

**BEFORE  
THE OHIO POWER SITING BOARD**

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

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**MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED,  
ROBERT AND DIANE McCONNELL, AND JULIA F. JOHNSON  
IN OPPOSITION TO BUCKEYE WIND’S MOTION FOR WAIVERS  
AND EXPEDITED RULING**

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**I. Introduction**

On July 14, 2014, Buckeye Wind, LLC (“Buckeye Wind”) filed a Motion for Extension seeking to change the deadline for commencing construction, as set forth in Condition 52 of its Certificate, from March 22, 2015 to March 22, 2018. The response of Intervenors Union Neighbors United, Julia F. Johnson, and Robert and Diane McConnell<sup>1</sup> to that motion pointed out that the requested extension, which requires amendment of the Certificate, was improperly framed as a motion. Memorandum Contra Motion for Extension (July 29, 2014). In response, Buckeye Wind disclosed that it provided statutory notice of its Motion for Extension, including newspaper publication, in accordance with the procedures for amendments set forth in R.C. 4906.06. Motion for Waivers and Expedited Ruling at 4; Reply to UNU Memo Contra at 3-4. Since those statutory procedures do not apply to motions, Buckeye Wind’s claim of compliance with the notice requirements of Section 4906.06 is a tacit admission that the extension it seeks is

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<sup>1</sup> For simplicity, this memorandum references these intervenors collectively as “UNU.”

indeed an amendment of the Certificate. Further bolstering that conclusion, Buckeye Wind now asks the Board for a *carte blanche* waiver of any amendment procedures in its Rules that may apply to its extension request.

Buckeye Wind presents the Board with two options to resolve the “procedural dispute” surrounding its request for an extension of the Certificate: (1) grant its Motion for Extension, or (2) grant its motion for waiver of all statutory and regulatory requirements applicable to amendment of the Certificate. There is, of course, a third option— the Board can treat this matter as an amendment and proceed in accordance with Revised Code Chapter 4906 and the Board’s own rules. For the following reasons, UNU urges the Board to do so.

**II. Buckeye Wind has not shown good cause for its waiver motion or its motion for expedited ruling.**

Board Rule 4906-1-03 provides, “The board or the administrative law judge may, for good cause shown, as supported by a motion and supporting memorandum, waive any requirement, standard, or rule set forth in Chapters 4906-1 to 4906-17 of the Administrative Code, except where precluded by statute.”

Buckeye Wind seeks to set aside the Board’s entire procedural framework applicable to amendment of its Certificate. It is Buckeye Wind’s burden, as movant, to show good cause supporting the requested waivers. It has not met that burden. For the following reasons, the Motions for Waivers and Expedited Ruling should be denied for lack of good cause shown.

**A. Buckeye Wind has offered no grounds for its Motion for Expedited Ruling.**

Buckeye Wind has made no showing of time urgency warranting an expedited ruling. The only justification it can muster for an expedited ruling on the Motion for Waiver is that it “will allow for a prompt resolution of Buckeye Wind’s Motion for Extension.” Motion for Waivers and Expedited Ruling at 9. However, that rationale would apply to any motion in any

case before the Board. Nowhere in its Motion for Expedited Ruling, its Motion for Waivers, or its Motion for Extension does Buckeye Wind explain why the Board's normal motion practice is inadequate to provide a "prompt resolution."

Board Rule 4906-7-12(C) provides that the moving party must provide grounds for its request for an expedited ruling. Because Buckeye Wind has shown no such grounds, the Board should deny Buckeye Wind's Motion for Expedited Ruling. In that event, UNU reserves the right to file a Supplemental Memorandum Contra Buckeye Wind's Motion for Waivers within the fifteen-day period allowed by Board Rule 4906-7-12(B)(1). The Supplemental Memorandum may include additional information that should be considered by the Staff and Board in the course of its investigation and hearing on the Certificate amendment.

**B. Good cause for the requested waivers does not exist where the alleged need for the waivers is due solely to Buckeye Wind's lack of diligence.**

Buckeye Wind could, and should, have raised its extension request in the proceedings that culminated in the amendment of its Certificate on February 18 of this year. Buckeye Wind failed to do so, even though its stated reasons for the extension were known at that time.

Buckeye Wind blames UNU for "litigation delays" that have allegedly prevented it from proceeding with construction. But the Supreme Court issued its decision on the appeal of the Buckeye Wind Certificate in March of 2012, a year before Buckeye Wind filed its first amendment application in March of 2013. Although Buckeye Wind also cites the appeal of the Champaign Wind certificate as a cause for delay, that appeal is irrelevant to the Buckeye Wind project if, as Buckeye Wind insists, Champaign Wind is a wholly separate project. *See* Buckeye Wind's Reply to Memorandum Contra of Champaign County and Urbana Township at 3 (Aug. 5, 2014) ("the Buckeye I and Buckeye II projects are not necessarily planned or intended to be built together"). But regardless, that appeal and the appeal of the U.S. Fish and Wildlife

Service's Incidental Take Permit were both filed before the Board's January 6, 2014 hearing on Buckeye Wind's amendment application. If the cited litigation truly interfered with Buckeye Wind's ability to proceed with construction,<sup>2</sup> then Buckeye Wind had both the knowledge and the opportunity to include its extension request as part of the previous amendment proceedings.

Furthermore, one stated purpose of Buckeye Wind's earlier amendment application was to align certain elements of the Buckeye Wind project with the Champaign Wind project – a rationale now advanced in support of Buckeye Wind's request for extension of the certificate. Buckeye Wind's Reply to Memo Contra of County and Urbana Township at 3-4. Accordingly, it would have been appropriate and sensible to include the extension request as part of the earlier amendment application. Buckeye Wind has offered no reason why it could not have done so.

If Buckeye Wind were truly seeking a “just, efficient and inexpensive determination of the extension request,” Motion for Waiver at 8, it should have requested the extension in the context of the earlier amendment. If it had done so, this entire debate over the procedure for review of its current extension request would be unnecessary. Its failure to do so does not place the onus on the intervenors or justify setting aside the legally-mandated procedures that the Board and Staff already followed in the earlier amendment proceedings. Given Buckeye Wind's lack of diligence in bringing its extension request as part of the earlier amendment application, there is no good cause to deviate from the Board's established amendment procedures.

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<sup>2</sup> Buckeye Wind has mustered no evidence, other than bald assertions, to demonstrate that litigation has prevented it from a proceeding with construction during the five-year term of the current Certificate. The Certificate was not stayed during the subsequent appeal to the Supreme Court, and that appeal was concluded a full three years before the construction deadline in Condition 52 of the Certificate. The Board should not approve Buckeye Wind's extension request without a specific showing of the reasons Buckeye Wind has been unable to begin a continuous course of construction within the five-year period of the current Certificate.

**C. Buckeye Wind’s open-ended motion for “any other waiver the Board deems necessary” is unlawful and unsupported by good cause.**

In an odd twist of logic, Buckeye Wind not only seeks waivers from specified Board rules, but also seeks “any other waiver the Board deems necessary to resolve the procedural dispute over the Motion for Extension.” Motion for Waivers at 1-2. Board Rule 4906-1-03 provides for waivers “for good cause shown, *as supported by a motion and supporting memorandum.*” (Emphasis added.) Buckeye Wind’s request for “any other waiver the Board deems necessary” is an impermissible gap-filling measure that calls upon the Board to determine what waivers are necessary. Since Buckeye Wind has not shown cause for waiver of requirements not specified in its motion and supporting memorandum, Board Rule 4906-1-03 does not authorize the Board to grant such an open-ended waiver request.

**III. Waiver of Rule 4906-5-10(B)(1) is precluded by R.C. 4906.07(C).**

Buckeye Wind seeks a waiver of the requirement of Rule 4906-5-10(B)(1) that the Staff shall conduct an investigation of the amendment application pursuant to Rule 4906-5-05 and make appropriate recommendations to the Board and the Administrative Law Judge. Motion for Waivers at 2. That requirement of the Board’s rules mirrors Revised Code 4906.07(C):

The chairperson of the power siting board shall cause each application filed with the board to be investigated and shall, not less than 15 days prior to the date any application is set for hearing, submit a written report to the board and to the applicant. A copy of such report shall be made available to any person upon request. Such report shall set forth the nature of the investigation, and shall contain recommended findings with regard to division (A) of section 4906.10 of the Revised Code and shall become part of the record and served upon all parties to the proceeding.

This statutory requirement does not apply solely to applications for new certificates. Revised Code 4906.06 explicitly addresses applications for amendments of certificates as well as applications for new certificates, and nothing in the language of section 4906.07(C) restricts the

term “each application” to new certificate applications only. Unlike other statutory procedures that explicitly allow for waiver for good cause shown, *e.g.*, Revised Code 4906.06(A)(6), nothing in section 4906.07(C) allows for such a waiver.

Even Buckeye Wind, in the Certificate proceedings below, conceded that the Staff had a “statutory duty” to conduct an investigation of a certificate application and to file an investigative report for the Board’s consideration. Reply Brief of Buckeye Wind at 99 (February 1, 2010). As noted above, that statute does not distinguish between initial applications and amendment applications. Therefore, Buckeye Wind’s Motion for Waivers must be denied because it seeks waivers precluded by statute. Ohio Adm. Code 4906-1-03. Furthermore, because section 4906.07(C) independently requires the Board (or its Staff) to investigate each application for a certificate amendment, Buckeye Wind’s requested waiver of Rule 4906-5-10(B)(1) will not result in the efficiency claimed by Buckeye Wind. Thus, there is no good cause for waiver of that rule.

**IV. There are compelling reasons why the Board should conduct a full investigation and consider the need for a public hearing before deciding whether to extend the Certificate.**

It is “the long-standing policy of the Board” to include in each certificate a condition requiring the applicant to begin a continuous course of construction within a specified time period. *Matter of the Application of Lima Energy Company*, Case No. 00-513-EL-BGN at 7, ¶ 8 (July 30, 2012); *Matter of Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN at 2, ¶ 9 (Sept. 30, 2013).<sup>3</sup> According to the Board, the purpose of this provision is (1) to encourage the efficient use of the land and limit the applicant’s ability to hold the rights to construct on the

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<sup>3</sup> Although the Board’s policy underlying limits on the duration of certificates is sound, UNU does not concede that extensions of those limits may be granted by motion.

property indefinitely, and (2) to ensure that the information upon which the Board initially relied in granting the certificate is still valid and accurate. *Id.*

Buckeye Wind claims that because its extension request makes no change other than the deadline to commence construction, there is nothing for the Board or the Staff to investigate. Motion for Waivers at 6. In fact, Buckeye Wind goes so far as to say that following the Board's amendment procedures in this case would be "form over substance." *Id.* at 5. This claim is entirely inaccurate. The Board's own past practice indicates that it is appropriate to investigate extension requests. When considering Lima Energy's request for an extension of the five-year continuous course of construction window, the Staff requested and considered a broad range of information relating to the current status of that facility, including information regarding the status of the electric grid interconnection for the project, initial site preparation activities that had been completed, and the status of the federal, state, and local permits obtained by the applicant. *Lima Energy* at 3-5. A similar inquiry is necessary in this case.

Buckeye Wind's Certificate was issued more than four years ago, and much has changed in terms of knowledge and understanding of the actual and potential impacts of the project. It is unreasonable to expect UNU, within the seven days allotted under the procedure for expedited ruling, to articulate all of the relevant information and topics that the Board and Staff should consider and investigate in evaluating the extension request. The following, however, are several important reasons that the Board should reject Buckeye Wind's waiver motion and should undertake a thorough investigation before deciding whether to extend the minimum length of the Certificate from five to eight years.

**(A) Ensuring validity and accuracy of assumptions underlying the initial Certificate.**

In accordance with the Board's policy articulated in *Norton Energy* and *Lima Energy*, as well as the hearing requirements of R.C. 4906.07(B), UNU urges the Board to investigate Buckeye Wind's extension request to ensure the assumptions underlying Certificate are valid and accurate. For example:

(1) There have been significant advances in the understanding of wind turbine noise since the Board issued the Buckeye Wind certificate in 2010. In late 2012, four acoustic experts commissioned by the Wisconsin Public Service Commission, including Buckeye Wind's expert in the certification proceedings below, released a report evaluating low frequency noise, infrasound, and adverse health claims by residents within the Shirley Wind project (Brown County, Wisconsin). The experts concluded that there is now enough evidence to classify low-frequency noise and infrasound from wind turbines as "a serious issue, possibly affecting the future of the wind industry." *See Exhibit A at 7.* Because the current findings on wind turbine noise indicate that the impacts are greater than were contemplated when the Board issued the Buckeye Wind certificate in 2010, extension of the Certificate would result in a material increase in the environmental impact of the facility. Revised Code 4906.07(B) requires a hearing before the Board can authorize such an impact.

(2) In light of evidence on ice throw hazards submitted in the Champaign Wind certificate proceedings, the Board established a setback between turbines and heavily traveled public roads in that project equivalent to 150 percent of the sum of the hub height and rotor diameter of the turbines. *See Application of Champaign Wind LLC*, No. 12-0160-EL-BGN, Opinion, Order and Certificate at 36-37 (May 28, 2013). This equates to a setback of 991 feet if Champaign Wind uses one of the GE turbine models proposed in its application. *Id.* at 36. The



Board applied no similar setback from roadways in the earlier Buckeye Wind Certificate. While UNU does not concede that the setbacks for the Champaign Wind facility are sufficiently protective, UNU urges the Board to re-evaluate the turbine sites approved for Buckeye Wind in light of its subsequent decision in *Champaign Wind* and the safety evidence submitted in that case.

(3) Consistent with the Staff's inquiry in *Lima Energy*, UNU urges the Board also to evaluate the continued validity and accuracy of other assumptions underlying the Buckeye Wind facility. For example, it would be appropriate to inquire into the status of all leases that Buckeye Wind holds for the project and the status of its selection of a turbine model for the project.

**(B) Impact of extension on property owners.**

As a result of Buckeye Wind's Certificate, landowners in and near the project footprint have suffered uncertainty regarding the marketability of their properties. As discussed in UNU's memorandum opposing the Motion for Extension (at 5-6), the pendency of the Buckeye Wind project has adversely affected property sales. This concern is squarely relevant to the Board's interest in limiting the length of certificates to "encourage the efficient use of land." *Lima Energy* at 7; *Norton Energy* at 2. Extending the minimum duration of the Certificate from five to eight years would increase commensurately these impacts on property owners, thereby materially increasing the environmental impact of the facility. A hearing is required before the Board may approve such a change. R.C. 4907.07(B).

Buckeye Wind dismissively urges the Board to ignore property values entirely. Reply to UNU Memo Contra Motion for Extension at 6-7. Notwithstanding the Board's previous rulings in this case and in the Champaign Wind proceeding, R.C. 4906.07(C) requires the Board to consider the statutory siting criteria when ruling on this amendment request. Those criteria

include the nature of the probable environmental impact, whether the facility represents the minimum adverse environmental impact, and whether the facility will serve the public interest, convenience, and necessity. R.C. 4906.10(A)(2), (3), (5). Furthermore, as noted above, a hearing is required where, as here, an amendment request would materially increase a facility impact. These statutory requirements are not subject to the Board's waiver authority in Rule 4906-1-3.

For all of these reasons, the choice whether to investigate Buckeye Wind's extension request is not a matter of "form over substance." The Board should deny Buckeye Wind's waiver motion and evaluate the requested extension in accordance with the Board's established procedures for amendment applications.

**V. UNU has standing to oppose Buckeye Wind's waiver requests.**

In the initial certificate proceedings in this case, the Board held that intervenors do not have standing "to challenge the Board's consideration of a waiver of its certification application filing requirements." *Matter of Buckeye Wind, LLC*, No. 08-666-EL-BGN, Opinion, Order and Certificate at 8 (March 22, 2010). In that case, Buckeye Wind sought waivers from requirements of Ohio Adm. Code Chapter 4906-13 pertaining to the contents of its certificate application. The ALJ reasoned that the intervenors lacked standing to challenge those waivers because "the purpose of the Board's certification application requirements, like the PUCO's SFRs, is to obtain sufficient information to enable the Staff to fulfill its statutory duty to conduct an investigation and file its report of investigation." *Id.*, Entry of July 31, 2009, at 8-9.

Unlike the 2009 waiver motion, Buckeye Wind's pending waiver motion is not confined to the nature of the information that should be provided to the Staff in the course of an investigation. Now Buckeye Wind seeks to excuse the Staff altogether from conducting an

investigation and filing a report of investigation, measures that Buckeye Wind described below as a “statutory duty.” Reply Brief of Buckeye Wind at 99.

Buckeye Wind acknowledged below that UNU “did have standing to intervene in this case,” *id.*, and the Board granted intervenor status to UNU based on its “real and direct interest in the Board proceeding.” Opinion, Order and Certificate at 8 (March 22, 2010). UNU has an equally real and direct interest in these amendment proceedings—including the thoroughness, fairness, and lawfulness of the proceedings, the ability to exercise UNU’s legal rights to discovery and to a hearing, and the accuracy of the facts upon which the Board basis its decision. Because Buckeye Wind’s waiver motion directly affects UNU’s interest in these aspects of the proceeding, UNU has standing to oppose this motion.

## **VI. CONCLUSION**

For all of the foregoing reasons, Buckeye Wind’s Motion for Waivers and Expedited Ruling should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 11, 2014, a copy of the foregoing Memorandum of Intervenor Union Neighbors United, Inc., Robert and Diane McConnell, and Julia F. Johnson was served by electronic mail on the following counsel and party:

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Summary: Memorandum Contra Buckeye Wind's Motion for Waivers and Expedited Ruling electronically filed by Mr. Christopher A Walker on behalf of Union Neighbors United and Johnson, Julia F. Ms. and McConnell, Robert Mr. and McConnell, Diane Mrs.