

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC, for a Certificate)	
to Install Numerous Electricity)	Case No. 08-0666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at)	
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	
In the Matter of the Application)	
of Buckeye Wind LLC to Amend its)	Case No. 13-360-EL-BGA
Certificate Issued in)	
Case No. 08-666-EL-BGN)	

MOTION FOR WAIVER AND REQUEST FOR EXPEDITED RULING

Buckeye Wind LLC (“Buckeye Wind”), having moved for good cause on July 14, 2014 that the Ohio Power Siting Board (the “Board”) extend its Certificate of Environmental Compatibility and Public Need (the “Certificate”) granted in Case No. 08-0666-EL-BGN from March 22, 2015 to May 28, 2018, hereby moves the Board pursuant to Rule 4906-1-03, to grant the following waivers from Rule 4906-5-10(B) to eliminate any procedural dispute over whether Buckeye Wind’s request for extension can be heard through a motion: (1) waiver from the requirement under Rule 4906-5-10(B) that an application for amendment to certificate be submitted in the same manner as if it was an application for a certificate; (2) waiver from the requirement of Rule 4906-5-10(B)(1) that Staff shall review the application for amendment pursuant to Rule 4906-5-05 and make appropriate recommendations to the Board and the Administrative Law Judge; (3) waiver from the requirement of Rule 4906-5-10(B)(1)(b) to notify the parties of any determination by the Board that a hearing is not required; and (4) any other

waiver the Board deems necessary to resolve the procedural dispute over the Motion for Extension.

This motion for waiver (“Motion for Waiver”) is being brought in response to claims by Union Neighbors United, Champaign County and Urbana Township (the “Intervenors”) that Buckeye Wind should have filed an application to amend its Certificate rather than following the Board’s long-standing practice of extending Certificates through motion practice. The reasons supporting this Motion for Waiver are set forth in the accompanying Memorandum in Support. Further, in order that further procedural delays be avoided or minimized, Buckeye Wind seeks an expedited ruling on this Motion for Waiver pursuant to Rule 4906-7-12(C). Buckeye Wind has contacted all parties regarding its request for expedited ruling, and at least one party has objected to an expedited ruling.

Respectfully submitted,

s/ Michael J. Settineri

M. Howard Petricoff (0008287)

Michael J. Settineri (0073369)

Scott M. Guttman (0086639)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

P.O. Box 1008

Columbus, Ohio 43216-1008

(614) 464-5462

(614) 719-5146 (fax)

mhpetricoff@vorys.com

mjsettineri@vorys.com

smguttman@vorys.com

Attorneys for Buckeye Wind LLC

**MEMORANDUM IN SUPPORT OF MOTION FOR WAIVER AND
REQUEST FOR EXPEDITED RULING**

I. INTRODUCTION

As more fully explained in its July 14 motion for extension (“Motion for Extension”), Buckeye Wind LLC (“Buckeye Wind”) is asking that the Board extend the Certificate granted by the Board in Case No. 08-0666-EL-BGN from March 22, 2015 to May 28, 2018. Union Neighbors United, Diane and Robert McConnell, Julia Johnson (collectively “UNU”), Champaign County and Urbana Township filed opposition responses to Buckeye Wind’s Motion for Extension claiming that Buckeye Wind should be required to file an application amendment. Buckeye Wind, however, served the Motion for Extension with all of the procedural protections required of an application for amendment, *i.e.*, service on local officials and publication in a newspaper of general circulation. Because the Motion for Extension requests only an extension of time to align deadlines with a proximate project, it does not implicate any factors that otherwise must be addressed in an application to amend a certificate under R.C. 4906.06 – factors that already have been litigated and decided in the original proceeding for the Buckeye I Wind Farm and the amendment that was recently approved in Case No. 13-360-EL-BGN. Nor does the extension threaten any adverse environmental impact or otherwise change the location of all or any part of the facility. Therefore, even if Buckeye Wind’s motion is treated as an application to amend its Certificate, it does not give rise to any right of or need for a public hearing. R.C. 4906.07(B). Accordingly, the Board’s long standing practice of hearing extension requests through a motion is appropriate, and to eliminate any procedural dispute over whether Buckeye Wind’s request for extension can be heard through a motion, Buckeye Wind respectfully requests that the Board waive the purely mechanical application of Rule 4906-5-

10(B). To avoid unnecessary additional delay, Buckeye Wind also requests an expedited ruling on this Motion for Waiver.

II. BACKGROUND

On July 14, 2014, Buckeye Wind filed its Motion for Extension of Certificate, asking the Board to extend the Certificate for approximately three years – from March 22, 2015 to May 28, 2018. The Motion for Extension was served upon all parties to the original certificate application proceeding. *Compare* O.A.C. 4906-5-10 (requiring application for amendment to be served upon “[a]ll parties to the original certificate application proceedings.”) The Motion was also served upon relevant public officials and public libraries as would be required of an application under both Section 4906.06(B) of the Revised Code and OAC Rule 4906-5-06. (*See* Proof of Service filed August 1, 2014.) Finally, the Motion was published in the Urbana Daily Citizen, a newspaper of general circulation in the area on Saturday, July 19, 2014. R.C. 4906.06(C). (*See* Proof of Publication filed August 1, 2014.)

Intervenors Union Neighbors United, Diane and Robert McConnell, Julia Johnson (collectively “UNU”), Champaign County and Urbana Township filed memorandum contra to the Motion for Extension on July 29, 2014, to which Buckeye Wind is filing reply briefs separately.

III. ARGUMENT

A. Good Cause Exists for Granting a Waiver From Certain Provisions of Rule 4906-5-10(B).

Through its Motion for Extension, filed July 14, 2014, Buckeye Wind seeks an extension of time to commence construction on the Buckeye I Wind Project because of litigation delays and in order to align development with the also approved and adjacent Buckeye II Wind Project. Extensions of time may, and indeed have, been sought by motion. *See In re; FDS Coke Plant,*

LLC, Case No. 07-703-EL-BGN, Entry dated Sept. 30, 2013 ; *In re: American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN, Entry dated Dec. 17, 2012. UNU, Champaign County and Urbana Township disagree with that approach, claiming that Buckeye Wind should have sought to amend its Certificate through an amendment application, and that the Board should apply the same procedures it would apply as if Buckeye Wind was changing the facility design.

The Intervenor's arguments are form over substance. The only issue before the Board is whether good cause exists to extend Buckeye Wind's Certificate. Nevertheless, to address and resolve the Intervenor's procedural concern, Buckeye Wind seeks the following waivers from Rule 4906-5-10(B) which will eliminate any procedural dispute over whether Buckeye Wind's request for extension can be heard through a motion: (1) waiver from the requirement under Rule 4906-5-10(B) that an application for amendment to certificate be submitted in the same manner as if it was an application for a certificate; (2) waiver from the requirement of Rule 4906-5-10(B)(1) that Staff shall review the application for amendment pursuant to Rule 4906-5-05 and make appropriate recommendations to the Board and the Administrative Law Judge; (3) waiver from the requirement of Rule 4906-5-10(B)(1)(b) to notify the parties of any determination by the Board that a hearing is not required; and (4) any other waiver the Board deems necessary.

Good cause exists to support all of the waiver requests as described below.

1. Notice and Service of the Motion for Extension were Made With the Procedural Protections Statutorily Required for an Application to Amend.

Insofar as Rule 4906-5-10(B) may apply to the requested extension of Certificate, it should be waived here because the form and substance of Buckeye Wind's Motion for Extension substantially satisfies the material requirements of an application for amendment. Specifically:

- The Motion for Extension was served on the "chief executive officer of each municipal corporation, county, township, and the head of each public agency

charged with the duty of protecting the environment or of planning land use in the area in which any portion of such facility is to be located,” ORC § 4906.06(B); O.A.C. 4906-5-06 & 4906-5-10(B)(2)(a)(i);

- The Motion for Extension was also served on the librarian for the “main public library of each political subdivision as referenced in division (B) of 4906.06 of the Revised Code,” O.A.C. 4906-5-06 & 4906-5-10(B)(2)(a)(i);
- The Motion was also served on “all parties to the original certificate application proceedings,” O.A.C. 4906-5-10(B)(2)(a)(ii); and,
- The Motion was published in the Urbana Daily Citizen, a newspaper of general circulation in the area on July 19, 2014, five days after the Motion for Extension was filed. R.C. § 4906.06(C).

(See Proofs of Service and Publication filed August 1, 2014.)

There is no question that service and notice were effective. Intervenors have responded to the Motion for Extension with substantive objections that, although they lack merit, demonstrate plainly that Intervenors had an opportunity to be heard. A number of public comments have also been filed on the case docket, showing the effectiveness of Buckeye Wind’s newspaper publication of its request to extend the Certificate.

2. *The Board May Review the Motion for Extension Just as it Would An Application for Amendment Making the Very Same Request.*

The Motion for Extension seeks no change in the Certificate other than an extension of the deadline to commence construction. (Motion at 1.) There is nothing for the Board Staff to review or investigate. The public record shows indisputably the delays that have resulted from Intervenors’ litigation strategy. The record in this matter also shows that the extension is requested in furtherance of an amendment to the Certificate approved on February 18, 2014 to

substantially improve the Buckeye I Wind Project by aligning its progress and development with the also approved Buckeye II Wind Project. The substantive issues involved for the Buckeye I Wind Project have been fully and completely considered through both public and evidentiary hearings, resulting in the Certificate being issued by the Board and the recent amendment to the project being approved. The only substantive issue remaining before the Board is whether good cause exists to extend Buckeye Wind's Certificate to align with the Buckeye II Wind Project certificate.

3. *No Party or Member of the Public will be Prejudiced if this Motion for Waiver is Granted.*

Importantly, no party will be prejudiced if this Motion for Waiver is granted. The Intervenor and correspondence submitted to the docket imply that Buckeye Wind is trying to avoid a public hearing on its extension request by following the Board's long standing practice of allowing extension requests by motion. That is not true, and importantly a request for an extension, whether styled as an amendment application or a motion, does not require the Board to hold a hearing. Section 4906.07 of the Revised Code only requires a hearing if "... the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application." (*See also* Rule 4906-5-10(B)(1)(a) following the statutory language). Accordingly, the Intervenor and public are not entitled to a hearing on Buckeye Wind's request to extend the Certificate regardless whether Buckeye Wind's request is treated as a motion or an application to amend, and no party or member of the public will be prejudiced if this Motion for Waiver is granted.

4. *Granting the Motion for Waiver will Secure a Just, Efficient and Inexpensive Determination of the Extension Request.*

Allowing Buckeye Wind's request for extension through the pending motion would also follow this Board's policy of applying the rules "to secure just, efficient, and inexpensive determination of the issues presented in matters under Chapter 4906. of the Revised Code."

O.A.C. 4906-1-02. If strictly applied here, Rule 4906-5-10(B)(1)) would require Staff to review the motion pursuant to Rule 4906-5-05. Under 4906-5-05, the Staff would have to provide a completeness review that is typically performed for an initial application for a certificate, and not for an application to amend a certificate. *See e.g.* case dockets for Case No. 13-360-EL-BGA; Case No. 10-3128-EL-BGA; and 11-3446-EL-BGA. A completeness review would address matters already determined under the Certificate and wholly unrelated to the extension of time that is being requested – for example, a description of the facility, a summary of environmental impact studies, a statement of the need for the facility and the reasons why the proposed location is best, etc. O.A.C. 4906-5-05(A)(1) & R.C. 4906.06(A)(1)-(6).

Granting the Motion for Waiver would also relieve Staff of the need to "conduct an investigation" and then "submit a written report" of its findings and recommendations. O.A.C. 4906-5-05(D). That has all been done – once on the initial application for the Buckeye I Wind Project and once more on the amendment to the Certificate that was recently approved by the Board in Case No. 13-360-EL-BGN. In the matter at bar, nothing precludes Staff from filing a memorandum or document on the docket providing its position on the extension request, but Staff should not be required to commit resources to conduct an investigation and provide a formal staff report as contemplated by Rule 4906-5-05 on the extension request. Neither justice nor efficiency nor economy would be served by further work elevating form over substance.

Accordingly, good cause exists warranting approval of Buckeye Wind's request for waivers from portions of Rule 4906-5-10(B) and a waiver from any other rule the Board deems necessary to ensure there is no dispute that Buckeye Wind's request for extension may be heard through its pending Motion for Extension.

B. Good Cause Exists for An Expedited Ruling

The Board can and should expedite its decision on this Motion for Waiver. Intervenor's procedural objection to Buckeye Wind's Motion for Extension, as will be addressed in the replies to be filed, are all form and no substance. Protracted delays due to extensive briefing of procedural issues that are not material to the substance involved are contrary to a policy of facilitating a just, efficient and inexpensive determination of the matter. O.A.C. 4906-1-03. Therefore, to minimize further delay, and to justly and efficiently decide the substance of a straightforward request for extension, the Board should provide an expedited ruling on this Motion for Waiver. O.A.C. 4906-7-12(C). Doing so will allow for a prompt resolution of Buckeye Wind's Motion for Extension.

IV. CONCLUSION

In its Motion for Extension of the Certificate, Buckeye Wind demonstrated good cause and provided all interested persons with the procedural protections of service and notice that apply to an application to amend a certificate. As well, the Staff was served with the Motion for Extension. Because the Motion for Extension provided all of the statutory procedural protections that would have been relevant to an application for amendment, the Board may grant Buckeye Wind a waiver from the requirements of Rule 49106-5-10(B) and from any other rule the Board believes a waiver is necessary. Doing so will resolve any procedural dispute as to whether Buckeye Wind's Motion for Extension can be considered. In addition, to avoid protracted

procedural delays due to debates about the form of the Motion for Extension versus an application for amendment, the Board should issue an expedited decision on this Motion for Waiver.

Respectfully submitted,

s/ Michael J. Settineri

M. Howard Petricoff (0008287)

Michael J. Settineri (0073369)

Scott M. Guttman (0086639)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

P.O. Box 1008

Columbus, Ohio 43216-1008

(614) 464-5462

(614) 719-5146 (fax)

mhpetricoff@vorys.com

mjsettineri@vorys.com

smguttman@vorys.com

Attorneys for Buckeye Wind LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties of record via U.S. Mail and via electronic mail on this 4th day of August, 2014.

Jack A. Van Kley
Van Kley & Walker, LLC
132 Northwoods Blvd., Suite C-1
Columbus, Ohio 43235
jvankley@vankleywalker.com

Christopher A. Walker
Van Kley & Walker, LLC
137 North Main Street, Suite 316
Dayton, Ohio 45402
cwalker@vankleywalker.com

Chad A. Endsley
Ohio Farm Bureau Federation, Inc.
280 N. High Street, 6th Floor
Columbus, Ohio 43218
cendsley@ofbf.org

Breanne Parcels, Director of Law
City of Urbana
205 S. Main Street
Urbana, OH 43078
Breanne.Parcels@ci.urbana.oh.us

Gene Park
Piqua Shawnee Tribe
1803 Longview Drive
Springfield, OH 45504
Ewest14@woh.rr.com

Werner Margard
John Jones
Assistant Attorneys General
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us

Daniel A. Brown
Brown Law Office LLC
204 S. Ludlow St., Suite 300
Dayton, Ohio 45402
dbrown@brownlawdayton.com

Jane A. Napier
Assistant Prosecuting Attorney
Champaign County
200 N. Main Street
Urbana, OH 43078
jnapier@champaignprosecutor.com

Sarah Chambers
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215-6101
Sarah.Chambers@ThompsonHine.com

s/ Michael J. Settineri

Michael J. Settineri

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Summary: Motion for Waiver and Request for Expedited Ruling electronically filed by Mr. Michael J. Settineri on behalf of Buckeye Wind LLC