

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)
Champaign Wind, LLC, for a Certificate)
to Install Numerous Electricity) Case No. 12-0160-EL-BGN
Generating Wind Turbines in)
Champaign County to be Collected at)
an Electrical Substation in)
Union Township,)
Champaign County, Ohio)**

**MEMORANDUM CONTRA OF BUCKEYE WIND LLC AND CHAMPAIGN WIND
LLC TO THE PETITION TO INTERVENE AND TO THE OPPOSITION TO REQUEST
TO EXTEND CERTIFICATES**

I. INTRODUCTION

The “Local Residents¹,” as they jointly refer to themselves, each seek to intervene in these proceedings in their individual capacities. They are not a homogenous group with unified interests that justify granting the Petition to Intervene with respect to all of them. Rather, there are two distinct groups of petitioners within the Local Residents. The first group, composed of Apthorpe, Boles, Brenneman, Gaertner, and Halterman, reside and own property well outside the project areas for the Buckeye Wind and Champaign Wind projects, too distant from any turbine sites to justify intervention over the requests for extension (the “Requests”). Their intervention should be denied.

¹ “Terry and Phyllis Rittenhouse, Keith and Lori Forrest, John and Joy Mohr, Brent and Johnna Gaertner, Mark and Marisue Schmidt, Carrie Apthorpe, Jim and Georgianna Boles, Bill and Carmen Brenneman, T. Gary and Paula Higgins, Brian and Bayleigh Halterman, Rodney Yocom, Robert and Roberta Custer, and Mathew Earl”

The second group of petitioners own property within the project area but devote the bulk of their petition to a legal argument regarding the application of setback requirements, an argument that is outside the scope of these Requests. If granted, the second group's intervention request should be limited to the extension actually raised by the Requests, rather than a broad-ranging argument about all aspects of the projects that Petitioners attempt to find fault with.

Finally, Petitioners' substantive arguments against the Requests are unfounded. Good cause exists to support the Request and the Board should exercise its authority to extend the Certificates issued to Buckeye Wind LLC and Champaign Wind LLC by one year.

II. BACKGROUND

Buckeye Wind LLC and Champaign Wind LLC (collectively, "Applicants") have requested extensions of the Certificates of Environmental Compatibility and Public Need issued in Case Nos. 08-0666-EL-BGN and 12-0160-EL-BGN, issued respectively to Buckeye Wind and Champaign Wind. The Supreme Court of Ohio has upheld the Board's issuance of both Certificates. *In re Application of Buckeye Wind LLC*, 131 Ohio St.3d 449 and *In re Application of Champaign Wind LLC*, 146 Ohio St.3d 489. In the matters at bar, the Applicants are requesting a one-year extension of the Certificates, from May 28, 2018 to May 28, 2019. No physical aspects of the Projects whatsoever are being changed through the Requests.

III. ARGUMENT

The standard for intervention in Board proceedings is a showing of good cause for the intervention. Ohio Adm.Code 4906-2-12(B)(1). In considering whether good cause exists, the Board or the administrative law judge may consider (a) the nature and extent of petitioners' interest, (b) the extent to which the petitioners' interest is represented by existing parties, (c) the petitioners' potential contribution to a just and expeditious resolution of the issues involved in

the proceeding, and (d) whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party. *Id.* The Board may also grant, under Ohio Adm.Code 4906-2-12(D)(1), limited participation if a person has no real and substantial interest with respect to the remaining issues.

A. The Board should Deny the Petitions to Intervene of Apthorpe, Boles, Brenneman, Gaertner, and Halterman

As an initial matter, the Board should deny the petitions of Apthorpe, Boles, Brenneman, Gaertner, and Halterman because they do not own property within the project area and the property they do own is far from the Projects’ turbine sites. With no property in the project area or near turbines, they have no interest that justifies intervention.

The following chart summarizes the distances at which these proposed intervenors own property from the nearest turbine:

Proposed Intervenor	Distance from Closest Owned Parcel
Carrie Apthorpe	1.5 Miles
Jim and Georgianna Boles	1.7 Miles
Bill and Carmen Brenneman	1.6 Miles
Brent and Johnna Gaertner	1.6 Miles
Brian and Bayleigh Halterman	2.9 Miles

See Aff. of Bonnie Pendergast attached as Exhibit A at ¶¶ 2 - 9.

The “closest” of this group of proposed intervenors is Carrie Apthorpe. She owns property approximately 1.5 miles from the nearest turbine site and therefore will not, and cannot, be affected by the Projects in any way, let alone affected by the Requests, which, again, do not result in any physical change to the Projects, and ask for only a one-year extension of the Certificates. Despite the limited nature of the Requests, Petitioners continue to attempt to justify their intervention by pointing to the alleged effects of shadow flickers and noise. See Petition to

Intervene at 3. Ms. Apthorpe does not reside in the shadow flicker study area of 1,400 meters (~.87 miles) from any turbine. *See* December 22, 2017 Amendment Applications at Exhibit F at 2. She also does not reside in an area affected by noise from any turbine. *See* December 22, 2017 Amendment Applications at Exhibit E at Plots 1-3. Similarly, none of the other proposed intervenors in this group, all of whom own property and/or reside more than 1.5 miles away, could possibly be generally affected by noise or shadow flicker. These petitioners also do not raise any specific issue with respect to the extension asked for in the Requests.

What remains after removing this purported justification for intervention is that these proposed intervenors are “consumers of electricity” and Champaign County property-owners, residents, and taxpayers. *See* Petition for Intervention at 3. These are not sufficient interests that justify intervention, especially when there are other petitioners, owning property closer to the turbine sites, who will represent petitioners’ interests. *See In re Black Fork* Case No. 09-546-EL-BGN, Entry (March 2, 2010) at ¶ 13 (“[i]t is not enough for a person seeking to intervene in a proceeding such as this to merely state that he or she resides in a county wherein the project under consideration is proposed to be sited”).

Finally, contrary to their implication, this group of petitioners is distinct from Union Neighbors United, Inc. (“UNU”), the non-profit corporation that opposed aspects of Applicants’ previous Applications to the Board. *See* Petition to Intervene at 4. UNU was permitted to intervene because its members lived adjacent to parcels of land on which turbines were proposed to be sited. *In re Buckeye Wind*, Case No. 08-666-EL-BGN, Entry (Jul. 31, 2009) at ¶¶ 6-7. Here, Apthorpe, Boles, Brenneman, Gaertner, and Halterman seek to intervene in this proceeding in their individual capacities, not as members of a single organization. Thus, each petitioner must meet the standard for intervention on their own merits, and more distant petitioners cannot

rely on the relative proximity of the second group of Local Residents to justify their own intervention.

The petitions to intervene by Apthorpe, Boles, Brenneman, Gaertner and Halterman should be denied.

B. The Board should Limit the Scope of the Interventions of Rittenhouse, Forrest, Mohr, Schmidt, Higgins, Yocom, Custer, and Earl to Only the Extension Requests

Petitioners Rittenhouse, Forrest, Mohr, Schmidt, Higgins, Yocom, Custer and Earl also seek to intervene in their individual capacities in this proceeding. This group of petitioners attempts to raise two interests that they assert justify intervention. First, petitioners in this group assert an interest in ensuring the proper applicability of setback requirements to the projects. Second, petitioners assert general interests in opposition to the Projects, related to shadow flicker and noise. Petition to Intervene at 5. These petitioners do not raise any specific issue with the extension request.

A large portion of the Petition to Intervene focuses on petitioners' legal argument that the Board must apply current statutory setbacks to the project solely because the Certificate is being amended. But a desire to re-litigate legal issues that the Board has already decided in favor of other applicants in the past is not a sufficient interest that allows for intervention on those issues in this proceeding. The Board has repeatedly taken the position that R.C. 4906.20 and R.C. 4906.201 are silent as to the definition of an "amendment to an existing certificate" that would trigger the enhanced setbacks, and has used its discretion to determine what qualifies as an amendment. Intervention on this issue is not appropriate in this proceeding given past Board precedent. *See e.g. In re Black Fork*, Case No. 10-2865-EL-BGN, Entry on Rehearing at ¶ 29 (Feb. 2, 2017); *In re Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA, Second Entry on

Rehearing (Aug. 17, 2017) at 7-8, ¶¶21-22 (addition of new turbine models do not constitute an amendment); *In re Black Fork*, Case No. 17-1148-EL-BGA, Order on Certificate (Dec. 7 2017) at 4, ¶17 (“The motions to intervene should be denied to the extent the Intervenors request intervention for the purpose of addressing irrelevant matters outside ...the identified scope of this application.”) (Limiting intervention to turbine model capacity change, when proposed intervenors also attempted to challenge the applicability of setback requirements).

Petitioners further argue that they should be “permitted to intervene in these cases to protect their interests that will be directly impact by the Combined Facility.” Petition to Intervene at 9. If the Board determines that intervention is appropriate for this second group of petitioners, it should exercise its authority under Ohio Adm.Code 4906-2-12(D) as it has done in other proceedings, and allow intervention only as to the extensions, not any other aspects of the Projects that Petitioners oppose in general.

C. Good Cause Exists to Support the Requests for Extension

In addition to their claims to intervene, Petitioners also make the substantive argument that the Requests are not supported by good cause, pointing to delays to the Projects allegedly cause by Applicants’ own actions. In making their argument, Petitioners disregard the overwhelming role that litigation delays have played in pushing back the beginning of actual construction on the Projects. There has been nearly eight years of delay between the two Projects waiting for litigation to conclude so that actual construction could begin. Neither Buckeye Wind nor Champaign Wind instigated that litigation. The litigation delay is the overwhelming reason for any delay in the Projects, and thus justifies the requested one-year extensions. *See e.g. In the Matter of the Application of Black Fork Wind Energy, LLC Regarding its Certificate of Environmental Compatibility and Public Need Issued in Case No. 10-2865-EL-*

BGN, Order on Certificate, at ¶ 1 dated December 7, 2017; *In re FDS Coke Plant, LLC*, Case No. 07-703-EL-BGN, Entry dated Sept. 30, 2013 (approving extension for reasons outside control of applicant); *In re Black Fork Wind Energy LLC*, Case No. 10-2865-EL-BGN, Entry dated March 24, 2016 (approving extension in part due to litigation delays, and in part because the applicant continued to expend resources to develop the project); *In re Buckeye Wind LLC*, Case No. 13-360-EL-BGA, Entry dated August 25, 2014 (approving extension due to litigation delays beyond control of applicant).

Petitioners also disregard the fact that the Amendment Applications filed December 22, 2017, were filed as a result of a settlement reached with UNU and other local residents in 2017 to resolve litigation before the Supreme Court of Ohio. As a result of this settlement, Applicants filed applications with the Ohio Power Siting Board to seek approval to reduce the 108-turbine location design and make other modifications to the project. Indeed, the Applicants' settlement of the Supreme Court litigation along with their continued efforts to develop the Projects show good cause for the extension. Petitioners have no basis for claiming the Applicants' actions are the reason for the delay in the Projects.

Petitioners finally argue that granting the Requests would “completely obliterate” the requirement in R.C. 4906.06(A) that “[t]he application shall be filed not more than five years prior to the planned date of commencement of construction.” Petition to Intervene at 9. That statute, however, relates to the time when an application for a certificate is filed. Applicants did plan to commence construction within five years of the submittal of the initial certificate applications – satisfying the statutory requirement. Regardless, even if that statutory requirement were applicable, Petitioners omit the second half of R.C. 4906.06(A), giving the Board the express authority to waive the five year period “for good cause shown.” The Board should

exercise the authority expressly granted to it by the General Assembly and extend the Certificates until May 28, 2019, for good cause shown.

IV. CONCLUSION

For the foregoing reasons, the intervention petitions of Apthorpe, Boles, Brenneman, Gaertner, and Halterman should be denied as not having an interest in this proceeding and also because the remaining petitioners will adequately represent their interests. As to the remaining petitioners, their intervention requests should, at most, be limited to the Applicants' requests for extension. Furthermore, good cause exists to support the requested extensions.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 23rd day of April 2018.

/s/ Michael J. Settineri

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BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of)
Buckeye Wind LLC to Amend the)
Certificate of Environmental) **Case No. 17-2516-EL-BGA**
Compatibility and Public Need Issued)
In Case No. 08-0666-EL-BGN)

In the Matter of the Application of)
Champaign Wind LLC to Amend the)
Certificate of Environmental) **Case No. 17-2517-EL-BGA**
Compatibility and Public Need Issued)
In Case No. 12-0160-EL-BGN)

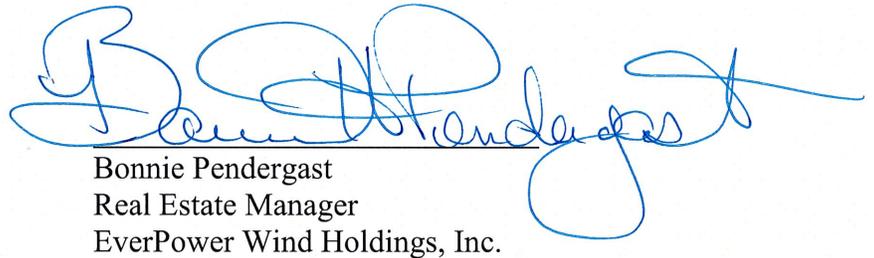
AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

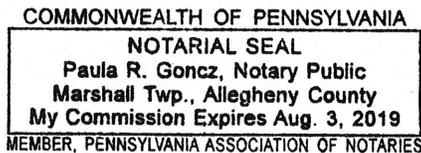
Now comes Bonnie Pendergast, Real Estate Manager, EverPower Wind Holdings, Inc.,
having been first duly sworn, declares and states as follows:

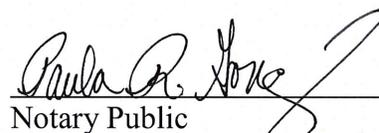
1. I am the real estate manager for the Buckeye Wind LLC Project originally certificated in Case No. 08-0666-EL-BGN and the Champaign Wind LLC Project originally certificated in Case No. 12-0160-EL-BGN. In that capacity, I have personal knowledge on leases for the project, the location of project turbine sites and the project boundary which represents the area bounded by the project facilities and associated setbacks.
2. Upon information and belief, Carrie Apthorpe resides at 5087 U.S. Highway 36, Urbana, Ohio which is outside the project boundary and approximately 1.5 miles from the nearest project turbine site.
3. Upon information and belief, James and Georgianna Boles reside at 6578 N. Ludlow Road, Urbana, Ohio 43078 and own three parcels of land.
4. Upon information and belief, the Boles' nearest parcel is outside the project boundary and approximately 1.7 miles from the nearest project turbine site.

5. Upon information and belief, William and Carmen Brenneman reside at 3409 Adell Drive, Urbana, Ohio 43078 and own two parcels of land.
6. Upon information and belief, the Brennemens' nearest parcel is outside the project boundary and approximately 1.6 miles from the nearest project turbine site.
7. Upon information and belief, Brent and Johanna Gaertner reside at 5133 Flatfoot Road, Cable, Ohio 43009 and own three parcels of land.
8. Upon information and belief, the Gaertners' nearest parcel is outside the project boundary and approximately 1.6 miles from the nearest project turbine site.
9. Upon information and belief, Bryan and Bayleigh Halterman reside at 2487 S. Ludlow Road, Urbana, Ohio 43078, which is outside the project boundary and approximately 2.9 miles from the nearest project turbine site.


Bonnie Pendergast
Real Estate Manager
EverPower Wind Holdings, Inc.

Sworn to before me and signed in my presence this 5 day of February, 2018.




Notary Public
My Commission Expires August 3, 2019

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in

Case No(s). 08-0666-EL-BGN, 12-0160-EL-BGN

Summary: Memorandum Contra to Petition to Intervene and to the Opposition to Request to Extend Certificates electronically filed by Mr. Michael J. Settineri on behalf of Buckeye Wind LLC and Champaign Wind LLC