-EL-BGN (Staff Report of Investigation at 46-48) (October 10, 2012) (hereinafter "Staff Report"); Staff Brief at 6-9.

1. Financial Assurances for Decommissioning

Staff has proposed a condition requiring financial assurances for decommissioning that County/townships accept but for two points. Staff's condition matches financial assurances to the turbines that must be decommissioned, those constructed or under construction.[3] County/townships want Champaign Wind to post financial assurances for sums required to decommission *all* turbines regardless of the number constructed or under construction; the first turbine under construction would require financial assurances for all turbines planned. Staff submits County/townships' approach requires excessive assurances and costs.

While County/townships find most of Staff's proposal "acceptable," they also suggest reducing the re-evaluation/re-estimate periods from five years to three. Staff submits three years is too short. The decommissioning provision Staff recommends represents the Board's most recent decisions.[4] County/townships seek the change only because their witness, Mr. Knauth recommended it, and Staff submits that does not justify a change from the Board's most recent rulings.

2. Tax Revenue

County/townships claim the significant, anticipated tax revenue showering monies on local governments should not be a determinative factor of public interest, convenience

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[3] Staff Brief, Appendix A at 12, Condition 52(h); Staff Report at 62, Condition 55(h).

[4] *See e.g. In the Matter of the Application of Black Fork Wind Energy, L.L.C. for a Certificate to Site a Wind-Powered Electric Generating Facility in Crawford and Richland Counties, Ohio*, Case No. 10-2865-EL-BGN (hereafter, *In re Black Fork)* (Opinion and Order at 34,74) (January 23, 2012); *In re Black Fork* (Joint Stipulation and Recommendation at 15-16) (September 28, 2011).

and necessity. They also argue about ambiguities associated with the meaning of "local," irrelevant for these purposes. Unquestionably, local taxing authorities will benefit from Champaign Wind. County/townships also argue about the basis of Staff's projections correctly observing that the Payment In Lieu of Taxes (PILOT) has not been finalized but they ignore that Staff used conservative projections based on the PILOT revenues. Rejection of the PILOT program results in higher local tax revenues, meaning greater economic benefit than discussed by Staff. PILOT results in revenues between $6,000 and $9,000 per megawatt of nameplate capacity.[5] Without the PILOT program, the existing tax provisions apply and the revenues increase to approximately $30,000 to $40,000 per megawatt of nameplate capacity.[6] Accordingly, tax revenues can only increase beyond those Staff considered when examining if the project served the public interest, convenience and necessity. County/townships complaints do not refute Staff's recommendation.

3. Setbacks

County/townships seem to believe the Gamesa turbine safety manual proposes a 400 meter *setback*. It does not. County/townships acknowledge the safety manual recommends the relevant 400 meter area be cleared and cordoned-off *in case of fire only*. It describes a *temporary clearance area* established to respond to a *temporary incident*, it does not describe a permanent restriction such as a *setback*.[7] Accordingly, Staff does not

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5 Tr. II at 378.

6 *Id.*

7 Tr. X at 2578.

consider it a *setback*.[8] In short, the basis of County/townships' claim does not apply to a *setback* condition.

4. Staff Investigation

Staff conducted a complete investigation as the record reflects. Despite that extensive review, County/townships argue about the completeness of Staff's investigation because of their impressions and concerns. Whatever the source of this vague unease, the record does not support it as County/townships argument shows. Simply, County/townships' impressions and concerns are unsupported.

For example, County/townships complained about Staff's unwillingness to revise its Staff Report recommendations. Unjustified! Staff witness Rostofer testified to Staff's willingness to modify its recommendations if warranted as shown in the record.[9] Staff's actions verified that willingness throughout this proceeding. Staff modified recommendations because of information provided at the public hearing and the requests and evidence of the applicant and intervenors at the evidentiary hearing.[10]

Of course, Staff did not make unjustified changes. For example, County/townships cited its interrogation of a Staff witness concerning a page reference in

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[8] Tr. X at 2578.

[9] *In re Champaign Wind*, Case No. 12-160-EL-BGN (Direct Testimony of Donald Rostofer (Staff Ex. 2) at 4) (November 5, 2012) (hereinafter "Rostofer Dir. Test.").

[10] *Id.* (Direct Testimony of Andrew Conway on behalf of the Staff of the Ohio Power Siting Board at 5) (November 5, 2012); Staff Brief, Attachment A.

a Staff Report footnote. Staff did not change the footnote page reference because of the references accuracy and even explained its rationale.[11]

County/townships also complained that Staff "indicated" it needed additional resources but believed additional resources would not have resulted in different Staff Report recommendations citing the testimony of Staff witness Huckleberry. False! In fact, Staff witness Huckleberry stated, effectively, that he had sufficient resources, and stated financial modeling results under examination were "sound and accurate."[12] He described the consultant's expertise and credibility and explained his confidence in the results of its modeling.[13] Accordingly, the record contradicts County/townships claim.

Moreover, County/townships' argument about a Staff witness maintaining what he believed true about an inconsequential fact also does not support their claims. County/townships have not shown the relevance of the county encompassing Bellefontaine. At most, the record stands as a testament to the witness' patience.

Ignoring Staff's independent analysis of the application and its explanation of the results, County/townships also complain about the lack of an independent analysis and they do so without further explanation. County/townships ignore not only Staff's analysis but also *County/townships'* ability to present in the hearing the results of any analysis they performed if they believed circumstances required greater investigation.

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11 Tr. IX at 2367.

12 Tr. XI at 2656.

13 *Id*. at 2654.

Finally, County/townships claim erroneously that Staff failed to consider turbine manufacturer's recommended setbacks. They cite the testimony of Staff witness Burgener to support their claims but they ignore that Mr. Burgener testified he verified that the setbacks met statutory requirements and testified *he did not make any determinations about the setbacks Staff should recommend*.[14] They also ignore his further explanation that "staff members look at specific types of impacts, and if those impacts would suggest that a greater setback [than the statutory minimum] should be required, then they would make that recommendation."[15] Indeed, Staff investigated greater setbacks.[16] It found that those recommended in safety manuals were temporary clearance areas recommended for temporary incidents such as emergencies.[17] Because they were recommended as temporary measures, they are not "setbacks."[18] Again, the record contradicts County/townships'claim.

Staff's investigation and report were thorough and complete as the record shows. County/townships have discredited only themselves with their claims. Impressions and concerns are not a basis to impeach the Staff or deny a certificate. Here, County/townships' impressions and concerns are not appropriate, being unsupported in, and contradicted by, the record.

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[14] Tr. X at 2453.

[15] *Id*.

[16] *Id*. at 2578.

[17] *Id*.

[18] *Id*.

5. Due Process

County/townships claim denial of due process because of evidentiary rulings associated with admitting and maintaining in evidence Champaign Wind's application. Arguing merely credibility and weight-of-the-evidence, County/townships claim the Attorney Examiners erred admitting the application and denying motions to strike parts of it. They further claim that error denied them due process without: explaining how the Attorney Examiner's rulings denied them due process; citing legal authority; or, presenting constitutional analysis and argument. County/townships enjoyed due process. They ignore: the notice they received; the discovery opportunities they possessed; the opportunity to present evidence and cross-examine witnesses they exercised; and, the ability to present argument they enjoyed. The Board's process, including that in this case, meets the due process standard and County/townships have not shown a violation of that standard.

County/townships' claim the public interest, convenience, and necessity requires their desired results. It does not and County/townships do not cite any authority for their claims. Additionally, only unfounded impressions and concerns underlie the claims. The Board should not be swayed by such arguments.

B. Nature of Environmental Impact and Minimum Environmental Impact.[19]

1. Groundwater

The City argues that the Applicant did not provide a competent witness to address its issue that blasting during construction of the wind farm project could impact the City of Urbana groundwater aquifer. Exhibit F of the Application, which was admitted into evidence, specifically discusses groundwater resources. Contrary to the City's assertion that the application "failed to note the City's use of the Mad River Aquifer and instead focuses solely on individual wells in the project area," Exhibit F does note the presence of the Mad River Buried Valley Aquifer and that the principle source of groundwater in the vicinity of the Project Area is the carbonate bedrock aquifer.[20] Further, Application Exhibit F indicates that there are multiple groundwater Source Water Protection Areas (SWPA) in the Eastern Portion of Champaign County, but that only one SWPA is within close proximity to the Project Area.[21] Both Applicant and Staff concluded that SWPAs would not be affected by the proposed facility.[22] While the City states that it is concerned that construction activities may impact groundwater supplies, the City introduced no evidence related to this alleged threat. Moreover, the Applicant has indicated that

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19 R.C. 4906.10 (A)(2), (3).

20 *In re Champaign Wind*, Case No. 12-160-EL-BGN (Application for Certificate of Compatibility and Public Need, Exhibit F at 5) (May 15, 2012) (hereinafter "Application").

21 *Id*. at 5-6.

22 Staff Report at 30; Co. Ex. 1 at 32-33.

blasting is not anticipated for this project.[23] As such, the additional condition proposed by the City is unnecessary.

2. Noise

It is a well-known fact that wind turbines produce noise. It is also well-established that some will be bothered by the noise made by the turbines, but that individual responses vary greatly. UNU cites several anecdotal instances of individuals or families that could not tolerate turbine noise. Staff acknowledges that not everyone will have the same experiences or reactions to turbine noise. It is simply not possible to satisfy everyone, or to eliminate all impacts that wind turbines will have in the community. But neither does the law require that the project be impact-free. The Board cannot, and should not, base it decision on the possible impact that noise might have on some person.

UNU complains that numerous residents will be exposed to turbine noise far exceeding five dBA above the normal background sound level for the community.[24] This exposure, it claims, will create undo "annoyance," resulting in higher levels of stress that harm the body.[25]

There are several issues relating to noise that the Board must address. Most specifically, the Board must determine whether wind turbine noise creates an impact that

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23 Co. Ex. 1 at 60.

24 UNU Brief at 7.

25 *Id*. at 8.

should be minimized. If so, then what is an acceptable level/type of noise? That is, when is "noise from the proposed facility . . . so egregious as to not be in the public interest"?[26]

UNU criticized the methodology employed by applicant's witness Hessler to measure background sound. As Staff noted in its Post-Hearing Brief, Mr. Hessler testified that, at the present time, no standard exists for this specific type of field study.[27] Mr. Hessler made a number of adjustments, and had to employ a number of additional techniques and analyses, to adapt his study to wind turbine noise.[28] While acknowledging that these methods may contain some flaws, the Board found Mr. Hessler's methodology reasonable and acceptable in the *Buckeye I* case,[29] and should reach the same conclusion here.

UNU urges the Board to adopt L_{90} as the standard for measuring the background sound level.[30] The Applicant proposed using an L_{EQ} standard in this case, relying, in part, on past decisions of the Board. While it is true that many of those decisions were made on records where there was no opposing testimony on the appropriateness of using the LEQ to determine the background sound level,[31] it is irresponsible for UNU to claim that

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26 *In the Matter of the Application of Buckeye Wind, L.L.C. for a Certificate to Construct Wind-Powered Electric Generating Facility In Champaign County, Ohio*, (hereinafter: *Buckeye I*) Case No. 08-665-EL-BGN (Opinion and Order at 52) (March 22, 2010).

27 Staff Brief at 19-20.

28 Tr. IV at 746-765.

29 *Buckeye I* (Opinion and Order at 55) (March 22, 2010).

30 UNU Brief at 19.

31 *Id*. at 28.

the Board acted unreasonably in determining the appropriate background sound levels to use based on the facts in those cases. The Board has stated it that will make the determination of an appropriate background sound level on a case by case basis,[32] and it must do so here.

The record contains evidence from two acoustical engineers, one on either side of the issue. Staff urges the Board to continue to resist the demand for an "absolute" standard. In determining whether the "noise from the proposed facility is so egregious as to not be in the public interest," the record shows that "the likelihood of complaints is quite small whenever the average project sound level is below 45 dBA, *regardless* of the actual background sound level,"[33] even if the higher LEQ is adopted in this case.

UNU raises numerous concerns that the modeling of the expected noise generated by the proposed project was not conducted properly and, as a result, the actual noise level experienced in the community will be greater than claimed levels. Staff Report condition 49 proposed limits on noise levels from operation of the facility, providing a limitation for daytime (7 A.M. to 10 P.M.) and a more restrictive nighttime limitation (10 P.M. to 7 A.M.) to address this very issue. Given those restrictions, Staff urges the Board to find that the noise impact assessment conducted by the applicant was reasonable and the impacts to be properly mitigated.

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32 *In the Matter of the Power Siting Board's Adoption of Chapter 4906-17, and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-17*, Case No. 08-1024-EL-ORD (Opinion and Order at 40) (October 28, 2008).

33 *In re Champaign Wind*, Case No. 12-160-EL-BGN (Amended Dir. Test. of George Hessler on behalf of Champaign Wind at 5) (October 31, 2012) (emphasis added).

UNU presented testimony from an audiologist who described the mechanics of noise and its impacts on the body. As UNU notes in its brief, the applicant's witness, Dr. Kenneth Mundt, could not deny that sleep deprivation from extreme noise might cause health problems.[34] But Dr. Mundt testified that there was insufficient epidemiological evidence "that could validly lead to a conclusion of a causal connection between residential proximity to industrial wind turbines and human disease or other serious harm to human health."[35] UNU, of course, disputes this conclusion,[36] but offers no valid scientific study demonstrating that wind turbine noise, at the design levels found acceptable to Mr. Hessler and as restricted by Staff's recommended conditions, will affect health. As was the case in *Buckeye I*, Staff urges that the Board find that the evidence presented in this case is insufficient to justify a decision that serious health impacts will result from the proposed project.

3. Setbacks

The setbacks proposed by the applicant, as modified by Staff's recommendations, are more than adequate to protect public safety. UNU, however, argues that the setbacks are inadequate, and that all setback measurements should be made from the property line, not at the residence.[37] Failing to do so, it claims, deprives property owners of the enjoy-

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34 UNU Brief at 9.

35 *In re Champaign Wind*, Case No. 12-160-EL-BGN (Rebuttal Test. of Kenneth Mundt on behalf of Champaign Wind at 33) (December 3, 2012).

36 UNU Brief at 16.

37 *Id*. at 38.

ment of their property, and exposes them to risk of serious injury or death.[38] But the record contains no reliable evidence of danger posed to person or property.

The argument that manufacturer safety manuals require greater setbacks than those proposed and recommended is also without merit. Staff witness Conway testified that he contacted all of the potential manufacturers, and that, with his recommended conditions, the project will exceed all manufacturer's recommendations on setbacks.[39]

UNU also misrepresents Staff's testimony with respect to setbacks from public roads. It is simply untrue that "Staff failed to measure the distances between the turbine sites and the public roads."[40] Staff did measure distances from arterial roadways, those which are more heavily travelled and therefore present the greatest public risk.[41] UNU asks the Board to direct its Staff to measure the distances for each setback and make a detailed paper record of them for the public's information. Staff's statutory duty is to assist the Board in its decision-making by conducting an investigation into the adequacy and reasonableness of applications, not to generate detailed information for public consumption. The Staff performed its responsibilities, and assures the Board that its recommended conditions ensure that the project's setbacks, both to roads and to habitable premises, meets or exceeds statutory requirements in all cases.

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38 UNU Brief at 48.

39 Tr. X at 2498-2499.

40 UNU Brief at 50.

41 *See, e.g.*, Tr. X at 2488-2489.

UNU's recommendation that no turbine be located any closer than 0.87 miles (nearly 4600 feet), and preferably one mile (5280 feet), from the property line of nonparticipating landowners is untenable.[42] This distance is significantly greater than proposed by the applicant or recommended by Staff. Indeed, UNU proposed a setback distance that is five to six times the minimum distance required by Ohio law for this project site. UNU's arguments and proposed setback requirements are masked. They are designed to kill the project, plain and simple.

If the siting guidelines proposed by UNU were to be adopted as a design methodology, it would effectively preclude the development of wind energy in much of the country, let alone Champaign County. A 1 mile setback from every house, without respect to property lines, would result in a circular "no turbine" area with a diameter of 2 miles, or more than 2,000 acres, around each house. This is not reasonable and should be rejected by the Board.

Both the City and the County also raise issues relating to setbacks. The City, while raising generalized concerns previous addressed in Staff's Post-Hearing Brief, offers no alternative. It does not propose any specific setback of method for determining an appropriate setback distance. The County's concern centers on manufacturer-recommended setbacks for cordoning off areas surrounding a turbine in the event of a fire or other emergency.[43] But this is not a siting issue. Rather, it is an issue of emergency

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42 UNU Brief at 15.

43 County Brief at 15.

response, a "simple safety measure" of evacuating homeowners in the rare circumstances where an emergency may pose an increased threat.[44] As applicant witness Shears testified on cross-examination, there is generally little, if anything, that local fire departments can do about something like a hub fire in a turbine, and that the accepted practice is to just let the nacelle burn.[45] This does not require increasing the setback, but adequately training safety personnel in best practices.

As Staff stated in its Post-Hearing Brief, a project need not be impact-free or with risk to sustain legal muster.[46] Staff urges the Board to find that the proposed setbacks adhere to, and indeed exceed, the requirements set forth in the statute, and support a finding that the proposed project is in the public interest, convenience, and necessity

4. Shadow Flicker

UNU objects to any reliance on applicants' witnesses to support the shadow flicker study submitted with its application. Specifically, UNU argues that the applicant did not present any witness who could discuss, beyond generalities, the substance of the Shadow Flicker Report.[47] The record is, it therefore claims, devoid of admissible, reliable, and accurate evidence on that subject.[48]

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44 Tr. IV at 908-911.

45 *Id*. at 923.

46 Staff Brief at 2, 4, 17.

47 UNU Brief at 52.

48 *Id*. at 53.

As UNU itself acknowledged, it is the Board's long-standing practice to allow an applicant to sponsor exhibits to the application without the need for witnesses with specific knowledge thereof. As the Board articulated in its Opinion and Order in the Buckeye I case:

> The Board notes that it is a long-standing practice in Board proceedings for an applicant to sponsor exhibits to an application through the testimony of a witness that is an officer or experienced employee of the applicant. The Board has admitted the testimony of a witness, and the related exhibits, where the witness demonstrates that the exhibits or studies were performed at the applicant's request, under the witness' direct or indirect supervision, and that the officer is sufficiently knowledgeable about the information in the exhibit or study to offer testimony. We have found this process to be an efficient method by which to introduce large amounts of data necessary to process certificate applications. Further, the Board notes that, pursuant to Section 4906.07, Revised Code, the Board is required to direct an investigation of the application and file a written report of the investigation.[49]

Nor has UNU provided any basis for its assertion that such a practice would result in an arbitrary and prejudicial double standard with regard to the admissibility of evidence in this case. The Shadow Flicker report in this case was performed at the applicant's request, under its witnesses' direct or indirect supervision. By contrast, the Caithness database that the Examiners excluded from the record in this case was not compiled by any or at the direction of any witness who testified in this case, and was illed with errors and omissions that made it, in the Staff's opinion, inherently unreliable.[50]

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49 *Buckeye I* (Opinion and Order at 12) (March 22, 2010).

50 Tr. X at 2507, *et seq*.

UNU claims that the shadow flicker study was fundamentally flawed. Relying simply on "simple geometry," UNU purports to criticize the model's methodology, going so far as to characterize it as "sleight of hand."[51] But the unrefuted evidence of record demonstrates that the study was performed using a widely accepted modeling software package developed specifically for the design and evaluation of wind power projects, employing "worst case" scenarios and conservative assumptions.[52] Rather than presenting evidence of its own, UNU attempts to confuse the record by positing arguments that, without support or scrutiny by cross-examination, may have no merit whatsoever.

Moreover, Staff has recommended that the applicant further model receptors that may experience more than 30 hours of shadow flicker per year, specifically demonstrating how its mitigation efforts will reduce shadow flicker impacts. Contrary to UNU's characterization, Staff has not recommended that "victim[s] alter his or her property to mitigate the nuisance."[53]

In light of the intermittent nature of shadow flicker, the available mitigation measures, and Staff's recommendation that approved turbines are subject to mitigation after construction if shadow flicker at any non-participating receptor exceeds 30 hours per year, Staff respectfully submits that concerns about shadow flicker have been ade-

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51 UNU Brief at 59.

52 Application, Exhibit P at 2-3.

53 UNU Brief at 60.

quately addressed, and are not so excessive as to render the project contrary to the public interest as required pursuant to R.C. 4906.10(A)(6).

CONCLUSION

Staff believes that the record in this case supports an affirmative Board finding on each of the applicable criteria in R.C. 4906.10. The Staff recommends that, if a certificate is issued to Applicant for this project, the Board require Applicant to comply with all of Staff s Recommended and modified conditions.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail, upon the following parties of record, this 28th day of January, 2013.

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Summary: Brief Reply Brief electronically filed by Mrs. Tonnetta Y Scott on behalf of PUCO