

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. 08-666-EL-BGN

IN THE MATTER OF THE APPLICATION
OF CHAMPAIGN WIND, LLC FOR A
CERTIFICATE TO CONSTRUCT A WIND-
POWERED ELECTRIC GENERATING
FACILITY IN CHAMPAIGN COUNTY,
OHIO.

CASE NO. 12-160-EL-BGN

ENTRY

Entered in the Journal on May 17, 2018

I. SUMMARY

{¶ 1} The Ohio Power Siting Board grants the request of Buckeye Wind, LLC and Champaign Wind, LLC to extend the certificates to construct the wind-powered electric generation projects until May 28, 2019.

II. DISCUSSION

A. *Applicable Law*

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

{¶ 3} Pursuant to R.C. 4906.04, the Board's authority applies to major utility facilities and provides that such facilities must be certified by the Board prior to the commencement of construction. The Board promulgated rules as set forth in Ohio Adm.Code Chapter 4906 prescribing regulations regarding applications for wind-powered electric generation facilities.

{¶ 4} Buckeye Wind, LLC (Buckeye) and Champaign Wind, LLC (Champaign) are persons under R.C. 4906.01(A).

B. Procedural History

1. BUCKEYE WIND, LLC

{¶ 5} On March 22, 2010, in Case No. 08-666-EL-BGN, the Board issued its Opinion, Order, and Certificate granting Buckeye's application for a certificate to construct a wind-powered electric generation facility in Champaign County, Ohio, subject to 70 conditions (Buckeye 1 project). The Board imposed a provision that the certificate shall become invalid if a continuous course of construction of the proposed facility has not commenced within five years of the date of issuance of the certificate, March 22, 2015. *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN (*Buckeye 1 Case*), Opinion, Order, and Certificate (Mar. 22, 2010) at 92.

{¶ 6} Union Neighbors United, Inc., Robert and Diane McConnell, and Julia F. Johnson (jointly, UNU), the Board of Commissioners of Champaign County, Ohio (County), and the Boards of Trustees of the Townships of Goshen, Rush, Salem, Union, Urbana, and Wayne (individually and jointly, Trustees) were granted intervention in the case. Buckeye, UNU and jointly the County and Trustees, filed applications for rehearing of the *Buckeye 1 Case*. The Board granted, in part, and denied, in part, the applications for rehearing. *Buckeye 1 Case*, Entry on Rehearing (July 15, 2010).

{¶ 7} UNU appealed, and the Trustees of Goshen, Salem, and Union and the County jointly appealed, the *Buckeye 1 Case* decision to the Supreme Court of Ohio. On March 6, 2012, the Court affirmed the Board's order in the *Buckeye 1 Case*. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878.

{¶ 8} On March 19, 2013, Buckeye filed an application seeking to revise the design of the facility to adjust the construction staging areas; shift the project substation by

1,000 feet; add a new access road; modify four previously approved access roads; and move the electric collection line system underground. On February 18, 2014, the Board approved Buckeye's application. *In re Buckeye Wind, LLC*, Case No. 13-360-EL-BGA (*Buckeye Supplement*), Order on Certificate (Feb. 18, 2014); Entry on Rehearing issued May 19, 2014. The County and Union, Urbana, and Goshen Townships appealed the Board's order to the Supreme Court of Ohio. On September 7, 2016, the Supreme Court of Ohio affirmed the Buckeye Supplement order. *In re Application of Buckeye Wind, L.L.C.*, 148 Ohio St.3d 69, 2016-Ohio-5664.

{¶ 9} On July 14, 2014, as corrected on July 15, 2014, in the *Buckeye 1 Case* and the *Buckeye Supplement*, Buckeye filed a motion for an extension of the term of the certificate issued for the Buckeye 1 project, from March 22, 2015 until May 28, 2018, to align the Buckeye 1 project certificate with the certificate for the Buckeye 2 project, discussed below. By Entry issued on August 25, 2014, the Board granted Buckeye's motion to extend the term of the Buckeye 1 project certificate until May 28, 2018. *Buckeye 1, et al.*, Entry (Aug. 25, 2014); Entry on Rehearing (Aug. 27, 2015). UNU appealed the Board's decision to grant the request to extend the certificate for the Buckeye 1 project to the Supreme Court of Ohio. By Judgement Entry issued on June 26, 2017, the Court granted UNU's and Buckeye's joint motion to dismiss the appeal.

{¶ 10} On December 27, 2017, UNU, Julia F. Johnson, and Robert and Diane McConnell filed a notice with the Board that they withdraw as intervenors in the *Buckeye 1 Case* and in the *Buckeye Supplement*.

{¶ 11} In addition to the appeals filed in the Supreme Court of Ohio, UNU also challenged the United States Fish & Wildlife Service (USFWS) issuance of the incidental take permit (ITP) to the United States Court of Appeals for the District of Columbia Circuit. By decision issued August 5, 2016, the United States Court of Appeals for the District of Columbia Circuit found that the USFWS violated the duties under the National

Environmental Policy Act (NEPA) and remanded the case to the USFWS and directed the USFWS and Buckeye to prepare a Supplemental Environmental Impact Statement (SEIS) analyzing alternative operating protocols. According to Buckeye, the preparation of the SEIS has commenced and Buckeye expects a draft SEIS for public comment to be issued in the third quarter of 2018.

2. CHAMPAIGN WIND, LLC

{¶ 12} On May 28, 2013, in Case No. 12-160-EL-BGN, the Board issued its Opinion, Order, and Certificate granting the application of Champaign Wind, LLC (Champaign) for a certificate to construct a wind-powered electric generation facility in Champaign County, Ohio, subject to 72 conditions (Buckeye 2 project). Like the Buckeye 1 project certificate, the Buckeye 2 project certificate includes a provision that the certificate shall become invalid if a continuous course of construction of the proposed facility has not commenced within five years of the date of issuance of the certificate, May 28, 2018. *In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN (Buckeye 2), Opinion, Order, and Certificate (May 28, 2013) at 79.

{¶ 13} The County, UNU and the Board of Trustees of the Townships of Union, Urbana, and Goshen (individually and jointly, Trustees) intervened in the *Buckeye 2* case. UNU and jointly the County and Trustees filed applications for rehearing of the Board's *Buckeye 2* Opinion, Order, and Certificate. The Board granted, in part, and denied, in part, the applications for rehearing. *Buckeye 2*, Entry on Rehearing (Sept. 30, 2013).

{¶ 14} UNU and jointly the County and Trustees appealed the *Buckeye 2* order to the Supreme Court of Ohio. By decision issued April 13, 2016, the Court affirmed the Board's order in the *Buckeye 2* case. *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513.

{¶ 15} On December 27, 2017, UNU, Julia F. Johnson, and Robert and Diane McConnell filed a notice with the Board that they withdraw as intervenors in the *Buckeye 2* case.

{¶ 16} Buckeye and Champaign are wholly-owned subsidiaries of EverPower Wind Holdings, Inc. and the proposed Buckeye 1 and Buckeye 2 projects are adjacent facilities.

III. DISCUSSION

{¶ 17} On April 3, 2018, in the above noted proceedings, Buckeye and Champaign (jointly, Movants) filed a request for a one-year extension of the certificates issued to construct the Buckeye 1 and Buckeye 2 projects, until May 28, 2019. Movants reason that good cause exist for the one-year extension in light of the delays as a result of litigation, as well as the Movants continued development of the facilities. Further, Movants state that, as part of the applications currently pending before the Board in Case Nos. 17-2516-EL-BGA and 17-2517-EL-BGA, Movants have proposed to reduce the Buckeye 1 and Buckeye 2 projects to no more than 55 turbine locations and have committed to construct no more than 50 turbines in total across both projects. Also on April 3, 2018, Buckeye and Champaign filed a proof of service of the request for an extension on parties of record and government officials for both projects and, on April 4, 2018, filed a copy of the notice of the extension sent to property owners in the project areas. On May 7, 2018, pursuant to Ohio Adm.Code 4906-3-11, Buckeye and Champaign filed the proof of publication of the notice for an extension of the certificates.

{¶ 18} On April 16, 2018, a group of individuals, namely Terry and Phyllis Rittenhouse, Keith and Lori Forrest, Jon 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 (jointly and collectively, Local Residents or

Petitioners) filed a petition to intervene in their respective individual capacity. On May 3, 2018, as supplemented on May 10, 2018, the County and the Township Trustees of Goshen, Union, and Wayne filed objections to Movants' request for an extension of the Buckeye 1 and Buckeye 2 certificates.

{¶ 19} In the petition, Local Residents state that each has a real and substantial interest in these proceedings as each resides, owns property, in one instance owns and operates a business, and pays taxes in Champaign County and consumes electricity. As such, Local Residents declare that they each meet the requirements for intervention in accordance with R.C. 4906.08(A) and Ohio Adm.Code 4906-2-12(B)(1). Local Residents state that their respective interests are not adequately represented in these proceedings, their respective interests will be directly affected by the construction of the Buckeye 1 and Buckeye 2 projects, and their interests will be adversely affected by nuisance noise and shadow flicker. Local Residents offer that UNU previously prosecuted its opposition to the projects and protected the interest of Local Residents. Local Residents state their intervention will contribute to a just and expeditious resolution of the issues in these proceedings and will not delay the cases nor unjustly prejudice any party. Local Residents submit the adverse impacts the projects create would be greatly reduced by the application and enforcement of the current setback requirements as set forth in R.C. 4906.20(B)(2)(a) and (b), and 4906.201(B)(2).

{¶ 20} County, Trustees, and Local Residents interpret any extension of the term of the certificates to constitute an amendment of the certificate. Further, County, Trustees, and Local Residents argue that R.C. 4906.201 expressly provides that the new turbine setback requirements apply to any amendments of an existing certificate made after September 15, 2014. County, Trustees, and Local Residents posit that Buckeye and Champaign have failed to demonstrate good cause for the requested certificate extensions. Local Residents submit the repeated amendments to the proposed facilities,

including the pending applications in Case Nos. 17-2516-EL-BGA and 17-2517-EL-BGA, are not the result of litigation. Local Residents point out, as Buckeye and Champaign admit, that the final designs for the projects are not expected to be completed until the third quarter of 2018. Local Residents contend the delay to commence construction is largely due to Movants' own conduct and any delay can hardly be attributed to Local Residents or any other intervenor in the numerous proceedings thus far. County and Trustees request that if the certificates are extended, that the conditions of the Buckeye 2 project supplement the Buckeye 1 project conditions, specifically with regard to the Road Use Maintenance Agreement and the decommissioning bonds, before the expiration date of the certificates are extended.

{¶ 21} Further, County and Trustees state that as parties of right they do not believe they are restrained by the response times for a motion as set forth in Ohio Adm.Code 4906-2-27. However, if the Board determines that the timeframes set forth in the Board rules are applicable, County and Trustees claim good cause exist for the Board to grant leave instanter. County and Trustees note that Trustees did not have a meeting to consider this matter until May 1, 2018, at its first meeting in May, and the other boards of trustees meet only once or twice a month. Therefore, County and Trustees state that given the date Movants filed their request and the practicality of the townships complying with public notice and meeting requirements, the township trustees were unable to discuss this matter any sooner. County and Trustees ask that the Board deny the request to extend the date to commence construction until the setback requirement and the conditions for the certificates is resolved. Further, County and Trustees request, in the alternative, that the Board consolidate this proceeding with the pending Buckeye 1 and Buckeye 2 amendment cases, in Case Nos. 17-2516-EL-BGA and 17-2517-EL-BGA.

{¶ 22} On April 23, 2018, Movants filed a memorandum contra Local Residents' petition to intervene. Buckeye and Champaign submit that there are two distinct groups

within Local Residents—one group who own property within the project areas and another group who own property outside of the project areas. According to Buckeye and Champaign, Apthorpe, the Boles, the Brennemens, the Gaertners and the Haltermans reside and own property outside the project area, some 1.5 to 2.9 miles from the nearest turbine location. Movants contend that the property closest to the project area at 1.5 miles, is not within the shadow flicker study area which is approximately .87 miles from any turbine, nor is this property or any other property of this group of prospective intervenors affected by noise or shadow flicker at more than 1.5 miles or more away. For this subset of Local Residents, Buckeye and Champaign submit their interest as a resident, property owner, taxpayer, and consumer of electricity is insufficient interest to justify intervention, particularly where there are other petitioners who can represent their interest. For these reasons, Buckeye and Champaign argue Carrie Apthorpe, Jim and Georgianna Boles, Bill and Carmen Brenneman, Brent and Johnna Gaertner, and Brian and Bayleigh Halterman have no interest that justifies intervention and, therefore, their requests for intervention should be denied.

{¶ 23} As to the remaining Local Residents, namely Terry and Phyllis Rittenhouse, Keith and Lori Forrest, Jon and Joy Mohr, Mark and Marisue Schmidt, T. Gary and Paula Higgins, Rodney Yocom, Robert and Roberta Custer, and Mathew Earl, Buckeye and Champaign do not directly challenge their request to intervene but ask that the scope of their intervention be limited to the request for an extension. Buckeye and Champaign contend that any attempt to re-litigate issues already decided by the Board is not sufficient reason to be granted intervention. Despite Movants' reluctance to style the extension request as a motion, Buckeye and Champaign recognize the Board has repeatedly interpreted an "amendment to an existing certificate," as used in R.C. 4906.20 and 4906.201, to mean more than a request to extend the term of a certificate. Buckeye and Champaign dispute Petitioners' claims regarding the construction delays as neither Buckeye nor Champaign instigated the eight years of litigation delays experienced for

the two projects to date, which Movants allege is the overwhelming reason for the delay in commencing construction. In addition, Buckeye and Champaign point out that Petitioners disregard that the pending applications in Case Nos. 17-2516-EL-BGA and 17-2517-EL-BGA are the result of a settlement reached with UNU. Accordingly, Buckeye and Champaign state that Local Residents have no basis to assert that the delays experienced are the result of Movants' own actions.

{¶ 24} On April 30, 2018, Local Residents filed a reply memorandum. In the reply memorandum, Local Residents submit that Movants' arguments distinguishing between property owners within the project area and property owners outside the project area are, without merit, and all Local Residents should be granted intervention. Local Residents reiterate their arguments regarding the implication of the new turbine setback requirements as a result of the request for an extension of the certificate.

{¶ 25} On May 11, 2018, Buckeye and Champaign filed a response to the objections of the County and Trustees. Movants state, irrespective of how the Board elects to process this request, persons or parties that opposes the Movants' request have been afforded adequate due process. Further, Buckeye and Champaign note that this request does not involve a change in the facility or any increase in the environmental impacts, pursuant to R.C. 4906.07(B), and, therefore, reason the County and Trustees are not entitled to nor is a hearing required. Movants reiterate that the overwhelming reason for the project delays has been due to litigation and that the pending applications in Case Nos. 17-2516-EL-BGA and 17-2517-EL-BGA are the result of a settlement with UNU. Buckeye and Champaign submit there is no reason to consolidate this request with the aforementioned application cases, like the County and Trustees ask, as these proceedings relate to an extension of the certificates to facilitate the commencement of construction and the application cases involve modifications to the physical

characteristics of the projects. Accordingly, Buckeye and Champaign argue the objections of the County and Trustees are without merit.

IV. BOARD CONSIDERATION AND CONCLUSION

A. *Request to file for Leave Instante*

{¶ 26} In regards to the filing of the County and Trustees, the Board clarifies that the timeframes set forth in Ohio Adm.Code 4906-2-27, as well as the remainder of Ohio Adm.Code Chapter 4906, apply to all parties to a Board proceeding equally unless the rules specifically provide otherwise. However, the Board will accept, under the unique circumstances in this instance, the reply memorandum of County and Trustees.

B. *Motion to Intervene*

{¶ 27} R.C. 4906.08(A)(3) provides that individuals seeking leave to intervene in a certification proceeding must file a petition to intervene within thirty days of the date of publication of the notice of a certification application or an amendment of a certificate and must demonstrate good cause in order to be granted intervention. While Local Residents assert that each meets the criteria for intervention individually, Local Residents overlook that their request for intervention is not timely. The Board notes that the intervention deadlines in the underlying *Buckeye 1* and *Buckeye 2* cases, have long since passed years ago. The notice for the applications were published on September 10, 2009, and August 4, 2012, respectively, the local and evidentiary hearings held, and the Board's Opinions, Orders, and Certificates issued on the initial applications. Further, as discussed below, the Board does not interpret a request to extend the expiration date to commence to construct as an amendment to the certificate and, therefore, does not initiate a renewed opportunity for intervention.

{¶ 28} R.C. 4906.08(B) does permit the Board, in extraordinary circumstances and for good cause shown, to grant a late-filed petition to intervene in subsequent phases of

a proceeding. Ohio Adm.Code 4906-2-12(C) requires that petitions to intervene in subsequent phases of a proceeding must include a statement of good cause for failing to timely file the petition for intervention and shall only be granted upon a finding that (1) extraordinary circumstances justify granting the petition and (2) the intervenor(s) agree to be bound by agreements, arrangements, and other matters previously made in the proceeding. Here, the petition of the Local Residents fails to demonstrate good cause to justify granting late intervention. Notably, Local Residents do not allege they were unable to timely intervene, but instead relied on another stakeholder, UNU, to protect their interests. The Board does not find UNU's withdrawal is an extraordinary circumstance, as it is not uncommon for parties to settle their disputes. Additionally, the Local Residents did not agree to be bound by matters previously decided in the *Buckeye 1* and *Buckeye 2* cases, as required by Ohio Adm. Code 4906-2-12(C). Moreover, the Board notes that remaining as parties in these proceedings are the Board of Commissioners of Champaign County and the Board of Trustees of Goshen, Union, and Wayne townships, elected representatives of their respective jurisdictions on behalf of the interests of their citizens, including the interests of the Local Residents in these matters. Accordingly, the Board finds that Local Residents' petition to intervene fails to meet the requirements of R.C. 4906.08(B) and Ohio Adm.Code 4906-2-12(C) and, therefore, is denied.

C. Motion to Extend the Certificates

{¶ 29} Having thoroughly considered the arguments discussed above, the Board determines that Movants have established good cause to extend the certificate end dates for the Buckeye 1 and Buckeye 2 projects from May 28, 2018 to May 28, 2019. Movants have demonstrated that litigation both at the Supreme Court of Ohio and the United States Court of Appeals has created significant delays in Movants' commencement of construction on these projects. Moreover, notwithstanding the above noted litigation delays, the Movants have continued to expend resources to develop the Buckeye 1 and

Buckeye 2 projects including, but not limited to, settling litigation with UNU, submitting applications to reduce the size of both projects as a result of the UNU settlement, conducted Phase I Cultural Survey for the Buckeye 1 project, conducted final archeological and architectural surveys for the Buckeye 1 project, completed preliminary engineering drawings for access roads and intersection improvements for the Buckeye 1 project, completed final engineering drawings of the seven acre laydown yard, completed collection line drawings for the Buckeye 1 project, developed a complaint resolution process, a decommissioning plan, and a transportation plan, ordered the project collection substation transformer, renewed applicable Federal Aviation Administration No Hazard determinations, and commenced preparation of the SEIS to be issued for public comment in the third quarter of 2018.

{¶ 30} Additionally, the Board finds that the mere extension of the expiration date of a certificate does not constitute an amendment of the certificate as contemplated by R.C. 4906.06. While the five-year time frame for the commencement of construction was listed among the conditions for the *Buckeye 1* and *Buckeye 2* certificates, that directive has historically been included within every Board order and is a function of when construction work on a project is expected to begin. However, there is no statutory requirement dictating that an applicant commence a continuous course of construction by a date certain. *Buckeye Supplement*, Entry on Rehearing (Aug. 27, 2015) at 7; *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN, Entry (Mar. 24, 2016) at 5; *In re 6011 Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA, Second Entry on Rehearing (Aug. 17, 2017) at 7-9.

{¶ 31} Further, it is indisputable that Buckeye and Champaign have been engaged in on-going litigation over an extended period on the Buckeye 1 and Buckeye 2 electric generation projects since the Board issued its Opinion, Order, and Certificates. The delays as a result of litigation are beyond the control of Buckeye and Champaign.

Further, the Board notes that Movants have continued to pursue development of the projects and request a one-year extension. The Board has previously approved requests for an extension of the term of the certificate as a result of delays due to protracted litigation. *Buckeye Supplement*, Entry on Rehearing (Aug. 27, 2015) at 7; *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN, Entry (Mar. 24, 2016) at 4. Accordingly, the Board finds the request to extend the term of the certificates, until May 28, 2019, to be reasonable and should be granted. As the only issue before the Board as a result of the April 3, 2018 filing is the extension of the date to commence construction, the Board finds the other issues raised to be beyond the scope of these proceedings.

V. ORDER

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That the request of the County and the Township Trustees of Goshen, Union, Urbana, and Wayne to file leave instanter be granted. It is, further,

{¶ 34} ORDERED, That the petition of Local Residents to intervene be denied. It is, further,

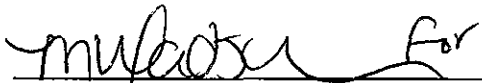
{¶ 35} ORDERED, That the request to extend the term of the certificates issued for the Buckeye 1 and Buckeye 2 projects, until May 28, 2019, be granted. It is, further,

{¶ 36} ORDERED, That a copy of this Entry be served upon the parties and all interested persons of record.

THE OHIO POWER SITING BOARD



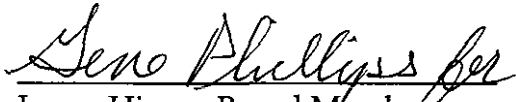
Asim Z. Haque, Chairman
Public Utilities Commission of Ohio



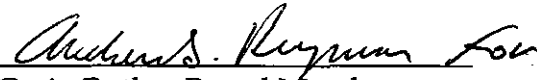
David Goodman, Board Member
and Director of the Ohio
Development Services Agency



James Zehring, Board Member
and Director of the Ohio
Department of Natural Resources



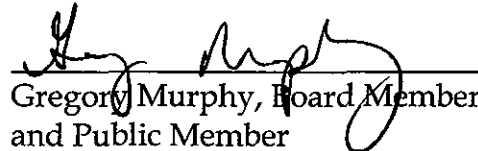
Lance Himes, Board Member
and Director of the Ohio
Department of Health



Craig Butler, Board Member
and Director of the Ohio
Environmental Protection Agency



David Daniels, Board Member
and Director of the Ohio
Department of Agriculture



Gregory Murphy, Board Member
and Public Member

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Barcy F. McNeal
Secretary