

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 APPLICATION
FOR REHEARING OF COUNTY AND TOWNSHIPS

I. INTRODUCTION

In their application for rehearing, Champaign County and Goshen, Union, and Wayne Townships repeat arguments previously rejected by the Board in these proceedings. Contrary to the County and Townships' claims, the Board's treatment of the extension request as a motion was proper, good cause exists to support the extension, and the new setback laws do not apply to the extension request (or to the project). The Board should deny the County and Townships' application for rehearing given the Board's prior rulings on these issues.

II. ARGUMENT

A. The Board followed its long-accepted process of granting extensions by motion

No statute sets any limits on when an applicant must start or complete construction after receiving a certificate. Based on this, it is the Board's "long-standing interpretation" that "extensions of certificate expiration dates" are to be decided "by motion" and that such requests

do not “constitut[e] an amendment of the certificate.” *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN, Entry on Rehearing dated Feb. 2, 2017 at ¶ 19. The Board has granted such extensions by motion “[s]ince 1996.” *Id.* During this time, the General Assembly has made no attempt to change the Board’s approach and has not passed any statute that defines an extension of a certificate as an amendment requiring application.

The Board’s long-standing practice to consider extensions of a certificate as not equating to an amendment and appropriate for granting by motion is also entitled to considerable weight and deference. *Cleveland v. Pub. Util. Comm.*, 67 Ohio St.2d 446, 451, 424 N.E.2d 561 (1981), citing *Indus. Comm. v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744 (1915); *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 23 (acknowledging the commission’s expertise and deferring to its statutory interpretations). Thus the Board’s action was appropriate here, despite the County and Townships’ argument to the contrary.

B. The new setback requirements do not apply

The County and Townships are wrong that the extension request triggers the new setback requirements. As an initial point, R.C. 4906.201(B)(1) grandfathers in the previous setback provisions “for any existing certificates and amendments thereto.” In addition, R.C. 4906.201(B)(2) specifies that the setback changes must not be interpreted to ‘...limit or abridge any rights or remedies in equity or under the common law.’ Put simply, the Buckeye Wind and Champaign Wind projects are grandfathered under the setbacks in place when the applications were submitted, and not subject to the new setbacks regardless of any amendment to the facilities.

The Board also has deference in how it interprets an ambiguous statute. 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. As set forth above, the Board has appropriately determined, since 1996, that extending a certificate is not an amendment at all, let alone an amendment that could trigger these new setback requirements. Therefore, the mere act of moving to extend a certificate does not trigger the application of the setback requirements on the face of the statute.

C. Good cause exists to extend the certificates

Despite the County and Townships’ claims to the contrary, there have been nearly eight years of litigation between the two projects, some of which was prosecuted by the County and Townships. As recognized by the Board, litigation is the overwhelming reason for the delays in actual construction of the projects, and justifies the one-year extension request. *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 dated Dec. 7, 2017, at ¶ 1. The County and Townships additionally attempt to blame Applicants for not including a request for extension in their recent amendment applications,¹ but cite to no authority for the proposition that the Applicants were required to combine the request with the pending amendment application. And regardless if it was included, no hearing would be required on the extension request.

The Board may also note that Buckeye Wind and Champaign Wind have continued to show a commitment to developing and constructing the Buckeye I Wind Project and Buckeye II Wind Project, all of which support an extension of the certificates. Applicants have expended additional and significant resources, and have continued their efforts to develop the projects, including, but not limited to, the following:

¹ Filed in Case Nos. 17-2516-EL-BGN and 17-2517-EL-BGN.

- Settled litigation with Union Neighbors United through a global settlement;
- Submitted amendment applications for both the Buckeye Wind I and Buckeye Wind II projects to reduce the size of both projects as a result of that settlement;
- Conducted a Phase I Cultural Survey for Buckeye Wind I and the laydown yard (Charles River Associates);
- Conducted final archeological and architectural surveys for Buckeye Wind I (Cultural Resource Analysts);
- Completed preliminary engineering drawings for access roads and intersection improvements for the Buckeye Wind I Project (Westwood Construction);
- Completed preliminary collection line design drawings for Buckeye Wind I (Pike Engineering);
- Completed final engineering drawings of the 7 acre laydown yard (Hull & Associates);
- Developed a complaint resolution process, a decommissioning plan, and a transportation plan;
- Ordered project collection substation transformer;
- Renewed all FAA Determinations of No Hazard for 55 turbine locations; and
- Commenced preparation of the Supplemental Environmental Impact Statement to be issued for public comment in the third quarter of 2018.

See Exhibit A, Dagger Aff. at ¶¶3a-3k attached to April 3, 2018 Requests for Extension of Certificates.

The County and Townships have no basis to claim that the extension request was not supported by good case. This unsupported and unfounded argument should be rejected by the Board.

III. CONCLUSION

For all of the above reasons, the Board should deny the County and Townships' application for rehearing.

Respectfully submitted,

/s/ MacDonald W. Taylor

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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 22nd day of June 2018.

/s/ MacDonald W. Taylor

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Summary: Memorandum Contra Application for Rehearing electronically filed by Mr. MacDonald W Taylor on behalf of Buckeye Wind LLC and Champaign Wind LLC