

**BEFORE
THE OHIO POWER SITING BOARD**

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| In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio |))))))) | Case No. 08-0666-EL-BGN |
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| In the Matter of the Application of Buckeye Wind LLC to Amend its Certificate Issued in Case No. 08-666-EL-BGN |))))) | Case No. 13-360-EL-BGA |
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**BUCKEYE WIND’S REPLY TO MEMORANDUM CONTRA BY INTERVENORS
UNION NEIGHBORS UNITED, ROBERT AND DIANE McCONNELL, AND JULIA
JOHNSON TO BUCKEYE WIND’S MOTION FOR CERTIFICATE EXTENSION**

I. INTRODUCTION

Buckeye Wind filed its request to extend its Certificate of Environmental Compatibility and Public Need issued in Case No. 08-666-EL-BGN (the “Certificate”) following the Board’s long standing practice to hear such requests through motion. Buckeye Wind also provided good cause for the extension, explaining how past and ongoing litigation continues to delay the project. Buckeye Wind provided examples of other certificate extensions and only seeks an extension to align the Buckeye I Wind Farm with the certificate timeframe for the Buckeye II Wind Farm, which is located in the same general area as the Buckeye I Wind Farm.

Even Union Neighbors United, Champaign County and Urbana Township (collectively “UNU”) acknowledge the litigation facing Buckeye Wind and admit they have appealed and seek to overturn the USFWS’ issuance of the incidental take permit issued to Buckeye Wind. Regardless, UNU opposes Buckeye Wind’s request to extend by arguing that Buckeye Wind should have filed an application to amend its Certificate and that doing so would allow the Board

to verify the information underlying the Certificate grant and avoid “encumbering” leaseholder properties and nonparticipating landowner properties. UNU’s arguments are form over substance, especially as the Buckeye II Wind Farm certificate runs through May 28, 2018 and will be built in the same general area as the Buckeye I Wind Farm.

As discussed below, Buckeye Wind believes that the Board’s long time practice of deciding certificate extension requests by motion rather than amendment is appropriate. Nevertheless, to avoid and resolve this procedural dispute, the Board can grant Buckeye Wind’s motion for waiver filed on August 4, 2014 (“Motion for Waiver”). Such a ruling would render UNU’s procedural argument moot and allow the Board to rule on the substance of Buckeye Wind’s request for extension.

II. ARGUMENT

A. UNU’s Procedural Argument is Form Over Substance as Buckeye Wind Served the Motion for Extension with all of the Procedural Protections Required of an Application for Amendment.

UNU argues at page one of its opposition that Buckeye Wind should have filed an application to amend its Certificate, and “... may not use a mere motion to apply for this certificate extension.” The Board, however, has a long standing practice of approving requests for certificate extensions through motions. *See e.g. In re Norton Energy Storage*, Case No. 99-1626-EL-BGN, Entry dated June 2, 2008 (granting a second 30-month extension to the project); *In re Lawrence County Energy Center, LLC*, Case No. 01-369-EL-BGN, Entry dated July 31, 2009 (granted 12-month extension after previously granting a 32-month extension); *In re Lima Energy Company*, Case No. 00-513-EL-BGN, Entry dated July 30, 2012 (extending certificate

from May 2007 to September 1, 2014).¹ That practice comports with the Board's express authority to waive the statutory requirement that an application be filed no more than five years prior to the planned date for project construction upon a showing of good cause (O.R.C. § 4906.06(A)) and Rule 4906-7-19(B) which allows the Board to prescribe different practices or procedures to be followed in a case.

Use of the motion for an extension rather than an amendment is simplicity and focus. There is no question under a motion for an extension that the only element that is under review is the time limit by which the project must be completed. An amendment on the other hand connotes substantive changes in the project itself. The motion for extension focuses the potential disagreements to a single issue – timing. The Board can focus on this single issue rather than the non-substantive nature of UNU's arguments by granting Buckeye Wind's Motion for Waiver, filed on August 4 in this proceeding. Doing so will render any procedural argument by UNU moot given that Buckeye Wind served the Motion for Extension with all of the procedural protections required of an application for amendment and is not changing the facility design.

For example, Buckeye Wind served a copy of the application on local officials and publishing notice within 15 days of the filing in newspapers of general circulation in the area. Buckeye Wind took those steps by:

- Serving a copy of the Motion for Extension 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,” O.R.C. § 4906.06(B); O.A.C. 4906-5-06 & 4906-5-10(B)(2)(a)(i);

¹ See also *In re Summit Energy Storage, Inc.*, Case No. 89-1302-EL-BGN, Entry dated November 23, 1998; *In re American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN, Entry dated December 17, 2012; *In re FDS Coke Plant, LLC*, Case No. 07-703-EL-BGN, Entry dated September 30, 2013.

- Sending a copy of The Motion for Extension to 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);
- Serving “all parties to the original certificate application proceedings,” O.A.C. 4906-5-10(B)(2)(a)(ii); and,
- Publishing in the Urbana Daily Citizen, a newspaper of general circulation in the area, a notice on July 19, 2014, five days after the Motion for Extension was filed. O.R.C. § 4906.06(C).

(*See* Certificate of Service to Motion for Extension *and see* Proofs of Service and Publication filed August 1, 2014.) These actions address UNU claims at page 3 of its opposition that Buckeye Wind should have followed the notice requirements of Sections 4906.06(B) and (C).

There is also 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 the 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.

UNU also claims at pages four to six of its opposition that Buckeye Wind is attempting to bypass the application process and that the Board must hold a hearing on Buckeye Wind’s extension request. 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, UNU, other intervenors and the public are not entitled to a hearing on Buckeye Wind’s request to extend the Certificate and no party or member of the public has been or will be prejudiced through the Board’s consideration of Buckeye Wind’s request for extension regardless whether the Board grants Buckeye Wind’s Motion for Waiver.

B. UNU’s Concern About the Validity of the Information Underlying the Board’s Initial Approval of the Certificate is Without Merit.

UNU also opposes the extension on the basis that Buckeye Wind must “submit an application” that addresses whether the information on which the Board relied to grant the Certificate remains valid. (UNU at 5.) UNU does not cite any information that it believes is invalid. Instead it simply argues that “Buckeye Wind must submit an application that deals with this question, and the staff must duly investigate and report on these issues.” (*Id.*) In fact, the argument is at odds with itself. Since Buckeye Wind only filed a motion for an extension, no other issues are before the Board. UNU can rest assured that all the other conditions and requirements of the certificate remain in full effect.

UNU not only fails to specify what information it believes should be considered, but also fails to take into consideration the many conditions the Board has imposed on the project that are prospective in operation. For example, the Certificate includes Condition 3 (page 83) which requires Buckeye Wind to obtain and comply with all applicable permits and authorizations required by federal and state entities prior to the commencement of construction and/or operation of the facility. Buckeye Wind must provide a road bond for roads (Condition 56 at page 93) and must repair roads and bridges following construction (Condition 25 at page 88).

Buckeye Wind must also obtain Staff approval on a variety of plans including final engineering and construction drawings (Condition 8 at pages 83-85), must employ best management practices in the vicinity of environmentally sensitive areas (Condition 11 at page 86) and develop a post-construction avian and bat mortality survey plan approved by Staff and the ODNR (Condition 15 at page 87). These and other conditions in the Certificate refute any claim by UNU that the Board should confirm the validity of the information underlying its decision to issue the Certificate.

Moreover, the Board recently approved the Buckeye II Wind project in the same general area in addition to its February 2014 approval of an amendment to the Buckeye I Wind project. The Buckeye I Wind project amendment included consideration of collection relocations, a substation relocation, access road changes and relocation of laydown yards. Significantly, the Buckeye I amendment allows both projects to share locations for facilities, and the Board's recent decisions in the Buckeye II Wind proceeding (Case No. 12-160-EL-BGN, Entry on Rehearing on September 30, 2013) and the Buckeye I amendment proceeding (Case No. 13-360-EL-BGA, February 18, 2014) validate the information underlying the original application.

With prospective conditions and a second project in the same general area that can commence construction through May 28, 2018, the Board can rely on its initial certificate issuance as well as the amendment approval in Case No. 13-360-EL-BGA to extend Buckeye Wind's Certificate to May 28, 2018.

C. UNU's Unsubstantiated Claim that Property Will be Encumbered has Been Addressed by the Board in Prior Proceedings.

UNU also argues that the Buckeye Wind's Certificate should not be extended because it is encumbering not only the land of leaseholders (who continue to receive payments) but also their nonparticipating neighbors. (UNU at 5.) UNU cites testimony by a nonparticipating

landowner from the Buckeye Wind II proceeding to support its argument that “many hundreds of families” will be unable to sell or develop as long as the Buckeye I project is pending. (UNU at 6.) This argument is at odds with the simple fact that Buckeye II is located in the same general area as the Buckeye I project with a certificate that extends to May 28, 2018. Even if the Board were to deny the extension for the Buckeye I project, the Buckeye II project is still certificated in the same area leaving UNU with the same concern about encumbering property.

The Board may also take note that it has rejected UNU’s claim about property devaluation in two separate proceedings. *See In re Buckeye Wind LLC*, Case No. 08-666-EL-BGN, Opinion, Order and Certificate at page 40 dated March 22, 2010 *and see In re Champaign Wind*, Case No. 12-160-EL-BGN, Opinion, Order and Certificate at 53-54. The Board also considered the testimony of residents like Ms. Parello in the Buckeye II Wind proceeding when reaching its decision about property values. (*Id.* at 17.) Having twice addressed UNU’s claim that the proposed wind farms will negatively impact property values in Champaign County, the Board does not need to revisit this topic a third time simply because Buckeye Wind is requesting an extension of its Certificate.

III. CONCLUSION

Buckeye Wind’s request to extend its Certificate is supported by good cause, and even UNU acknowledges that it continues to litigate against Buckeye Wind’s incidental take permit. (UNU at 6.) Yet, rather than address the substance of Buckeye Wind’s request for extension, UNU has focused its opposition on the form of Buckeye Wind’s request even though Buckeye Wind has followed the Board’s long standing practice of receiving extension requests through motions. To resolve and avoid that procedural dispute, the Board may grant Buckeye Wind’s Motion for Waiver given that Buckeye Wind informed the public of its extension request by publishing notice of its request and serving all parties and local officials with a copy of the

extension request. Doing so will render UNU's procedural argument moot and allow the Board to focus on the substantive reasons for Buckeye Wind's extension request, all of which support the granting of the request for certificate extension.

Respectfully submitted,

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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 U.S. Mail and via electronic mail on this 5th day of August, 2014.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/5/2014 5:12:01 PM

in

Case No(s). 08-0666-EL-BGN, 13-0360-EL-BGA

Summary: Reply By Buckeye Wind LLC to Memorandum Contra of Union Neighbors United, Robert and Diane McConnell and Julia Johnson to Buckeye Wind's Motion for Certificate Extension electronically filed by Mr. Michael J. Settineri on behalf of Buckeye Wind LLC