BEFORE
THE OHIO POWER SITING BOARD

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**
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**

BUCKEYE WIND'S MEMORANDUM CONTRA TO THE APPLICATION FOR REHEARING OF INTERVENORS UNION NEIGHBORS UNITED, INC., ROBERT AND DIANE McCONNELL, AND JULIA JOHNSON

I. INTRODUCTION

By granting Buckeye Wind's motion for extension of the Buckeye I Wind Farm certificate of environmental compatibility and public need (the "Certificate"), the Ohio Power Siting Board aligned the certificate's expiration date with the certificate expiration date for the Buckeye II Wind Farm. Both of these projects will be located in the same general area of Champaign County, Ohio, have been designed to share facilities and now have matching certificate expiration dates of May 28, 2018. Intervenors Union Neighbors United, Inc., Robert and Diane McConnell and Julia Johnson (collectively "UNU") disagree with the Board's decision to grant the extension even though UNU does not dispute that the Buckeye II Wind Farm will be located in the same general area as the Buckeye I Wind Farm. UNU raises five grounds for rehearing including a claim that the Board should have required Buckeye Wind to file an application as if Buckeye Wind was modifying the facility. That claim, as with UNU's other grounds for rehearing, is without merit because the Board's long-standing practice of

hearing extension requests by motion complies with Chapter 4906 of the Revised Code and the Board's rules. The Board acted lawfully and reasonably in hearing Buckeye Wind's request for extension by motion, and good cause exists supporting the extension including the litigation delays that UNU has and continues to impose on the project. UNU's application for rehearing should be denied in its entirety.

II. ARGUMENT

Although UNU only lists four grounds for rehearing in its Application for Rehearing (pages 1-2), UNU appears to actually raise five grounds for rehearing in its memorandum in support. The five grounds for rehearing are addressed below.

A. The Board Acted Lawfully and Reasonably in Hearing Buckeye Wind's Extension Request by Motion.

Courts may defer to and even "rely on the expertise of a state agency in interpreting a law where 'highly specialized issues' are involved and 'where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.'" *Sunoco, Inc. v. Toledo Edison Co*., 129 Ohio St. 3d 397, 401, ¶ 23 (2011) (citation omitted). Moreover, "[c]ourts will defer to an agency's interpretation of its own rule, as long as it is reasonable." *State ex rel. Richmond v. Indus. Comm*., 139 Ohio St. 3d 157, 163, ¶ 28 (2014). Here, the Board's rules permit extensions of time to be sought and granted upon motion. O.A.C. 4906-1-05 ("Any request for the extension or waiver of a time limit shall be made by motion.") The Board's rules also permit the Board to prescribe different practices or procedures to be followed in a case. O.A.C. 4906-7-19(B). Contrary to UNU's claim, the Board's long-standing practice of allowing certificate extensions to be requested by motion (instead of by application) is entirely reasonable and lawful.

First, the Board has reasonably determined that an extension of a certificate is not an "amendment" of the certificate within the meaning of Chapter 4906. Although the General Assembly did not expressly define the term "amendment" in Chapter 4906, its intentions can be reasonably ascertained from the terms of R.C. 4906.07(B). Under R.C. 4906.07(B), which UNU does not discuss, a change in the facility is a prerequisite to an "application for amendment of a certificate." Specifically, the General Assembly provided as follows:

> 4906.07 (B) **On an application for an amendment of a certificate**, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate **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. (Emphasis added.)

As the emphasized text shows, the General Assembly presupposes that an "amendment" involves a "proposed change in the facility… ." To read 4906.07(B) as UNU would have it – that any change in any word in a certificate would require "an application for an amendment" and investigation and report and hearing – would render the language regarding "the proposed change in the facility" irrelevant surplusage. Such a reading would be improper. *See Hughes v. Registrar, Ohio BMV*, 79 Ohio St. 3d 305, 307 (1997) (explaining that "courts must harmonize and give full application to all provisions unless they are irreconcilable and in hopeless conflict"); *see also* R.C. 1.47 (stating presumption that ". . . [t]he entire statute is intended to be effective"). Because a proposed extension of a certificate deadline is not a "proposed change in the facility," it does not seek an amendment within the meaning of Chapter 4906 and does not needlessly require considerable time, expense and cost of an application. Therefore, consistent with the language of Chapter 4906, the Board's rules and longstanding practice reasonably allow certificate extensions to be sought by motion and not by application.

Second, even if an extension of a certificate is in some technical sense an amendment of the certificate, the Board may and does properly consider such requests by motion. After all, the Board has discretion to determine the form and content of applications to amend a certificate. R.C. 4906.06(E). The Board's rules also permit the Board to prescribe different practices or procedures to be followed in a case. O.A.C. 4906-7-19(B). When an amendment involves a proposed change in the facility, a staff investigation, written report and a public hearing may be required. *See* R.C. 4906.07(B). But there is no such requirement, and no reason for such requirement when, as here, an "amendment" merely seeks to preserve the status quo for an additional period of time. The Board has a longstanding practice of requiring and reviewing requests to extend certificates upon motion.[1] *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; *In re Lima Energy Company*, Case No. 00-513-EL-BGN, ¶ 8 Entry dated July 30, 2012 (cited by UNU).[2] It has statutory authority to do so under R.C. 4906.06(E). This is reasonable.

There is also nothing to UNU's contention at page 3 and page 9 of its memorandum in support that this issue is governed by R.C. 4906.07(C), which provides that "each application filed with the board" shall be investigated and that a written report of that investigation shall be filed when an application is set for public hearing. R.C. 4906.07(C). UNU's position assumes that an "application" is required to extend a certificate and then assumes that the application must be investigated and a report issued to the Board. But, as explained above, neither of those

[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 (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.

[2] *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.

assumptions is reasonable –because an extension of a certificate is not an "amendment" within the meaning of R.C. 4906 (and, therefore, does not require an "application") or because even if an extension of a certificate requires a technical amendment application, the Board reasonably exercised its discretion in allowing "applications" for extension to be made in the form of a motion and for good cause shown.

UNU disputes that the Board has discretion under its rules to hear an extension request by motion, arguing that that Rule 4906-5-10(A) precludes Buckeye Wind from obtaining a certificate extension by motion. As noted above, however, the Board's rules permit the Board to prescribe different practices or procedures to be followed in a case (O.A.C. 4906-7-19(B)) as well as permit extensions of time to be sought and granted upon motion (O.A.C. 4906-1-05). Even if an extension of a certificate requires a technical amendment application (which it does not), the Board has discretion under its rules to utilize motions to address extensions of certificates. This interpretation follows the Board's rule on construction which states "[t]his chapter shall be construed by the board 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. Regardless whether an extension of a certificate requires a technical amendment application, the Board acted within its authority granted by Chapter 4906 and its rules to hear Buckeye Wind's request through a motion. UNU's first and second grounds for rehearing are without merit and should be denied.

B The Board's Decision to Extend Buckeye Wind's Certificate was not Unlawful or Unreasonable.

1. UNU's third ground for rehearing is without merit as good cause exists to extend the Certificate.

In granting Buckeye Wind's request for extension, the Board acknowledged that "certain delays have been beyond Buckeye's control." (Entry at ¶ 12.) The Board noted that nearly two-

years took place from the Board's decision to issue the Certificate until March 6, 2012 when the Supreme Court of Ohio affirmed the Board's decision. (Entry at ¶ 3). Even UNU acknowledges this litigation as well as UNU's appeal of the U.S. Fish and Wildlife Service's Incidental Take Permit which remains ongoing before the U.S. Court of Appeals – D.C. Circuit, Case No. 1:13cv1435. That litigation has further delayed Buckeye Wind's ability to proceed with the Buckeye I Wind Farm and creates the risk that the ITP will be reversed. Just as important, Champaign County and Urbana, Union and Goshen townships are currently litigating the Board's decision to amend Buckeye Wind's Certificate before the Supreme Court of Ohio (*see* Supreme Court Appeal No. 14-1210, filed July 16, 2014). The risk that the ITP could be reversed or that additional project delays could result from any court reversal are risks that project financers will not tolerate. This alone provides good cause and shows that the Board's decision to extend Buckeye Wind's Certificate was reasonable.

UNU's only response to the delays caused by litigation is to blame Buckeye Wind for not including an extension request when it submitted its amendment application on March 19, 2013. The Board appropriately looked past this claim considering that UNU cannot point to any legal authority that required Buckeye Wind to include the extension request with the amendment application. Moreover, it is telling that UNU neither raised any concerns with noise or shadow flicker nor made any mention of the documents it attached to its memorandum contra to Buckeye Wind's motion for extension in the amendment proceeding. UNU did try to include the documents in the Champaign Wind proceeding (Case No. 12-160-EL-BGN) in January 2013 but apparently thought the documents did not warrant being raised in the Buckeye I Wind Farm amendment proceeding.

Contrary to UNU's claims, good cause exists to support Buckeye Wind's Certificate extension. UNU's third ground for rehearing should be denied.

2. UNU's request to have a hearing on turbine noise and ice throw is an unauthorized challenge to a Board decision that has been affirmed by the Supreme Court of Ohio.

For its fourth ground for rehearing, UNU claims that the Board erred by not conducting a full investigation and considering the need for a public hearing. (UNU at 9.) UNU "urges the Board to investigate Buckeye Wind's extension request to ensure the assumptions underlying [the] Certificate are valid and accurate." (UNU at 9.) As examples, UNU asks the Board to reopen its investigation on turbine noise and ice throw even though the Board resolved those issues at Certificate issuance and just recently again in the Buckeye II Wind Farm proceeding.[3] (UNU at 9.) UNU's requests have nothing to do with the extension of the Certificate but are simply an attempt to challenge the issuance of the Certificate.

The Board appropriately rejected UNU's argument in its Entry, finding that "throughout the term of all certificates, the Board tracks the progress of projects. Based on this tracking process, if there is a need for an amendment, the Board would require an applicant to file an appropriate application." (Entry at ¶ 12.) Indeed, UNU fails to take into consideration the many conditions the Board has imposed on the project that are prospective in operation. For example, Condition 3 (page 83) requires Buckeye Wind to obtain and comply with all applicable permits

[3] UNU references a noise report and other material from a Wisconsin wind farm proceeding at page 9 and 10 of its application for rehearing, yet fails to disclose to the Board the full extent of the discussion on that report. *See In re Highland Wind Farm*, Case No. 2535-CE-100, Public Service Commission of Wisconsin. Mr. Hessler, who previously provided testimony in the initial Buckeye Wind proceeding and Champaign Wind proceeding on behalf of the applicants, provided testimony in the Wisconsin proceeding in 2013 that undermines UNU's characterization of the report. In written direct testimony filed on January 10, 2013, he noted at page 5 that the low frequency noise levels recorded were so imperceptible that it was likely that the same levels would have been observed even with the turbines shut down. He also stated at page 9 that no unusual or unusually high levels of infrasound were observed at the sites. *See* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=178851. UNU did not include or mention Mr. Hessler's Wisconsin testimony to the Board (filed after the report was docketed) because his testimony does not support UNU's characterization of the report.

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 conditions provide a process for the Board to monitor progress of the facility so any claim by UNU that the Board needs to confirm the validity of the information underlying its decision to issue the Certificate prior to extending the Certificate is without merit.

The Board also recently approved the Buckeye II Wind project to be constructed in the same general area as the Buckeye I Wind project (Case No. 12-160-EL-BGN, Entry on Rehearing on September 30, 2013) and just approved an amendment to the Buckeye I Wind project in February 2014 (Case No. 13-360-EL-BGA, February 18, 2014). 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 Buckeye I and Buckeye II to share locations for facilities, a significant point in this proceeding. This fact and the Board's recent decisions in the Buckeye II Wind proceeding and the Buckeye I amendment proceeding provide further support for the Board's decision to extend the Buckeye I Wind Farm Certificate.

UNU may want to reopen the initial Certificate proceeding to challenge the Board's decisions on noise and ice throw, but that is not a valid basis to deny a Certificate extension. UNU also ignores the fact that the Buckeye II Wind Farm turbines will be located in the same general area with a certificate expiration of May 28, 2018. Given this simple fact, extending Buckeye Wind I's Certificate to the same date of May 28, 2018 does not necessitate a "full investigation" of the information underlying the original Certificate application.

3. UNU's unsubstantiated claim that property will be encumbered has been addressed by the Board in prior proceedings.

To further support its fourth ground for rehearing, UNU also argues that "as a result of Buckeye Wind's Certificate, landowners in and near the project footprint have suffered uncertainty regarding the marketability of their properties." (UNU at 11.) 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 had denied 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 the marketability of property.

UNU cites to Section 4906.07, Revised Code, and claims that the Certificate extension impacts owners' marketability of property, "thereby materially increasing the environmental impact of the facility." (UNU at 11.) UNU's attempt to align the marketability of property with environmental impacts is contrary to the plain language of R.C. 4906.07(B) which only requires the Board to hold a hearing when there is a change in a facility design.

> "[o]n an application for an amendment of a certificate, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate 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.

R.C. 4906.07(B) (emphasis added). Moreover, as discussed in Section A above, the statutory language applies to "proposed changes" in a facility and again, a hearing is only required if there is a material increase in any environmental impact or a substantial change in facility design. A request to extend a certificate does not fall under this statute.

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 did not need to revisit this topic a third time simply because Buckeye Wind requested an extension of its Certificate. UNU's fourth ground for rehearing should be denied.

C. The Board's Current Rules Remain In Effect.

For its fifth ground for rehearing, UNU claims that the Board incorrectly relied on new rules it issued in Case No. 12-1981-GE-BRO when granting Buckeye Wind's motion for extension. UNU's argument is without merit for the simple reason that the new rules are not yet in effect, leaving the prior rules in place. The Board made this clear in paragraph 138 of its February 18, 2014 Finding and Order in Case No. 12-1981-GE-BRO stating "[i]n conclusion, the Commission finds that Ohio Adm. Code Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 *should* be rescinded and replaced by new Ohio Admin. Code Chapters 4906-1 through 4906-7." The Board never stated that the current rules "are" rescinded and common sense dictates that the current rules remain in effect until the new rules take effect.

Thus, UNU's fifth ground for rehearing is without merit especially when UNU relies upon and cites to a current Board rule in the very first sentence of its application for rehearing.

III. CONCLUSION

The Board's decision to extend the Certificate was not unlawful or unreasonable given that good cause exists to support the extension of Buckeye Wind's Certificate. Moreover, the Board appropriately heard Buckeye Wind's extension request through a motion and UNU was given every opportunity to comment on the extension request, which it did. Accordingly, for the foregoing reasons, UNU's application for rehearing should be denied.

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 6th day of October, 2014.

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Summary: Memorandum Contra to Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Buckeye Wind LLC