ORIGINAL

IN THE SUPREME COURT OF OHIO

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. 2013-1874** **Ohio Power Siting Board Case No. 12-0160-EL-BGN**

MERIT BRIEF OF INTERVENING APPELLEE CHAMPAIGN WIND LLC

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INTRODUCTION

This is the third appeal submitted to this Court regarding the Ohio Power Siting Board's approval of a wind farm. In March 2012, this Court affirmed the Board's approval of the Buckeye Wind project over the objections of the same dissenters in this appeal. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878. In August 2013, this Court affirmed the Board's approval of the Black Fork Wind Energy Project. *In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478. In both cases, this Court recognized the thoroughness of the Board's review process. *In re Black Fork* at ¶23; *In re Buckeye Wind* at ¶31.

The Board conducted the same thorough review process for the Buckeye Wind II project, the subject of this proceeding. The Appellants in this appeal disagree, taking issue as they did in the *Buckeye Wind* proceeding with the Board's governance of its proceedings and repeating their concerns from *Buckeye Wind* about blade shear, decommissioning, setbacks and noise. The record, consisting of the testimony of 36 witnesses and 3,010 pages of transcripts, however, shows that the Board fulfilled its role as required by the General Assembly and in doing so, carefully considered the dissenters' challenges to the proposed project.

The Appellants may want this Court to reweigh the evidence, but the role of this Court is to defer to the Board's decision unless it is "...manifestly against the weight of the evidence and so clearly unsupported by the record to show misapprehension, mistake or willful disregard of duty." *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d at 238, 361 N.E.2d 436 (1977) (citations omitted). The Board did not act unlawfully or unreasonably in reaching its decisions, and this Court should affirm in full the Board's May 28, 2013 Opinion, Order and Certificate, as it affirmed the Board's

March 22, 2010 Opinion, Order and Certificate in the *Buckeye Wind* proceeding. *See also In re Application of Buckeye Wind, LLC*, Pub. Util. Comm. No. 08-666-EL-BGN, 2010 Ohio PUC LEXIS 303 (Mar. 22, 2010).

STATEMENT OF FACTS

Champaign Wind defers to the Ohio Power Siting Board's (the "Board") presentment of the proceedings for its Statement of Facts, with the addition of some brief background facts. Buckeye Wind LLC is a subsidiary of EverPower Wind Holdings, Inc. as is Champaign Wind LLC, the applicant for the Buckeye II Wind project. (Appx. at 13; CW Supp. 6, *Buckeye Wind* Order at 2; 2010 Ohio PUC LEXIS 303 at *3.) In March 2010, the Board approved Buckeye Wind LLC's application for the Buckeye Wind project, and this Court affirmed the Board's decision in March 2012. *In re Application of Buckeye Wind, LLC*, Case No. 08-666-EL-BGN (Opinion, Order, and Certificate) (Mar. 22, 2010 at 3-4) (hereinafter referred to as "*Buckeye Wind* Order", affirmed *In re Application of Buckeye Wind, LLC* 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869; 2010 Ohio PUC LEXIS 303). With the Buckeye Wind project approved for construction, Champaign Wind submitted an application to the Board in May 2012 for the 56 turbine Buckeye Wind II project. (Appx. at 13, Order at 2.) The Buckeye Wind II project, with over 100 participating landowners, will be located in the same general area where the Buckeye Wind project will be constructed. (Appx. at 13-14, Order at 2-3; Staff Report at 47; CW Supp. at 125, Co. Ex. 1 at 4.) The majority of the land for the Buckeye Wind II project became available in 2011 as a result of the purchase of a lease block from another competing wind energy developer. (CW Supp. at 111; TR 157.)

ARGUMENT

A. This Court Should Apply The Same Standard Of Review It Applied In The *Buckeye Wind* Appeal.

In its 2012 *Buckeye Wind* decision, this Court noted that it can reverse, vacate or modify an order of the Board only if the order is found to be unlawful or unreasonable based on the record. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶26, citing *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427, ¶17. "Under the 'unlawful or unreasonable' standard of R.C. 4903.13, this court will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record to show misapprehension, mistake or willful disregard of duty." *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d at 238, 361 N.E.2d 436 (1977) (citations omitted). The Court has "'complete and independent power of review as to all questions of law'" in appeals from the board. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶13, quoting *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997).

B. The Board And This Court In *Buckeye Wind* Rejected Many Of Same Claims UNU and the County Raise In This Proceeding.

In March 2010, the Board issued a certificate for the Buckeye Wind project, a certificate that this Court affirmed in all respects on March 6, 2012. *In re Buckeye Wind.* This Court found the Board's 101 page decision in *Buckeye Wind* to be "thorough and shows that the board considered all points of view, including the intervenors' positions on every issue." *Id.* at ¶12. The Appellants now challenge the Board's 103-page

decision approving the Buckeye Wind II project, as they did in the *Buckeye Wind* proceeding, raising many of the same issues.

1. *Buckeye Wind* and this proceeding share the same parties.

Julie Johnson, Diane and Robert McConnell and their 10 member organization, Union Neighbors United (collectively, "UNU") and Champaign County, Goshen Township, Urbana Township and Union Township (collectively the "County") were appellants in *Buckeye Wind* and are the Appellants in this proceeding. *In re Buckeye Wind* at ¶2; *see also* UNU Supp. at 352; UNU Ex. 17 at 2. The Ohio Power Siting Board was the appellee in *Buckeye Wind* as it is in this proceeding. Buckeye Wind LLC and Champaign Wind LLC, the applicants and intervening appellees in *Buckeye Wind* and this proceeding respectively, are subsidiaries of EverPower Wind Holdings, Inc. *Trautwein v. Sorgenfrei*, 58 Ohio St. 2d 493, 500, 391 N.E.2d 326 (1979) ("[i]n ascertaining whether there is an identity of such parties a court must look behind the nominal parties to the substance of the cause to determine the real parties in interest"). Also having an interest in this proceeding are the 100 landowners participating in the project. (Staff Report at 47; CW Supp. at 125, Co Ex. 1 at 4.)

2. This appeal involves many of the same issues raised in *Buckeye Wind*, along with many of the same witnesses.

UNU and the County raise many of the same issues in this proceeding that were resolved in *Buckeye Wind*. For example, UNU repeats its request for a noise standard that would limit operational noise levels to no more than 5 dBA over the quietest 10 percent of the time at nearby residences, a standard this Court rejected in *Buckeye Wind*. (UNU Brief at 37.) The County also repeats the argument from *Buckeye Wind* that it was deprived the ability to call and examine witnesses that worked on the

application, a contention this Court rejected in *Buckeye Wind*. (County Brief at 13.) *In re Buckeye Wind* at ¶8.

Likewise, the two proceedings share many of the same witnesses. Thirty-three witnesses testified in the *Buckeye Wind* proceeding. (CW Supp. 7-8, *Buckeye Wind* Order at 3-4; 2010 Ohio PUC LEXIS 303 at *8-9.) Thirty-six witnesses testified in the proceeding on the application for the Buckeye Wind II project. *In re Application of Champaign Wind LLC*, Case No. 12-160-EL-BGN, Opinion, Order and Certificate, May 28, 2013 at 3, hereinafter referred to as the "Order.") Rick James testified for UNU in this proceeding, as he did in the *Buckeye Wind* proceeding. (Appx. at 66, Order at 55; CW Supp. at 57, *Buckeye Wind* Order at 53; 2010 Ohio PUC LEXIS 303 at *130.) Champaign Wind witness David Hessler testified in this proceeding and the *Buckeye Wind* proceeding. (Appx. at 25, Order at 14; CW Supp. at 52, *Buckeye Wind* Order at 48; 2010 Ohio PUC LEXIS 303 at *119.)

Other witnesses testifying in both proceedings included Champaign Wind witnesses Hugh Crowell and Christopher Shears. (Appx. at 21, 23, Order at 10, 12; CW Supp. at 15-17, *Buckeye Wind* Order at 11-13; 2010 Ohio PUC LEXIS 303 at *26-28.) Julie Johnson, a member of UNU, presented testimony in both proceedings (Appx. at 57, Order at 46; CW Supp. at 45, *Buckeye Wind* Order at 41; 2010 Ohio PUC LEXIS 303 at *102) as did Champaign witness Dr. Kenneth Mundt, an epidemiologist. (Appx. at 57, Order at 46; CW Supp. at 64, *Buckeye Wind* Order at 60; 2010 Ohio PUC LEXIS 303 at *148.)

3. *Buckeye Wind* resolved many of the issues now raised in this proceeding.

In *Buckeye Wind*, this Court rejected UNU's arguments on noise and blade throw, and also rejected many procedural arguments related to witness testimony and discovery. The Court affirmed the Board's decisions on noise, acknowledging acoustic engineer David Hessler's testimony in *Buckeye Wind* that UNU's proposed noise standards were unrealistic and would effectively prohibit the development of wind energy in Ohio. *In re Buckeye Wind* at ¶30. The Court also affirmed the Board's conditions regarding setbacks and blade throw. *In re Buckeye Wind* at ¶¶ 20-21.

Importantly, this Court noted that all "... the issues were debated at length by the parties and witnesses at the evidentiary hearing." *In re Buckeye Wind* at ¶30. The exact same process occurred in this proceeding on the Buckeye Wind II project application, as all issues were debated at length, briefing conducted, and a thorough 103-page decision issued by the Board summarizing the arguments and its conclusions. The Board also considered UNU and the County's applications for rehearing, *i.e.* administrative appeals to the Board, and issued a 48-page decision affirming its initial decision. (Appx. at 115-163.) One significant finding by the Board was that the Buckeye Wind II project, like the Buckeye Wind project, was designed to comply with the statutory setback requirements for wind farms set by the General Assembly, as well as manufacturer recommended setbacks. (Appx. at 120-121, Rehearing at 6-7.)

C. The Board fulfilled its Role in this Proceeding as Required by the General Assembly.

Pursuant to Section 4906.10(A), Revised Code, the Board may not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless it finds and determines that,

after weighing all evidence, the certificate meets each of the eight criteria listed in the statute. As required, the Board analyzed the statutory criteria and applied it to Champaign Wind's application, determining that the application for the Buckeye Wind II project, as modified by the Board, properly complied with all statutory requirements under Chapter 4906, Revised Code and Chapter 4906, Ohio Administrative Code.

1. The Board properly applied the statutory criteria.

The Board thoroughly analyzed the evidence submitted during the hearing, establishing that Champaign Wind's application complied with each of the eight statutory criteria. The Board's discussion examines each of the eight criteria set forth in Section 4906.10(A) of the Revised Code one at a time, listing the evidence presented by the parties, analyzing that evidence, and setting forth its well-reasoned conclusion on each criteria. (Appx. 29-87; Order at 18-76.)

2. The Board did not exceed the bounds of its authority.

The Board properly complied with all procedures required by Chapter 4906, Revised Code and Chapter 4906, Ohio Administrative Code. As the administrative adjudicatory body responsible for determining whether to approve or deny an application, the Board has full authority to determine whether an applicant has complied with the requirements set forth in the Ohio Revised Code and Ohio Administrative Rules and to administer the hearing in accordance with those rules. This authority includes the power to make determinations regarding issues of witness credibility, hearsay, procedural, and evidentiary rulings. Despite Appellants' arguments regarding the Board's rulings on requested subpoenas, hearsay and expert testimony, the Board was

vigilant in analyzing evidentiary issues and testimony, and appropriately excluded that which was not properly before the Board.

3. The Board appropriately relied on the record to approve and issue the Certificate.

The Board's 103-page ruling and the 72 project conditions imposed by the Board were based on the extensive record produced by the nearly three week hearing in the application, and the determination of the expertise and credibility of each witness presented by the parties. Under R.C. § 4903.13, this Court shall only reverse, vacate or modify an order of the Board order that is unlawful or unreasonable. Neither UNU nor the County have provided any justification for doing so, as the Board's factual determinations were reasonable and not manifestly against the weight of the evidence. The Board's 103-page Order and the 72 conditions, meticulously written, demonstrates that its decision was based upon the evidence and completely supported by the record.

D. UNU and the County/Townships Received A Fair Hearing Before The Board.

[Response to UNU's Propositions of Law 2, 3, 4, 8, and 10 and County Propositions of Law 3.]

The Board properly conducted all aspects of the hearing, giving parties the chance to fully participate by submitting evidence and witness testimony to support their positions. The Board also carried out its evidentiary decisions and rulings appropriately. As a result, UNU and the County received a fair hearing before the Board and were not prejudiced by any of the procedural rulings.

1. UNU and the County fully participated in the evidentiary hearing.

Appellants were given the full opportunity to participate in the nearly three week evidentiary hearing to determine whether Champaign Wind's application met the

required statutory criteria. UNU presented six witnesses, while the County and Townships presented four witnesses. There were 122 marked exhibits and over 3,000 pages of testimony transcribed. (Appx. at 14, Order at 3.) Appellants also had the right of subpoena, which the County exercised to force the appearance of a Staff witness. (TR 2633-2634.) Contrary to their claims, Appellants received a fair hearing and were prejudiced in no way. *In re Black Fork Wind Energy* at ¶18 ("A party is precluded from claiming a denial of the right of cross-examination when that party did not take advantage of the opportunity to subpoena the witness.")

a. Appellants were permitted to fully cross-examine witnesses on information relevant to the application and staff report.

The Board permitted UNU and the County to cross-examine witnesses fully on information relevant to the application proceedings. UNU and the County cross-examined each of the witnesses offered by Champaign Wind, including experts Michael Speerschneider, Hugh Crowell, Mark Thayer, Christopher Shears, Terry Vandewalle, Francis Marcotte, Robert Poore, David Hessler, Dr. Kenneth Mundt, and landowners Don Bauer and Mark Westfall. UNU and the County were also able to cross-examine the witnesses offered by the Staff and cross-examine each other's witnesses if they so chose. Only when UNU's questioning strayed outside the scope of information relevant to the application hearing did the Board limited questioning. (Appx. at 20, Order at 9.)

For example, UNU was able to explore the appropriate distance for setbacks, and how the Timber Road II blade shear incident affected the Staff's determination of what constituted an appropriate setback. (Appx. at 20, Order at 9; CW Supp. at 112-114, TR 2571-2573.) The Board's administrative law judge, however, properly limited questioning when UNU's counsel went beyond asking Mr. Conway about how his

opinion was developed in the Staff Report from the Timber Road II incident as to blade shear and setbacks, and into the specifics of the Timber Road II incident which were not relevant to the application because different turbines were proposed for the Champaign Wind project. (CW Supp. at 114-115, TR 2573-2574.) Such questioning has no bearing on whether Champaign Wind's application complies with the setbacks mandated by statute and whether its application complied with the eight statutory criteria. The Board properly limited testimony to evidence relevant to Champaign Wind's application.

b. The Board appropriately affirmed the administrative law judges' rulings on drafts of the application and Staff's report.

As noted above, the Board's administrative law judges permitted UNU and the County to liberally cross-examine witnesses on the application and Staff report. Likewise, the administrative law judges properly prevented discovery of draft versions of Champaign Wind's application and limited cross-examination on a draft version of the Staff Report. (Appx. at 22-23, Order at 11-12.) UNU disagrees, claiming that the failure to allow discovery of the draft application and limiting cross-examination of the draft Staff Report is an abuse of the Board's discretion. (UNU Brief at 48-50.)

The Board affirmed the administrative law judge's ruling, holding that drafts are irrelevant because "the admission of any drafts, whether it be an application or staff report, will not make it more or less probable that Champaign's application meets or does not meet" the eight criteria listed in Section 4906.10, Revised Code. (UNU Appendix ("Appx.") at 23, Order at 12.) The Board also noted, as Champaign Wind did, that UNU was given the opportunity to question Staff's witness on matters relating to the Staff Report, including how staff members arrived at their conclusions in the Staff

Report, taking into account the Timber Road II incident and the removal of the Vestas turbine from the application. (Appx. at 125, Rehearing at 11; TR 2566-2573.) UNU was not prejudiced by the administrative law judges' ruling, and this Court should affirm the Board's ruling.

c. Appellants extensively questioned witnesses regarding sponsorship of the Application and exhibits.

Both UNU and the County were able to cross-examine Champaign Wind's witnesses Michael Speerschneider and Hugh Crowell at length during the proceeding. For example, UNU and the County spent two days cross-examining Michael Speerschneider, an officer of Champaign Wind and EverPower's Senior Director of Permitting and Government Affiars, on the application. (TR 21-416.) Yet, the County argues that its right to due process was denied because allegedly Champaign Wind witnesses Speerschneider and Crowell presented testimony on the application and supporting exhibits but could not answer all of the County's questions. (County Brief at 13-18.) The Board disagreed, finding that it was appropriate to allow a company witness to sponsor the application into evidence, which is what Mr. Speerschneider did. (Appx. at 23-24, Order at 12-13.)

The Board recognized that Mr. Speerschneider has "a wide range of experience in developing and permitting renewable energy projects" and "as a high-ranking corporate officer and the senior director of permitting, the answers to questions within his direct testimony clearly fell within his job description." (Appx. at 23-24, Order at 12-13.) Board precedent allows introduction of an application by a sponsoring witness who had significant responsibility in the production of the application, as Mr. Speerschneider did. (Appx. at 24, Order at 13.) He also managed the production of the application,

including the studies and exhibits contained within the application. (*Id.*) Further, the County was fully able to cross-examine Mr. Speerschneider regarding his knowledge of the application and corresponding exhibits, as was UNU, and Mr. Speerschneider provided extensive answers on a variety of topics to UNU and the County. (TR 48-138; 150-376.)

Similarly, Mr. Crowell's testimony was properly admitted because he was the senior project manager in ecological areas, and he testified to matters such as wetland surveys and permitting. Additionally, the transportation study was conducted under his direction. It is also important to note that the transportation study was actually admitted with Mr. Speerschneider's testimony as part of the application (Co. Ex. 1), and that he answered questions on that exhibit during his cross-examination. (TR 427; TR 109-117.)

The County's claim of a due process violation by the Board is not supported by the record, and further the County never exercised its right to subpoena other witnesses involved in the application. *In re Black Fork Wind Energy* at ¶18 ("A party is precluded from claiming a denial of the right of cross-examination when that party did not take advantage of the opportunity to subpoena the witness.")

2. The Board's decision to uphold the Administrative Law Judges' rulings on hearsay was appropriate.

The Board's decision to affirm the administrative law judges' exclusion of hearsay evidence was appropriate. UNU claims the Board erred by excluding testimony from William Palmer related to the Caithness database, which the Board determined to be unreliable hearsay. (UNU Brief at 24-28; TR 1359:25-1360:3; Appx. at 20-21, Order at 9-10.) Further, UNU claims that the Board permitted Staff witness Andrew Conway and

Champaign Wind witness Robert Poore to base their testimony upon hearsay, yet did not permit William Palmer to base his testimony upon similar sources. (UNU Brief at 24.) Contrary to Appellant UNU's claims, the Board's decisions were consistent because it excluded hearsay (and testimony based upon hearsay) while permitting introduction of testimony based upon independently verifiable information.

a. The Caithness database is hearsay, analogous to a Wikipedia page, and was properly excluded.

The administrative law judges properly excluded the Caithness database as hearsay. The Board noted that the website "is an open, online forum, where information is obtained from individuals who can add information, documents, and data into the database." (Appx. at 21, Order at 10.) UNU admits the open nature of the website in its merit brief at footnote 7, going outside the record in the footnote to discuss the website's operation. (UNU Brief at 26.) UNU also cites to portions of UNU witness Palmer's testimony on page 26 of its merit brief, claiming it is the only "record evidence" of the database's reliability. That testimony, however, was stricken from the record by the administrative law judge's prior to Mr. Palmer's cross-examination and is not properly before this Court. (UNU Supp. at 200, TR 1360.)

Regardless, UNU does not dispute that the website "disclaims any accuracy of the items contained within its database, and there was no possible way for either UNU witness Palmer or the ALJs to independently verify who the author of the information was or whether the information was reliable." (Appx. at 21, Order at 10.) Ultimately, the Board could not permit the source or testimony on it as the "website itself serves to function in a similar manner to other online forums, such as Wikipedia, where anyone can author or edit content without peer review or qualitative analysis." (Appx. at 21,

Order at 10.) Importantly, Mr. Palmer *was* permitted to testify regarding blade throw occurrences that he could confirm, just not the unverified items on the Caithness database. (*See, e.g.*, CW Supp. at 116-117, TR 1482:20-1483:16.) The Board correctly excluded the anonymous online database and all testimony stemming from it.

b. Testimony based upon professional experience and verifiable documents was properly permitted.

The Board appropriately permitted testimony given by Champaign Wind witness Mr. Poore and Staff witness Mr. Conway because the sources relied upon by these experts were not hearsay, but rather verified documents, and the witnesses' testimony was based upon their professional experience and opinions. (Appx. at 21-22, Order at 10-11; UNU Supp. 236-237, 244-245, TR 2493:13-2494:2; 2523:1-2524:9.)

Mr. Poore's reference to two presentations by people he recognized as experts in the wind industry, Rob Istchenko and Matt Jacobs, was admissible under the learned treatise exception to the hearsay rule. (Appx. at 21-22, Order at 10-11; UNU Supp. at 324, Co. Ex. 9 at 4.) Further, Mr. Poore testified that as a professional in the wind industry, he would hear about blade failure if it ever occurred through word of mouth or the press, and the Board correctly held that such a statement is not hearsay. (Appx. at 22, Order at 11; UNU Supp. at 60, TR 578:17-21.) The key point is that Mr. Poore's testimony was based on his thirty years of experience in the industry, something Mr. Palmer lacked. (Appx. at 21-22, Order at 10-11.)

Similarly, Mr. Conway's testimony was not based on hearsay. Mr. Conway's testimony explained his personal experience in evaluating blade shear and minimum setback recommendations, which included visiting site locations, speaking with manufacturers, reviewing studies on blade shear, and other information. (Staff Ex. 7,

Conway Dir. 5:8-17.) Mr. Conway was also able to identify the sources of information and the studies referenced that were done by recognized organizations. (UNU Supp. 236-237, 244-245, TR 2493:13-2494:2; 2523:1-2524:9.) Mr. Conway used the studies as a source in his evaluation of the appropriate distance for minimum setbacks, along with many other references and sources.

The Board compared these witnesses' testimony with that of UNU witness Palmer, noting that "while UNU witness Palmer does have experience as an engineer, he has no experience in the wind industry and it would have been unreasonable for the Board to admit testimony about the wind industry from an internet website that consists entirely of third-party information." (Appx. at 132, Rehearing at 18.) The Board did "... not see any inconsistency between Board rulings admitting exhibits that were complied under the direction of witnesses with extensive industry experience, as opposed to testimony derived from internet websites where any third party can post information or data." (Appx. at 132, Rehearing at 18.) There is no basis to find that the Board exercised its power in an arbitrary manner, and this Court should reject UNU Proposition of Law No. 4.

3. The Administrative Law Judge appropriately quashed UNU's subpoenas as overly broad and burdensome.

Rather than serving targeted discovery, UNU served wide-ranging subpoenas on various third party companies with global operations. On review, the Board upheld the administrative law judge's decision to quash the subpoenas, finding that UNU's third party subpoenas were overly broad and "not focused on obtaining information that could be admissible before the board." (Appx. at 18-20, Order at 7-9.) The Board highlighted

the broadness of UNU's subpoenas with the following example from a UNU subpoena to a third party:

> All studies, reports, and other documents relating to adverse effects caused or potentially caused by wind turbines on humans, wildlife, aviation, property values, or the environment through noise, shadow flicker, blade throw, blade icing, wildlife collisions with turbines, or other effects. All documents relating to any complaints that wind turbines have caused the forgoing effects.

(Appx. at 19, Order at 8.)

The Board also noted UNU's "...own admission that it could refine the scope of its requests including narrowing the subject matter and the types of documents to be produced." (Appx. at 19, Order at 8.) The Board found it disturbing that UNU did not object to the administrative law judges' October 22, 2012 ruling until January 16, 2013, well after the hearing closed. (Appx. at 128, Rehearing at 14.) UNU could have taken an interlocutory appeal to the Board immediately upon the judge's ruling, but did not. (Appx. at 128-129, Rehearing at 14-15.) The Board also noted that nothing precluded UNU from submitting new subpoenas that were "...more narrowly tailored toward to the documents UNU was seeking to obtain." (Appx. at 26, Order at 15.) UNU, however, never bothered to file amended or revised subpoenas. (*Id.*)

UNU also was not prejudiced by the quashing of its overly broad subpoenas. UNU was able to present witness testimony on the Timber Road II incident as well as submit documents into the record, including reports on the incident prepared by the Vestas turbine manufacturer and the operator of the wind farm. UNU also cross-examined Staff witnesses and Champaign Wind witnesses on the incident. The Board noted all of this testimony in its entry on rehearing. (Appx. at 129, Rehearing at 15

citing Order at 9; TR at 1300-1303, 1315-1316, 1318-1320, 1328-1332, 2485-2486, 2550-2553, 2566-2572.)

As the administrative law judge stated, when ruling on the motions to quash, UNU has no one to blame but itself for "seeking an entire body of information that is not tailored in any way to the proposed project" and "unlimited in scope." (Appx. at 173-174; Entry, Oct. 22, 2012 at 10-11, ¶22.) No abuse of discretion occurred in the quashing of UNU's overly broad subpoenas, and UNU Proposition of Law No. 2 is without merit.

E. The Board Properly Denied UNU's Request to Reopen the Hearing and Supplement the Record.

[Response to UNU's Propositions of Law 9]

The Board properly denied UNU's request to reopen the hearing because UNU sought only to introduce a study related to infrasound and low-frequency noise that was cumulative of evidence already submitted, therefore inappropriate under Ohio Admin. Code Rule 4906-7-17(C). (Appx. at 25-26, Order at 14-15.) The Board noted that "[w]hile UNU believes that the information it sought to introduce would not be cumulative, as required by Rule 4906-7-17(C), O.A.C., the record reflects that UNU actually presented two witnesses who alleged that LFN exists from wind turbines and leads to adverse health effects." (Appx. at 132-133, Rehearing at 18-19).

UNU cites to the case of *Kroger v. Ryan*, 83 Ohio St. 299 (1911) for the contention that evidence is not cumulative if it relates to new and distinct facts. (UNU Brief at 47.) The *Ryan* case does not support UNU's claim, as the new evidence in that case related to findings of noxious germs that led to the post-birth death of a mother, and not the estate administrator's charge of failure by the attending physician to remove

all of the placenta. *See Ryan*, 83 Ohio St. at 307. As the Court noted, "[c]umulative evidence, as we understand it, is additional evidence of the same kind to the same point." *Id.* That cumulative evidence is exactly what UNU sought to present in its motion, a select snippet from another state proceeding to support and bolster its claims on infrasound and its own witnesses' testimony. In fact, UNU improperly cites to the excluded evidence for the truth of the contents of the excluded report in its merit brief. (UNU Brief at 47-48.) For that reason the Court should not consider that portion of UNU's brief.

Likewise, the case of *State v. Siller*, No. 90865, 2009-Ohio-2874, 2009 Ohio App. LEXIS 2434 (8th Dist. June 18, 2009) does not support UNU's contention that "contradictory evidence" is not cumulative evidence. (UNU Brief at 47.) The *Siller* case related to new evidence of blood spatters on the front of the State's star witness, indicating that the witness actually participated in the crime contrary to his claims. *Siller*, 2009-Ohio-2874. In the prior trial, only one blood spatter had been discovered on the back of the witness' pants. *Id.* at ¶27. The appellate court found this evidence not to be cumulative because it established that the witness was in very close proximity to the beating. *Id.* at ¶57.

Unlike the facts in *Siller*, UNU attempted to present evidence through its motion to reopen the record that duplicates Rick James' and Dr. Punch's testimony that low frequency noise exists from turbines and causes adverse health effects. This is not "contradictory" evidence as UNU claims (UNU Brief at 47), but rather cumulative evidence on the same point. The Board properly denied UNU's motion to reopen the hearing because a "review of the information within the LFN study reveal[ed] that it is

neither inconsistent nor contradictory with the position that UNU" presented in the proceeding. (Appx. at 26, Order at 15.)

F. Substantial Evidence Supports the Board's Decision

[Response to UNU Propositions of Law 5, 6 and 7]

The Board reviewed hundreds of pages of exhibits and heard nearly three weeks of testimony (resulting in over 3,000 pages of transcript) on the Buckeye Wind II project application, the subject of this appeal. Both UNU and the County fully participated in the evidentiary hearing yet, as they did in *Buckeye Wind*, they still dispute the Board's factual findings on blade shear, noise and setbacks. Factual disputes, however, are not for this Court to resolve. "Under the 'unlawful or unreasonable' standard of R.C. 4903.13, this court will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record to show misapprehension, mistake or willful disregard of duty." *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d at 238, 361 N.E.2d 436 (1977) (citations omitted). As in the *Buckeye Wind* case, substantial evidence supports the Board's decision to approve the Buckeye Wind II project.

1. The Board thoroughly considered all of the evidence offered by the parties.

As it did in the *Buckeye Wind* proceeding, the Board carefully summarized the evidence and the parties' arguments on blade shear, noise and health. The Board meticulously described the testimony of Champaign Wind's witness David Hessler, an acoustical engineer, as it did with the testimony of UNU witness Rick James, also an acoustical engineer. The Board also reviewed exhibits and studies presented in the witnesses' testimony on operational noise and blade shear, ultimately concluding that

the project's setbacks and Staff's recommended noise limit of 44 dBA at night for non-participating residences were in the public interest and supported by the evidentiary record. (Appx. at 74, Order at 63.)

a. The Board considered the evidence on blade shear, finding that the project's setbacks are sufficient.

The Board thoroughly considered the evidence presented on blade shear and setbacks, determining that the evidence demonstrated the rare occurrence of blade throw, and that the safety precautions implemented by Champaign Wind and conditions proposed by Staff would further minimize the already low potential for blade shear. (Appx. at 53, Order at 42.) As a result, the Board held that the setbacks proposed in the application are "sufficient to protect residents from the risk of blade shear or turbine fire, and that the risk of blade shear or fire is *not* such that it renders the proposed project contrary to the public interest." (*Id.*) (emphasis added.)

i. The Board reviewed testimony on wind turbine safety manuals.

For example, the Board considered testimony on turbine safety manuals for the turbines proposed for the project when addressing UNU's and the County's claims that the safety manuals called for larger setbacks. (UNU Brief at 34; County Brief at 11; Appx. at 53, Order at 42; Appx. at 120-121, Rehearing at 6-7.) The Board noted the testimony of Staff witness Andrew Conway who explained that the clearances cited by the County and UNU referred to "recommended temporary clearance areas in the event of temporary safety situations such as fire or overspeed, akin to temporary evacuations that might take place during a gas leak, and are not recommended permanent setback distances." (Appx. at 53, Order at 42.)

ii. The Board considered the rarity of blade shear events.

The Board also meticulously detailed the parties' positions on whether blade shear is a rare event. (Appx. at 50-53, Order at 39-42.) UNU attempted to prove that blade shear is a common occurrence merely by citing the "myriad of reasons" that can cause turbine blades to break. (UNU Brief at 29.) However, Champaign Wind witness Robert Poore, a 30-year wind industry veteran and engineer, confirmed that blade shear is a very rare event. (Appx. at 51, Order at 40; UNU Supp. at 325-327, Co. Ex. 9 at A.11-12.) Staff witness Conway, a professional engineer licensed in Ohio, conducted an investigation on blade shear and came to the same conclusion. (Appx. at 53, Order at 42; Staff Ex. 7 at 2; UNU Supp. at 236, 249, TR 2493, 2547.) The Board also noted that Conway had contacted turbine manufacturers during his investigation and confirmed that the setbacks proposed for the project exceed any manufacturer recommendations. (Appx. at 53, Order at 42.)

iii. The Board considered safety precautions and protections.

The Board also considered the precautions that can be taken by manufacturers and wind farm operators to reduce the already-low risk of blade failure. (Appx. at 53, Order at 42; UNU Supp. 327-329, Co. Ex. 9 at A.13.) The Board pointed out that there are many levels of safety measures that would be triggered prior to a blade break as well as other safety controls, including "international engineering standards, two fully independent braking systems, pitch controls, sensors, speed controls, monitoring systems that provide automatic shut down at wind speeds over a threshold, significant vibrations, or rotor blade stress, third-party oversight in the manufacturing process, quality assurance processes, inspections, proper maintenance practices, limitations on remote fault resets, and training." (Appx. at 53, Order at 42; *see also* Appx. at 140, Rehearing at 26.)

The Board's conclusions were based on extensive testimony by Champaign Wind witnesses Michael Speerschneider and Robert Poore from DNV KEMA and a 30 year wind industry veteran, as well as Staff witness Andrew Conway on safety mechanisms and the applicant's own practices for selecting and maintaining turbines. (Appx. at 48-53, Order at 37-42; UNU Supp. at 33, 36-37, TR 310, 318-319; UNU Supp. 327-329, Co. Ex. 9 at A.13.) The Board was able to consider testimony from Christopher Shears, an officer of Champaign Wind and EverPower's Senior Vice President as well as Robert Poore, that they were not aware of a member of the general public being injured by a blade failure. (CW Supp. 108, Co. Ex. 12 at 3; UNU Supp. at 325, Co. Ex. 9 at A.10.)

iv. The Board examined the project's setbacks.

The Board also considered UNU's assertions that blade parts of an "injurious" size could travel far enough to warrant greater setbacks. The Board, however, failed to find any evidence to indicate "a need for a 1,640 foot setback between turbines and properly lines," noting that evidence presented by UNU witnesses was not reliable and that credibility lay with the official reports it reviewed related to the Timber Road II incident. (Appx. at 52, Order at 41.) On that point and contrary to UNU's claim, the Board allowed and considered UNU witness Schaffner's testimony on his findings at the Timber Road II incident, along with various reports by the Timber Road II turbine operator submitted by UNU into the record. (Appx. at 139, Rehearing at 25.) The Board's consideration of all the testimony and evidence on blade shear supports the reasonableness of its findings.

b. Evidence on noise was carefully considered and weighed.

The Board also carefully summarized the evidence and the parties' arguments on turbine noise. (*See* Appx. at 68-74, Order at 54-63; Appx. at 149-158, Rehearing at 35-44.) For example, as to UNU's claim that a L90 plus 5 dBA standard should apply, the Board highlighted the testimony of acoustical engineer David Hessler that the Leq is "still the actual average level that is recorded over every 10-minute measurement period, and the poorest sound measurement is not the Leq but rather the LMax." (Appx. at 153, Rehearing at 39.) The Board also noted the testimony of Staff witness Ray Strom that Staff had only received two noise complaints from wind farms operating in Ohio with similar Leq noise limits and that the source of one of the complaints was not from a turbine but rather a pool pump. (Appx. at 153-154, Rehearing at 39-40.)

i. The Board rejected UNU's conclusions on noise effects.

The Board also disagreed with UNU's request for a 38 dBA noise limit, citing Mr. Hessler's testimony on the small number of noise complaints that occur when noise levels are less than 45 dBA regardless of the existing background level. (Appx. at 73, Order at 62; Appx. at 155, Rehearing at 41.) The Board also found support for Mr. Hessler's testimony in the testimony by Dr. Kenneth Mundt, an epidemiologist, discussing a study's findings that only a small number of respondents were annoyed by sound levels above 37.5 dBA and that the study's finding was " ... much more closely aligned with Mr. Hessler's two percent figure than UNU's deceptive statistics." (Appx. at 156, Rehearing at 42.)

The Board also corrected UNU on its interpretation of recommendations and findings by the World Health Organization on nighttime noise, finding that "[t]he record reflects that the WHO study did not adopt 40 dBA as a threshold, but rather that the WHO study concluded that adverse effects were observed within the range of 40 dBA to

50 dBA." (Appx. at 156, Rehearing at 42.) In fact, contrary to UNU's representation, the WHO guidelines state that a L-night, outside noise level of 40 dB is equivalent to the *lowest observed adverse effect level* (LOAEL) for night noise. (CW Supp. 119, TR 1739.) The WHO has also recommended an interim target level of 55 dBA L-night, outside for nighttime noise levels, a fact the Board noted in its Order. (Appx. at 66, Order at 55; CW Supp. at 118, TR 1738; UNU Supp. at 230-231, TR 1817-1818.) All of this evidence supports the Board's decision to adopt a nighttime noise limit for the project of 44 dBA at nonparticipating residences.

ii. The Board rejected UNU's rigid and impractical property noise limit.

The evidence also supports the Board's decision to reject UNU's request to apply a noise limit of 38 dBA across the entirety of each nonparticipating property. (UNU Brief at 44.) Contrary to UNU's claim, the Board did not impose a property boundary noise limit in its Order, rather Champaign Wind adopted 50 dBA as its design goal for the project and the Board evaluated and considered the modeling results in the application. (UNU Brief at 44; UNU Supp. at 15-17, Co. Ex. 1 at Ex. O. p.2.) As David Hessler explained, property line noise limits are not necessary because the point of a noise regulation is to control noise where people are most of the time, and particularly at night. (CW Supp. at 120, TR 736; UNU Supp. at 338, Co. Ex. 11 at A.10.) The Board relied on this testimony, noting that "the intent of a noise regulation is to control noise where people spend the majority of their time, particularly at night." (Appx. at 55, Order at 44.)

2. The Board considered the credibility of all witnesses.

The Board also considered the credibility of the witnesses when weighing the evidence. For example, the Board noted that UNU's reliance on a "treatise" by UNU witness Punch was "... misguided, as the article not only failed to undergo proper peer review or scientific analysis, but also relied exclusively on self-reported complaints or symptoms of health effects, which casts doubt over the treatise's findings." (Appx. at 73, Order at 62.) Although UNU asks this Court to revisit the credibility of the witnesses, the Court should defer to the Board as the trier of fact. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St. 2d 105, 108, 346 N.E.2d 778 (1976) (recognizing that it is the Board's function, not the Court's function, to weigh the evidence).

a. The Board heard testimony on setbacks, blade shear, noise and health from witnesses presented by UNU, Champaign Wind and the Staff.

The Board used seventeen pages of its decision to discuss the testimony of the witnesses testifying on setback, blade shear, noise and health issues. On blade shear, the Board noted the testimony of Michael Speerschneider, EverPower's Director of Permitting with over 10 years experience in the wind industry, on a host of issues, including how EverPower selects turbines, maintains turbines and monitors turbines for any issues. Christopher Shears, the former head of the British Wind Energy Association and a longtime wind industry veteran, and Robert Poore, from DNV KEMA and a 30 year wind industry veteran, both testified that they were not aware of a member of the general public being injured by a blade failure. (Appx. at 54-55, Order at 39-40; CW Supp. at 108, Co. Ex. 12 at 3; UNU Supp. at 338, Co. Ex. 9 at A.10.)

David Hessler, an acoustical engineer, testified regarding his experience in the wind industry, his conservative modeling for the project and his experience on the rate

of noise complaints for similar projects. (Appx. 65-66, 69-70, Order at 54-55, 58-59.) Dr. Kenneth Mundt, an epidemiologist, testified regarding the lack of any links between health and turbines, as well as addressing Dr. Punch's claims. (Appx. 73-74, Order at 62-63.) The Board noted the lack of complaints at the existing wind farms in Ohio as testified to by Staff witness Raymond Strom, and summarized the testimony of Staff witness Andrew Conway, a registered professional engineer in the State of Ohio, regarding his investigation of blade shear and his communications with turbine manufacturers regarding each manufacturer' recommended setbacks. (Appx. 53, 70-71, Order at 42, 59-60.)

The Board also considered the testimony from UNU's witnesses who admitted they did not have experience in the wind industry. The Board described the testimony of William Palmer, a safety engineer from the nuclear industry who advocated applying the zero risk approach for the nuclear industry to the wind industry. (Appx. at 48, Order at 37; Appx. at 132, Rehearing at 18.) The Board also considered the testimony of Dr. Jerry Punch, an audiologist who admitted he was not qualified to opine on health issues and admitted he relied on deposition transcripts for an article he wrote. (Appx. at 69, Order at 58.) The Board further considered the testimony of UNU witness Rick James, an acoustical engineer. (Appx. at 66-68, Order at 55-57.) With these witnesses' and other witnesses' testimony, the Board was able to assess the credibility of each witness and their testimony.

b. The Board found the testimony by Champaign Wind's and Staff's witnesses to be more credible than that of UNU's witnesses.

Although Appellants are dismissive of the meticulous effort by the Board in summarizing and considering the evidence, the result was that the Board, as it did in

Buckeye Wind, found the testimony of Champaign Wind's and Staff's witnesses to be more credible than that offered by UNU's witnesses. Indeed, the Board's comprehensive 103-page opinion demonstrates the methodical and thorough approach the Board took to reviewing the evidence presented and weighing the credibility of each witness. The Board did this even though it considered much of the same evidence and witness testimony in *Buckeye Wind*.

i. The Board found UNU witness Schaffner's testimony not credible.

As to setbacks, the Board considered UNU witness Schaffner's testimony about his examination of the Timber Road II site a few days after the incident. He testified that he did not measure the distance of blade pieces from the turbine until four or five days after incident, that smaller pieces of fiberglass may have been blown around by the wind, and that children were picking up pieces. (Appx. at 52, Order at 41.) The Board did not find Schaffner's testimony as credible as the official report on that incident admitted into evidence by UNU, which noted a travel distance of 764 feet for a piece of the blade. (*Id.*)

ii. The Board found Champaign Wind's and Staff's expert witnesses testimony on blade shear and setbacks more credible than UNU's witnesses.

The Board also noted the rarity of blade shear as testified by Champaign Wind witnesses Speerschneider, Shears and Poore, and Staff witness Conway (a professional engineer), and the fact that the temporary clearance areas recommended by the turbine safety manuals for fires and emergencies were not appropriate for use as a guide in siting setbacks for those turbines. (Appx. at 53, Order at 42.) The Board also credited testimony by Champaign Wind witness Poore that blade events are very rare

and that certain practices can reduce an already low risk, such as third party oversight of the manufacturing process and quality assurance processes, inspections based on the experience of the selected turbine model, using proper maintenance practices, limiting remote fault resets (such as what occurred in the Timber Road II incident) and training. (Appx. at 51-52, Order at 40-41; UNU Supp. at 327-329, Co. Ex. 9 at A.13.)

The Board considered the credibility of UNU's witnesses William Palmer taking into account the testimony of Champaign Wind's and Staff's witnesses. The Board noted that "... although UNU argues that blade shear is prevalent in the wind industry, UNU did not present any evidence that a member of the general public has ever been injured." (Appx. at 52, Order at 41.) UNU's witness Palmer also testified that he had never worked in the wind industry (TR 1465) and drove down roads with turbines located within 110 feet of the roads. (TR 1467.)

iii. The Board found UNU's health expert not qualified.

The Board also considered UNU witness Jerry Punch's testimony on health issues. UNU relies on Punch's testimony to support its claims that noise from the turbines will result in health issues. The Board considered UNU's arguments and Punch's testimony along with the testimony of Champaign Wind witness Dr. Kenneth Mundt, the only epidemiologist to testify. The Board found that "[d]espite UNU's attempts to persuade the Board through the use of emotional rhetoric and the parade of negative scenarios that could occur upon approval of the proposed project, we find that UNU's evidence in support of alleged health consequences lacks credibility. (Appx. at 73, Order at 62 *citing* Staff Report at 32-33; UNU Supp. at 367, UNU Ex. 19 at 10; UNU Supp. at 336-337, Co. Ex. 11 at 4-5.) This finding has merit, considering that Punch admitted he was not qualified to opine on the causal link between turbine noise and

health effects, is not a medical doctor but rather a clinical audiologist, and is not an epidemiologist. (UNU Supp. at 218, TR 1662.)

The Board also found the testimony of Champaign Wind witness David Hessler on operational noise to be credible, and supported by the testimony of the epidemiologist, Dr. Mundt. (Appx. at 72-73, Order at 61-62; Appx. at 156, Rehearing at 42.) Mr. Hessler provided detailed testimony on the modeling he conducted for the project and his background noise studies in the field. (Appx. at 65-66, Order at 54-55). He also explained the basis for the project design goal of 44 dBA, how that goal was achieved and why noise levels under 45 dBA regardless of background lead to few complaints. (*Id.*) The Board found this testimony credible, noting that the validity of Hessler's background noise study was confirmed by UNU's own noise witness, Rick James. (Appx. at 67, Order at 56; Appx. at 152, Rehearing at 38.)

Taken as a whole, the witness testimony and evidence in the record provides a reasoned explanation for the Board's decision, including its findings on blade shear, noise and health. As discussed below, the Board bolstered its findings by adding a number of conditions to the project, including a complaint procedure to address noise complaints.

3. The Board gave additional consideration to UNU's and the County's arguments through its administrative appeal process.

UNU and the County also were able to avail themselves of the Board's administrative appeal process. As allowed by statute and under the Board's rules, a party may file an "application for rehearing" with the Board. UNU and the County did so, raising many reasons why they felt the Board should reverse its findings in the Order, including the same arguments they now raise to this Court. Extensive briefing

was filed during the Board's administrative appeal process, including briefs filed by Champaign Wind on July 8, 2013 responding to UNU's and the County's applications for rehearing, respectively. The Board carefully summarized the parties' arguments and issued a thorough and detailed 48-page decision affirming its Order and rejecting the arguments the appellants raise before this Court. (Appx. at 115-163.)

4. The Board's conditions ensure safety and that complaints are addressed.

The Board's 72 project conditions imposed on the project in the Order further support the reasonableness of the Board's findings. Like this Court's finding in *Buckeye Wind*, these conditions provide additional assurance as to the adequacy of the turbine setbacks and limits on operational noise. *See In re Buckeye Wind* at ¶34. (Appx. at 88-110.)

a. The Board's Order includes conditions on ice detection systems, first response plans and training and turbine safety manual compliance.

Both UNU and the County fail to acknowledge the conditions the Board added to the certificate to ensure the safety of the general public. For example, Condition 37 requires Champaign Wind to follow the turbine manufacturer's most current safety manual. (Appx. at 98, Order at 87.) Conditions 38 and 39 require coordination with first responders and the submittal of an emergency and safety plan for Staff review and approval. (Appx. at 98-100, Order at 87-89.) Condition 41 requires worker instruction on potential hazards of icing conditions, while Condition 42 requires ice warning systems on all turbines. (Appx. at 98-99, Order at 87-88.) All of these conditions, along with other conditions in the Order, are intended to ensure the safety of the public and the wind farm's employees.

b. The Board's Order includes a condition requiring a detailed complaint resolution procedure that will ensure any noise complaints by the public will be addressed.

Conditions addressing facility noise are also in the public interest. Condition 46 imposes a limit of 44 dBA for operational noise from the facility at nighttime, and Conditions 46 requires further review of the impact and mitigation of project-related noise complaints through an extensive complaint resolution process. (Appx. at 99, Order at 88.) As stated by the Board:

> As discussed below, we believe the inclusion of Staff's recommended condition for a noise complaint resolution process provides continued protection of the public interest by providing a procedure that will ensure nonparticipating property owners' use and enjoyment of their property will not be compromised by the operation of the proposed facility. The Board emphasizes that the worst-case scenario noise limits will be strictly enforced and nonparticipating landowners will have a remedial process in the event noise levels exceed what is approved herein.

(Appx. at 73-74, Order at 62-63.)

The Board also recognized the importance of the complaint resolution process required in Condition 48, finding that the required complaint resolution process will "... protect the public interest by ensuring that nonparticipating residents will have an avenue by which their concerns about unacceptable levels of noise for the proposed project can be resolved." (Appx. at 74, Order at 63.) Condition 48 reads as follows:

> Applicant must develop a complaint resolution process that shall include procedures for responding to complaints about excessive noise during construction, and excessive noise and excessive shadow flicker caused by operation of the facility. The complaint resolution process must include procedures by which complaints can be made by the public, how complaints will be tracked by Applicant, steps that will be taken to interact with the complainant and respond to the complaint, steps that will be taken to verify the merits of the complaint, and steps that will be taken to mitigate valid complaints. Mitigation, if required, must consist of either reducing the impact so that the project contribution does not exceed the requirements of the certificate, or other means of mitigation reviewed by Staff for confirmation that it complies with this condition.

(Appx. 100; Order 89.)

The Board also imposed a condition requiring Champaign Wind to submit all complaints about project construction and operation to the Board's Staff immediately upon receipt of a complaint. (Appx. at 89; Order at 78.) The Board's condition is much more detailed than the Buckeye Wind I project's complaint resolution procedure, which required "[a] completed informal complaint resolution procedure, including, at a minimum, a process to periodically inform staff of the number and substance of complaints received by Buckeye." (CW Supp. 89; *Buckeye Wind* Order at 85; 2010 Ohio PUC LEXIS 303 at *209.) The Board's requirement that Staff be made aware of all complaints, along with the rest of Condition 48 and Condition 5, further supports the reasonableness of the Board's decision on operational noise and the limit it has imposed on the project.

c. Condition 52(c) allows the Board to force turbine decommissioning due to health and safety reasons.

One condition that was not present in *Buckeye Wind* is Condition 52(c). This condition provides extensive protection to the public in the event the Board determines that health and safety reasons arise during operation of the project. Specifically, Condition 52(c) expressly provides that "[t]he Board may also require decommissioning of individual wind turbines due to health, safety, wildlife impact, or other concerns that prevent the turbine from operating within the terms of the certificate." (Appx. at 103, Order at 92.) This condition provides broad protection to the public by ensuring Board oversight during operation of the project. Even UNU's own witness, audiologist Jerry Punch testified at the evidentiary hearing that this condition would make him "more comfortable" and that a complaint resolution procedures would be appropriate. (CW

Supp. 121-123, TR 1760-1762.) The Board's 72 conditions governing construction and operation of the project alone, provide ample support that the public interest will be protected. UNU's Propositions of Law 5, 6 and 7 and the County Proposition of Law 2 are without merit.

G. The Board's Requirement for Decommissioning Financial Assurance is Reasonable and Higher than the Amount Required for *Buckeye Wind*.

[Response to the County's First Proposition of Law]

In *Buckeye Wind*, the County argued that the $5,000 per turbine decommissioning bond required in the first year after turbine construction was not supported by the record. This Court rejected that argument in *Buckeye Wind*, finding that the evidence introduced at hearing supported the amount required for the decommissioning bond. *In re Buckeye Wind* at ¶35. The County makes a similar argument in this proceeding, even though the decommissioning bond amount for the Buckeye Wind II project is much higher than the Buckeye Wind I decommissioning bond amount.

1. The County wants decommissioning bonds in place for turbines even if the turbines are not constructed.

Although the Board's decommissioning condition for the Buckeye II Wind project requires a higher decommissioning bond amount, the County is still not satisfied. It argues in its First Proposition of Law that the Board should have required a decommissioning bond prior to construction equal to the total cost to decommission all approved turbines regardless of the number of turbines constructed. (County Brief at 10.) The County claims that requiring Champaign Wind to revise the bond as turbines are constructed would involve "significant time and expense" to Staff and the Board,

and would not encourage Champaign Wind to construct the "total project" in a shorter period of time. (County Brief at 10.) The County also claims that its witness, Jonathan Knauth, stated that splitting the decommissioning cost by turbine may not be an adequate amount for decommissioning. (County Brief at 9-10.)

2. The financial assurance for decommissioning for Buckeye Wind II is more than sufficient and greater than that approved for the Buckeye Wind I Project.

The County ignores the fact that the Buckeye Wind II decommissioning condition requires a much higher initial decommissioning bond than the bond approved in *Buckeye Wind.* The Board approved a $5,000 per turbine decommissioning bond amount for the Buckeye Wind project until the end of the first year of operation. *In re Buckeye Wind* at ¶43. After the first year, the bond amount is to be determined every three years using a formula that takes into account salvage value of the turbines. (CW Supp. 100, *Buckeye Wind* Order at 96; 2010 Ohio PUC LEXIS 303 at *227.) For Buckeye Wind II, the Board replaced the $5,000 per turbine bond with a bond amount based on an independent engineer's estimate to decommission the turbine without regard to salvage value, an amount that will be much higher than the amount required for Buckeye Wind's first year of operation. (Appx. 104, Order at 93).

The Board's formula to calculate the decommissioning bond can be found at Condition 52(g) of the Board's Order. (Appx. 104, Order at 93.) An independent licensed Ohio professional engineer must estimate the total cost to implement the decommissioning plan for the entire project *without regard* for salvage value and taking into account any contingency costs. (Appx. 104, Order at 93.) The engineer's estimate for decommissioning the entire project must then be divided by the total number of approved turbine, providing the required decommissioning amount for each turbine that

must be posted prior to construction. (*Id.*) The engineer's estimate must also be updated every five years in conjunction with the submittal of the updated decommissioning plan. (Appx. 104-105, Order at 93-94.)

The Board considered this formula and the evidence in the record when rejecting the County's arguments on the bond amount. As summarized in its Entry on Rehearing,

> As the Board found in the opinion, order, and certificate, the County/Townships' proposed condition would require Champaign to post financial assurance without considering the number of turbines actually constructed or under construction, and would require a revised decommissioning plan every three years, which is too short to be practical and does not align with the Board's most recent decisions on decommissioning[.]"

(Appx. at 121-122, Rehearing at 7-8.) Even the County's own witness, Jonathan Knauth, implied that the Board's approach would be acceptable, stating that an estimate for the amount to decommission the entire project applied on a per turbine basis would be an "okay approach." (CW Supp. at 124; TR 1399.)

3. <u>As a whole, the Board's decommissioning condition is reasonable and in the public interest.</u>

Since the approval of the Buckeye Wind project, the Board has refined the decommissioning condition it includes in wind farm certificates. Condition 52(a) and (b) of the Board's Order requires Champaign Wind to submit a final decommissioning plan to both the Board's Staff and the County Engineer 30 days prior to the preconstruction conference and an updated plan every five years thereafter. (Appx. 102-103, Order at 91-92.) Condition 52(c) sets the timetable for decommissioning and allows the Board to require decommissioning for a number of reasons including if the Board "deems the facility or turbine to be in a state of disrepair..." (Appx. 103, Order at 92.)

Taken as a whole, the Board's condition on decommissioning is in the public interest and provides adequate assurances that whenever the project is decommissioned, adequate funds will be available to complete that task. The County's approach would be like requiring the County to pay liability insurance premiums for trucks that it budgeted to purchase in the future, but never actually did. The county would undoubtedly only pay liability insurance premiums on those trucks it purchased, not those it might have planned to purchase. The same analogy applies here. The County's First Proposition of Law should be rejected.

H. The Board's Findings under RC 4906.10(A)(6) Were Not "Solely" Premised on Ohio's Alternative Energy Portfolio Mandate Enacted by Ohio's General Assembly.

[Response to UNU's Proposition of Law One]

Champaign Wind concurs with the Board's arguments presented in its merit brief, and writes to reiterate to the Court that the Alternative Energy Portfolio Standard under R.C. § 4928.64 was not the only (or determinative) factor supporting the Board's decision. This Court need not and should not reach the constitutional question of whether the in-state mandate "violates the Commerce Clause." "A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988) (citation omitted). *Accord: Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) ("Our usual practice is to avoid the unnecessary resolution of constitutional questions."). "Courts decide constitutional issues only when absolutely necessary" to

avoid rendering "advisory opinions." *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, 137 Ohio St. 3d 469 (2013) (citations omitted).

1. The Board's finding under R.C. § 4906.10(A)(6) is supported by evidence other than just the in-state requirement of the AEPS mandate.

There are ample grounds in the record supporting the Board's decision which do not require this Court to consider the constitutionality of the Ohio legislative mandate. Contrary to UNU's assertions, the in-state mandate was not the "only" factor that the Board considered in favor of finding a "public interest, convenience, and necessity." (UNU Brief at 12-13). Rather, the Board's 103-page Opinion, Order, and Certificate lists several factors and findings applicable to RC § 4906.10(A)(6), comprising almost 30 pages of factual findings in support of issuing the Certificate, including but not limited to "that the renewable energy generation by the proposed facility will benefit the environment and consumers," and the facility will provide "additional electric generation to the regional transmission grid." (Appx. at 83, Order at 72.)

Indeed, the Board expressly stated that "[t]he Board emphasizes that, in considering *whether the proposed project is in the public interest, convenience, and necessity*, we have taken into account that *the renewable energy generation by the proposed facility will benefit the environment and consumers*." (Appx. at 83, Order at 72 (emphasis added).) The Board followed this statement by noting the fact that an "electric utility may fulfill a portion of its AEPS requirements by entering into an electric utility supply contract with the owner of a wind facility, such as the proposed facility in the application," merely "***adds support***" to favorable finding under RC § 4906.10(A)(6). (Appx. at 46, Order at 35 *citing* Co. Ex. 5 at 3-4 and Staff Report at 47-48 (emphasis added).) The testimony of Champaign Wind witness Speerschneider reflects the

additional benefits of the project such as delivering "... clean, sustainable electricity to the Ohio bulk power transmission system." (UNU Supp. at 286, Co. Ex. 5 at 3.)

Importantly, the "AEPS requirements" are not solely in-state requirements. The AEPS mandate generally requires that, by 2025, at least 25 percent of all electricity sold in the state come from alternative energy resources, of which only a small percent is required to be sited in Ohio by R.C. § 4906.64. The Project would still assist in the need to meet that statutory requirement (as the Board so recognized) *even if* this Court were to sever those portions of the mandate that UNU challenges. Following UNU down this path would be an exercise in judicial futility. Without evaluating the constitutionality of a complex and comprehensive regulatory program, there are ample grounds on which the Certificate can be affirmed.

2. UNU lacks standing to challenge the AEPS mandate under the zone of interests and third party standing tests.

UNU also lacks standing to raise its alleged "dormant Commerce Clause" challenge under the zone-of-interests and third-party standing tests. "A party must have standing to be entitled to have a court decide the merits of a dispute." *Utility Service Partners, Inc. v. Pub. Util. Comm. of Ohio*, 124 Ohio St. 3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶49 (quoting *N. Canton v. Canton*, 114 Ohio St. 3d 253, 2007-Ohio-4005, 871 N.E.2d 586, ¶21.). To have standing, UNU must show that (1) its challenge "falls within the zone of interests to be protected" by the dormant Commerce Clause, which has a clear economic goal and (2) it must also assert "its own rights, not the claims of third parties,'" *actually regulated* by the AEPS mandate.

The "zone of interests" test is a prudential standing doctrine applicable to challenges under the dormant Commerce Clause. *See Wyoming v. Oklahoma*, 502

U.S. 437, 469 (1992) (noting that the zone-of-interests test "governs claims . . . under the negative Commerce Clause"). This standing requirement "denies a right of review if the [challenger's] interests are [only] marginally related to or inconsistent with the purposes implicit in the [dormant Commerce Clause]." *City of L.A. v. County of Kern*, 581 F.3d 841, 847 (9th Cir. 2009) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)).

Under this test, a claimant does not have standing to challenge a statute under the dormant Commerce Clause when that claimant's "injury" is ***only marginally related*** to the economic, anti-protectionist purpose. This includes situations where—as here—the claimant does not engage (or intend to engage) in interstate commerce, and is merely an in-state resident burdened by "passed on," incidental effects. *Id.*

Here, UNU's "interests" are quintessentially local, non-economic and far removed from the purpose of the dormant Commerce Clause. UNU's concerns as alleged in its merit brief relate to blade shear, setbacks and noise levels. Importantly, UNU's interests are not commercial in any way. UNU is not a producer of energy products. UNU does not allege (for itself or any of its members) that it engages or intends to engage in any commerce at all, let alone "interstate commerce."

In fact, UNU's interest is so far removed from the free-flow-of-commerce purpose of the dormant Commerce Clause that even if this Court were to hypothetically sever those portions of the AEPS mandate relating to in-state requirements, the AEPS mandate would ***still*** increase the "need" for renewable energy sources (like this Project) and would ***still*** increase the likelihood of wind farms sited in Ohio. *See Cnty. of Kern*,

581 F.3d at 847-48 (making a similar point). UNU's interests lie with opposing the use of certain renewable energy facilities, not with any alleged protectionism in the Ohio AEPS. UNU's challenge of the statue must fail.

In addition to the "zone of interests" test, prudential standing requires that a claimant assert its own rights, rather than the legal rights or interests of third parties. *Util. Serv. Partners, Inc.*, 2009-Ohio-6764, ¶49; *Warth v. Seldin*, 422 U.S. 490, 499 (1975).[1] The rights provided by the dormant Commerce Clause accrue to entities regulated by the challenged law, or who are attempting to do business across state boundaries. *See Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (the dormant Commerce Clause confers a "right to engage in interstate trade free of restrictive state regulation" (internal quotation omitted)). UNU, however, does not allege that its members are part of either group and "cannot claim any personal right under the Commerce Clause to [higher property values or unobstructed views]. Any relief due [UNU] turns on the rights of the" entities regulated by the AEPS statute. *See Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1381 (8th Cir. 1997). UNU lacks standing to raise the issues imbedded in Proposition of Law No. 1, and, accordingly, that proposition must fail.

3. The AEPS statute is constitutional.

Though this Court need not reach the constitutional issue for the foregoing reasons, if it does choose to reach this issue, UNU's challenge still fails because the

[1] This Court recognizes a narrow exception to the third-party standing rule when a claimant (i) suffers its own "injury in fact" (ii) possesses a sufficiently "close" relationship with the person who possesses the right and (iii) shows some "hindrance" in the way of that person seeking relief. Here, the exception clearly does not apply. Even assuming an "injury in fact," UNU cannot legitimately claim that it has a "close" relationship with utility companies engaging in interstate commerce, nor is there any "hindrance" to those companies asserting their rights.

AEPS statute is constitutional. Unlike other statutes that have been challenged and overturned, the purpose of the AEPS statute is not some form of economic protectionism nor is its purpose to benefit Ohio businesses, but was instituted to protect the health and well-being of the citizens of the State of Ohio. The Commerce Clause's limitation on state regulatory power "is by no means absolute" and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). State statutes that specifically distinguish interstate commerce from other forms of commerce are struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Gen. Motors Corp. v. Tracy*, 73 Ohio St.3d 29, 31, 652 N.E.2d 188, (1995), *aff'd*, 519 U.S. 278 (1997).

Requiring a portion of the energy provided to the State, by both in- and out-of-state energy producers, to come from clean and renewable energy sources is in the best interest for Ohioans and the local environment. The AEPS statute's constitutionality lies in its purpose which is decidedly not economic, but for the purpose of benefitting the local public as a whole. It will have an impact not only on Ohio citizens, but citizens in and around the Ohio border. As such, this statute is constitutional as it concerns a matter of legitimate local concern, even though interstate commerce may tangentially be affected.

IV. CONCLUSION

As they did in *Buckeye Wind*, UNU and the County want this Court to revisit the Board's procedural rulings, reweigh the evidence and remand the matter for further

hearing. And like *Buckeye Wind*, "[i]t is difficult to understand what additional hearings might accomplish. All the issues were debated at length by the parties and witnesses at the hearing." *In re Buckeye Wind* at ¶31. With 36 witnesses testifying, 122 exhibits marked and 3,010 pages of testimony along with a meticulous 103-page Board decision followed by a thorough 48-page entry on rehearing, the Board fulfilled the role created for it by the General Assembly when it considered the Buckeye Wind II project application. The Board did not act unlawfully or unreasonably in reaching its decisions, and this Court should affirm the Board's May 28, 2013 Opinion, Order and Certificate as it affirmed the Board's March 22, 2010 Opinion, Order and Certificate in the *Buckeye Wind* proceeding.

Respectfully submitted on behalf of,

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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 on this 25th day of March 2014.

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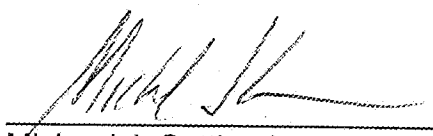

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