

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Buckeye Wind LLC to Amend its Certificate Issued in Case No. 08-0666-EL-BGN	)	Case No. 08-0666-EL-BGN
	)	
In the Matter of the Application of Champaign Wind LLC to Amend its Certificate Issued in Case No. 12-0160-EL-BGN	)	Case No. 12-0160-EL-BGN
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**APPLICATION FOR REHEARING OF INTERVENORS  
CHAMPAIGN COUNTY BOARD OF COMMISSIONERS AND  
THE TOWNSHIPS OF GOSHEN, UNION AND WAYNE**

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Pursuant to Revised Code § 4903.10 and Ohio Administrative Code § 4906-2-32 (D), Intervenor Champaign County Board of Commissioners and the Townships of Goshen, Union and Wayne (hereinafter "County and Township Intervenor") apply for rehearing in this matter. For grounds, the County and Township Intervenor submit that the Ohio Power Siting Board's ("Board") May 17, 2018 Entry and Order ("Order") is unlawful and erroneous for the following reasons:

1. The Order is unlawful and unreasonable because it purports to amend an express term of the March 22, 2010 and May 28, 2013 Certificates issued to Buckeye Wind and Champaign Wind, respectively, without complying with the legally-mandated procedure for certificate amendments.
2. The Order is unlawful and unreasonable because Buckeye Wind and Champaign Wind have not each shown good cause to extend their Certificates by motion or otherwise.
3. The Order is unlawful and unreasonable as it also fails to require that Buckeye Wind and Champaign Wind meet the current setback requirements of R.C. 4906.20 and 4906.201, which

will also be required upon the approval of the pending amendment cases of the subject Certificates, and also fails to set forth consistent conditions for the projects that now appear to be intended to be constructed together.

4. The Order is unlawful and unreasonable as the Board should conduct an investigation and consider the need for a public hearing before making such decision.

The basis for this application is set forth in more detail in the attached Memorandum in Support.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

### **1. Extension of the deadlines for construction constitutes an amendment of the Certificates which is subject to procedural requirements of the Ohio Revised Code and the Board's own rules.**

Condition 52 of the March 22, 2010 Certificate issued to Buckeye Wind states, "[t]he certificate shall become invalid if Buckeye has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate." By its original terms, therefore, the Certificate expired if Buckeye Wind does not commence a continuous course of construction on or before March 22, 2015. The Board previously amended the condition to extend the time for expiration to more than an additional three years, being May 28, 2018.

Condition 12 of the May 28, 2013 Certificate issued to Champaign Wind states, "[t]he certificate shall become invalid if Champaign Wind has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate." By its original terms, therefore, the Certificate expired if Champaign Wind did not commence a continuous course of construction on or before May 28, 2018. However, the request for extension herein indicated that commencement of construction would not even occur until later this year.

Alteration of the expiration date set forth in Condition 52 and 12 of the respective Certificates clearly constitutes amendment of the Certificates. In fact, Buckeye and Champaign Wind tacitly conceded the point by providing statutory notice of its Request for Extension in accordance with the procedures for amendments set forth in R.C. §4906.06.

The Board's governing statute sets forth a specific procedure to be followed in the case of amendments of certificates. R.C. § 4906.06(E) states, "[A]n application for an amendment of the certificate shall be in such form and contain such information as the board prescribes." R.C. §4906.07(C) further states:

“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.”

*R.C. §4906.07(C)*

Nothing in the language of R.C. §4906.07(C) restricts the term "each application" to new certificate applications only. This is evident in the Board's interpretation of the governing statute in its own former procedural rule, OAC § 4906-5-10:

“(B) Applications for amendments to certificates shall be submitted in the same manner as if they were applications for a certificate, unless such amendment falls under a letter of notification or construction notice pursuant to the appendices to rule 4906-1-01 of the Administrative Code.

(1) The board staff shall review applications for amendments to certificates pursuant to rule 4906-5-05 of the Administrative Code and make appropriate recommendations to the board and the administrative law judge.

(a) If the board, its executive director, or the administrative law judge determines that the proposed change in the certified facility would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility other than as provided in the alternates set forth in the application, then a hearing shall be held in the same manner as a hearing is held on a certificate application.”

*OAC §4906-5-10(B) (now rescinded)*

Therefore, the statutory procedure for Staff and Board review of applications applies equally to applications for new certificates as it would for amendments. See *OAC §4906-3-11*.

In this case, however, there is no question that extension of the deadlines in Conditions 52 and 12 do in fact constitute amendment of the respective Certificates. It is a change in the explicit conditions of the Certificates. Furthermore, Buckeye and Champaign Wind's claim to have continued to pursue the development of the generation facilities is just not relevant. The deadlines in Conditions 52 and 12 requires Buckeye Wind and Champaign Wind, respectively, to commence a continuous course of **construction** not "development," within the specified time period. No construction has begun on these facilities and none is intended until fall of this year, per the Applicants. If a "continuous course of construction" had begun, this debate over the Certificates' deadline would be moot.

Ironically, this Board set forth in the Order of the Champaign Wind Project, also now known as the “Buckeye II Project”, the following:

“The [Supreme] Court has concluded that the Board has the authority to allow Staff to monitor compliance with the conditions the Board has set. *In re Application of Buckeye Wind, L.L.C. for a Certificate to Construct Wind-Powered Electric Generation Facilities in Champaign County, Ohio, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, f 16-17, 30.* Such monitoring includes the convening of preconstruction conferences and the submission of follow-up studies and plans by the applicant. As recognized by the Court in *Buckeye Wind*, if an applicant proposes to change any of the conditions approved in the certificate, the applicant is required to file an amendment.”

(Opinion, Order and Certificate of May 28, 2013 in Case No. 12-160-EL-BGN)

Because the Board's Order of May 17, 2018 alters the deadlines for construction set forth in Conditions 52 and 12 of the respective Certificates without first complying with the legal requirements applicable to certificate amendments and contrary to this Board’s own statements in a relevant entry, the Order is unlawful and unreasonable.

**2. Buckeye and Champaign Wind have not shown good cause to alter the Certificate deadlines.**

Even if the Board had the authority to amend Conditions 52 and 12 of the respective Certificates by motion, Buckeye and Champaign Wind have mustered no specific evidence to demonstrate that litigation has prevented it from beginning a continuous course of construction during the original five-year term of the Certificate (for Champaign Wind) or a second extension of the term of the Certificate (for Buckeye Wind). The Board should not approve Buckeye and Champaign Wind's extension request without evidence of the reasons it has been unable to begin a continuous course of construction within the time allowed.

Litigation on Buckeye Wind’s Certificate ended on March 6, 2012, with the conclusion of the appeal to the Supreme Court. Buckeye Wind could have begun construction thereafter but then chose to file an amendment to its Certificate thereafter. Litigation on Champaign Wind’s Certificate ended on April 13, 2016 with the conclusion of the appeal to the Supreme Court, over two years ago. Although there has been some extended litigation in these two cases, the excuse that litigation has

now delayed construction is not timely. All litigation was completed approximately one year ago. If the cited litigation truly interfered with both Buckeye and Champaign Wind's ability to proceed with construction, then Buckeye and Champaign Wind clearly had both the knowledge and the opportunity to include its extension request as part of the amendment proceedings filed in December of 2017 and which is still pending. Buckeye and Champaign Wind have offered no reason why they could not have done so and waited until less than two months before the expiration of the Certificates to request extensions.

As good cause has not been shown in extending the Certificates, the Board's Order is unlawful and unreasonable

**3. The Order fails to mandate that Buckeye Wind and Champaign Wind to meet current setback requirements and fails to set forth consistent conditions for the two projects now being treated, essentially, as one project.**

Recent filings in other Board wind siting cases make plain that this extension request has little, if anything, to do with alleged litigation delays. Instead, it is an attempt to avoid application of recent statutory setback requirements. HB 483 provides that any amendment made to an existing certificate after September 15, 2014, shall be subject to a setback of at least 1,125 feet in horizontal distance from the tip of the turbine's nearest blade to the property line of the nearest adjacent property. R.C. §§4906.20, 4906.201. The minimum statutory setback in effect in 2009 and 2013, when the Buckeye and Champaign Wind Certificates were issued, used the nearest residential structure as the point of reference and the minimum setback was smaller. R.C. §4906.20(B)(2)(a), repealed in H.B. 59 (eff. 5/29/13). The Board has failed herein to address the compliance with the current minimum setback requirement in these two projects. There is little doubt that the filing of these extension requests herein and not in the amendment applications pending is a desire to avoid the application of the H.B. 483 setbacks and to first extend the Certificates, then amend them

utilizing the extensions to argue that the projects are existing and not “amended” projects. This unstated motive underscores the importance of requiring Buckeye and Champaign Wind to produce specific evidence in support of its showing of good cause.

If Buckeye and Champaign Wind were truly seeking an efficient determination of the extension request, they should have requested the extension in the context of the pending amendment applications. If they had done so, this entire debate over the procedure for review of their current extension requests would be unnecessary. Further, issues such as setback modifications and consistency in conditions could be addressed along with the timeliness of the proposed construction, which the undersigned believes goes hand-in-hand. Failure to include the extension in the amendment cases does not justify setting aside the legally-mandated procedures. Given Buckeye and Champaign Wind's lack of diligence in bringing its extension request as part of the earlier amendment applications, there is no good cause to deviate from the Board's established amendment procedures and, therefore, the Board's Order is unlawful and unreasonable.

**4. 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 has been 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). Although the Board's policy underlying limits on the duration of certificates is sound, the extensions of those limits may not be granted by motion.

The Board is apparently of the view that the only issue before it is whether to extend the certificate, and there is no need for a Staff investigation. Yet the Board's own past practice indicates that there are times when 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 eight years ago and much has changed in terms of knowledge and understanding of the actual and potential impacts of the project, including the later approval of Champaign Wind's Certificate within and near the footprint of the Buckeye Wind project. There are several important reasons, including review of the impacts of the Certificates set forth in R.C. §4906.10, that the Board should undertake a thorough investigation before deciding whether to extend the minimum length of the Certificate from five to approximately nine years for Buckeye Wind and to six years for Champaign Wind. Further, it is foreseeable that another extension may be necessary as the Staff's investigation has not been completed as of the date hereof in the pending amendment cases before the Board and it may be several months before the process is completed if hearings are deemed necessary therein.

For the reasons set forth herein, the intervening Boards of Champaign County Commissioners and the Townships Trustees of Goshen, Union and Wayne request that the Ohio Power Siting Board order that the issues presented by the aforementioned Boards be addressed by reconsideration and rehearing on the extension request addressed herein as its Order of May 17, 2018 is unreasonable or unlawful. Further, the County and Township Intervenors request that the Board not extend the subject Certificates for an additional year until the issues set forth herein regarding setbacks and consistencies regarding the conditions of the two Certificates are resolved. Further, they pray that the Board, in the alternative, merge the request for extension of the subject Certificates into the pending



amendment cases, Case Nos. 17-2516-EL-BGA and 17-2517-EL-BGA, to determine if the Certificates to be extended, along with the amended application, meet the current statutory guidelines and that the Board take no action to extend such Certificates until hearing and opportunity for public comment

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following persons, via email, as well as within the OPSB's e-filing system, this 12th day of June, 2018.

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Summary: Application For Rehearing electronically filed by Jane A. Napier on behalf of Champaign County Board of Commissioners and Goshen Township Board of Trustees and Union Township Board of Trustees and Wayne Township Board of Trustees