ORIGINAL

IN THE SUPREME COURT OF OHIO

UNION NEIGHBORS UNITED, ROBERT MCCONNELL, DIANE MCCONNELL, AND JULIA F. JOHNSON, CHAMPAIGN COUNTY, GOSHEN, SALEM AND UNION TOWNSHIPS,	:	
Appellants,	:	**Case No. 2010-1554**
v.	:	**On Appeal from the Ohio Power Siting Board**
OHIO POWER SITING BOARD,	:	**Ohio Power Siting Board Case No. 08-666-EL-BGN**
Appellee.	:	

MERIT BRIEF OF INTERVENOR APPELLEE BUCKEYE WIND, LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 2

STANDARD OF REVIEW 2

RESPONSE TO UNU PROPOSITION OF LAW NO. 1

The Power Siting Board's determinations regarding turbine operational noise are supported by the record. 3

A. Sufficient evidence exists supporting the Power Siting Board's decision to reject UNU's proposed absolute noise standard of 5 dBA over background sound levels. 3

B. Sufficient evidence exists supporting the Power Siting Board's decision to reject UNU's proposed absolute noise standard of 35 dBA 7

C. Sufficient evidence exists supporting the Power Siting Board's decision to reject UNU's proposed absolute low frequency noise standard 13

D. The Power Siting Board did not abuse its discretion in formulating the certificate conditions related to operational sound levels 17

RESPONSE TO UNU PROPOSITION OF LAW NO. 2

Buckeye Wind's Application gave full consideration to low frequency noise levels. 20

RESPONSE TO UNU PROPOSITION OF LAW NO. 3

The Power Siting Board did not commit reversible error in finding that the proposed facility satisfied Section 4906.10(A)(3)'s requirement that it represents the minimum adverse environmental impact 22

RESPONSE TO UNU PROPOSITION OF LAW NO. 4

The Power Siting Board's determination that the Facility will serve the public interest, convenience and necessity at the proposed setbacks was proper and not a basis for reversible error 25

RESPONSE TO UNU PROPOSITION OF LAW NO. 5

The Power Siting Board may admit opinion evidence of an expert where the record reflects the witness has years of experience and sufficient knowledge 31

RESPONSE TO UNU PROPOSITION OF LAW NO. 6

The Power Siting Board did not abuse its discretion in requiring live witnesses 32

RESPONSE TO UNU PROPOSITIONS OF LAW NO. 7, 8, 9 AND 10

The Power Siting Board has statutory authority to set forth the terms and conditions upon which an application for a certificate of environmental compatibility and public need may be granted 35

Seventh Proposition of Law 35

Eighth Proposition of Law 38

Ninth Proposition of Law 38

Tenth Proposition of Law 39

RESPONSE TO COUNTY/TOWNSHIP PROPOSITION OF LAW NO. 1

A condition in a certificate of environmental compatibility and public need requiring the submittal of road bonds for construction and decommissioning subject to the approval of the Power Siting Board's Staff and the Ohio Department of Transportation adequately serves the public interest, convenience and necessity 43

RESPONSE TO COUNTY/TOWNSHIP PROPOSITION OF LAW NO. 2

The Power Siting Board's discretion under R.C. § 4906.10(A), to impose terms and conditions in a certificate of environmental compatibility and public need does not conflict with the express language of R.C. § 5727.75 45

RESPONSE TO COUNTY/TOWNSHIP PROPOSITION OF LAW NO. 3

The Power Siting Board did not commit reversible error when it ordered Buckeye Wind to post and maintain a bond equal to $5,000.00 per turbine from the commencement of construction until the facility is operational for one year 48

CONCLUSION.....50

CERTIFICATE OF SERVICE.....51

TABLE OF AUTHORITIES

Page

CASES

Canton v. Imperial Bowling Lanes (1968), 16 Ohio St. 2d 47, 242 N.E.2d 566 47

Chester Twp. v. Power Siting Comm. (1977), 49 Ohio St. 2d 231, 3 O.O.3d 367, 361 N.E.2d 436 ..... 2, 20, 22, 48

City of Cincinnati v. Public Utilities Commission of Ohio et al. (1949) 151 Ohio St. 353, 86 N.E. 2d 10 45

Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St. 3d 530, 2004-Ohio-6767, 820 N.E.2d 885 2

Consumers' Counsel v. Pub. Util. Comm'n, Slip Opinion No. 2010-Ohio-6239 ..... 3, 22

Egbert v. Ohio Department of Agriculture (2008), 2008-Ohio-5309 40

Hubbard v. Canton City School Bd. of Edn., 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E.2d 543 46

In re Application of Am. Transm. Sys., Inc., 125 Ohio St. 3d 333, 2010-Ohio-1841, 928 N.E.2d 427 ..... 2, 32, 34, 39

Keller v. Columbus, 100 Ohio St. 3d 192, 2003 Ohio 5599, 797 N.E.2d 964 46

LTV Steel Co. v. Indus. Comm. (2000), 140 Ohio App. 3d 680 40

Mathews v. Eldridge (1976), 424 U.S. 319 ..... 39, 40, 42

Ohio Edison Co. v. Power Siting Commission (1978), 56 Ohio St. 2d 212, 383 N.E.2d 588 47

Provident Bank v. Wood (1973), 36 Ohio St. 2d 101, 304 N.E. 2d 378 47

Seitz v. All Creatures Animal Hosp. (Nov. 15, 1985), Ashtabula App. No. 1192, LEXIS 9306 40

Sherwin-Williams Co. v. Dayton Freight Lines, Inc., 112 Ohio St. 3d 52, 2006-Ohio-6498, 858 N.E.2d 324 46

State v. Ferguson (2008), 120 Ohio St. 3d 7 46

Util. Serv. Partners, Inc. v. Pub. Util. Comm'n, 124 Ohio St. 3d 284, 2009 Ohio 6764, 921 N.E.2d 1038 ..... 3, 7, 22

Wingate v. Hordge (1979), 60 Ohio St. 2d 55, 396 N.E. 2d 770 47

STATUTES

R.C. § 1.48 46

R.C. § 3706.15 47

R.C. § 4903.10 45

R.C. § 4903.13 2

R.C. § 4906.02 39

R.C. § 4906.04 ..... 35, 41

R.C. § 4906.06 41

R.C. § 4906.07 41

R.C. § 4906.10 ..... passim

R.C. § 4906.12 2

R.C. § 4906.20 ..... 25, 26, 30

R.C. § 4906.97 ..... 20, 42

R.C. § 4906.98 42

R.C. § 5709.61 47

R.C. § 5727.75 ..... 45, 46, 47, 48

RULES

OAC 4906-13 ..... 20, 21

OAC 4906-17 ..... passim

OAC 4906-17-08 ..... 12, 13, 26

OAC 4906-5-05 21

OAC 4906-9-01 ..... 20, 42

INTRODUCTION

The General Assembly, when it created the Ohio Power Siting Board (the "Board" or "Power Siting Board"), charged it with finding the proper balance between growth and preservation, energy and economic stagnation. To guide the Board, the enabling legislation provided the Board with a set of eight criteria to measure whether the impact from a major utility facility is too great. R.C. § 4906.10(A)(1)-(A)(8).

The Board applied this criteria when approving Buckeye Wind LLC's ("Buckeye Wind") application for a certificate of environmental compatibility and public need. (the "Application"). In reaching its determinations, the Board thoroughly considered the evidence in the record and the parties' arguments. Yet, Union Neighbors United, Robert McConnell, Diane McConnell and Julia Johnson (collectively "UNU") disagree with the Board's factual findings, claiming that the Board simply "rubber stamped" Buckeye Wind's Application. (UNU Merit Brief at 13, 20.)

The Board's lengthy opinion indicates otherwise. Indeed, in making its determinations, the Board weighed the evidence consisting of the testimony of 36 witnesses, a 2,497 page transcript and hundreds of pages of exhibits. As discussed in this brief and reflected in the Board's March 22, 2010 Opinion, Order and Certificate, the evidence supported all of the Board's determinations. The Board's weighing of the evidence, along with its statutory authority under R.C. § 4906.10(A) to impose terms and conditions in a certificate of environmental compatibility and public need are fatal to UNU's appeal. For this reason and others, UNU's ten propositions of law are without merit and should be rejected by this Court. Likewise, this Court should reject the three propositions of law raised by Champaign County and the townships of Goshen, Salem, and Union.

STATEMENT OF FACTS

For its Statement of Facts, Buckeye Wind adopts the Board's presentment of the proceedings. Because UNU's Statement of Facts is simply an argument as to the sufficiency of the evidence before the Board, Buckeye Wind responds to those arguments in the applicable proposition of law submitted by UNU. Citations are made to the UNU supplement ("Supp.") and the UNU appendix ("Appx.") as indicated. Citations to Buckeye Wind's supplement are in the form of "BW Supp."

ARGUMENT

STANDARD OF REVIEW

This court applies the same standard of review to Power Siting Board determinations as applied to orders by the Public Utilities Commission of Ohio. *Chester Twp. v. Power Siting Comm.* (1977), 49 Ohio St. 2d 231, 238, 3 O.O.3d 367, 361 N.E.2d 436. "R.C. 4903.13 applies to board proceedings pursuant to R.C. 4906.12 and provides that an order 'shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable.'" *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St. 3d 333, 2010-Ohio-1841, 928 N.E.2d 427, at ¶ 17, quoting *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St. 3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. "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.* (1977), 49 Ohio St.2d at 238, 361 N.E.2d 436 (citations omitted).

RESPONSE TO UNU PROPOSITION OF LAW NO. 1

The Power Siting Board's determinations regarding turbine operational noise are supported by the record.

In their first proposition of law, UNU argues that the Board " ... failed to satisfy its obligation under R.C. § 4906.10 to issue a certificate only to a wind project that 'represents the minimum adverse environmental impact' with respect to turbine noise." (UNU Merit Brief at 19-20.) In essence, UNU is asking this Court to weigh the evidence presented to the Board on the issue of operational noise from turbines even though this function lies with the trier of fact and not the Court. *Util. Serv. Partners, Inc. v. Pub. Util. Comm'n,* 124 Ohio St. 3d 284, 2009 Ohio 6764, 921 N.E.2d 1038, ¶ 35; *Consumers' Counsel v. Pub. Util. Comm'n,* Slip Opinion No. 2010-Ohio-6239, ¶ 32. For this reason alone, UNU's first proposition of law must be rejected.

A. Sufficient evidence exists supporting the Power Siting Board's decision to reject UNU's proposed absolute noise standard of 5 dBA over background sound levels.

In support of its first proposition of law, UNU argues that the Board should have adopted an absolute operational noise level of 5 dBA over background sound levels for the Facility even though no such legal requirement exists. Citing no evidence, UNU claims that the "Board's failure to prevent higher noise impacts will guarantee misery for a significant number of citizens[.]" (UNU Merit Brief at 23.) Contrary to UNU's contention, the Board's determination that "the record does not support the adoption of absolute noise levels as requested by UNU" was proper and fully supported by the record. (Certif. at 64 (Appx. 117.))

As an initial point, Buckeye Wind did not advocate that the Board adopt a noise standard of 5 dBA above ambient background levels. Rather, as recognized by the

Board, Buckeye Wind sought to design the Facility using the background L90 plus five dBA metric as a design goal even though it is not generally practical to achieve that metric. (Certif. at 49 (Appx. 102), TR 848 (Supp. 181.)) As Buckeye Wind's acoustic expert, David Hessler, testified:

> The background L90 plus five dBA metric is useful as an ideal design goal but it is not typically practical to use this approach as a regulatory limit, or standard, because for wind projects in rural areas mixed with scattered residences, it is seldom, if ever, possible to limit project noise to less than 5 dBA above the near minimum background level -- at least under the critical wind speed conditions we use for assessment purposes; i.e. at wind speeds usually in the five to six m/s range.

(BW Ex. 26 at 2 (Supp. 382.)) Thus, contrary to UNU's claim (UNU Merit Brief at 20-21), Buckeye Wind utilized the 5 dBA above L90 background level as a "reasonable design target," and in no way offered that target as a concession that the practice is "commonly accepted" and used as a limit for "preventing unacceptable impacts." (BW Ex. 1, Ex. K at 28 (BW Supp. 45)) (emphasizing that an absolute limit should not be adopted).

It is important to understand the impracticality of the 5dBA over background limit advocated by UNU. In its ground for rehearing, UNU argued to the Board that the L90 statistical sound level should be used for the ambient background level. (See UNU Application for Rehearing at 12 (Appx.174.) and see UNU Merit Brief at 48.) However, as Mr. Hessler explained, the L90 statistical sound level is "... commonly used to conservatively quantify background sound levels." (BW Ex. 1, Ex. K, p.1. (BW Supp. 18) It "...is the sound level exceeded during 90% of the measurement interval and has the quality of filtering out sporadic, short-duration noise events thereby capturing the quiet lulls between such events." (*Id.*) "It is this consistently present 'background' level that forms a conservative or 'worst-case' basis for evaluating the

audibility of a new source." (*Id.*) In other words, the L90 sound level is the background noise during the quietest 10 percent of the time that is measured. (TR at 888 (BW Supp.72.))

This is a very extreme noise standard. If applied to the Facility, operational noise at the outside of a residence could not exceed Mr. Hessler's measured nighttime background L90 level of 29 dBA at the critical wind speed plus five dBA, a nighttime level of 34 dBA . (Certif. at 49 (Appx. 102.)) In response to UNU's acoustic witness Richard James testimony that a 1.25 mile setback was necessary to achieve a L90 plus 5 dBA limit, Mr. Hessler testified that applying such a setback would preclude development of wind projects east of the Mississippi River. (BW Ex. 8 at 7 (Supp. 352.))

Other jurisdictions in the United States commonly impose operational noise limits of 50 dBA. (BW Ex. 26 at A.10 and A.13 (Supp. 383-384.)). A 5dBA plus L90 background limit for the Facility is also contrary to the World Health Organization's ("WHO") finding that "[t]here is no sufficient evidence that biological effects observed at the level below 40 dB $_{\text{Lnight, outside}}$ are harmful to health. (BW Ex. 18 at XVI (Supp. 378.)) It is also contrary to Mr. Hessler's testimony that in his experience, noise levels below 45 dBA do not lead to complaints. (BW Ex. 26 at 4 (Supp. 384.))

Regardless of the evidence to the contrary, UNU jumps to the conclusion that any noise levels exceeding five dBA over the L90 ambient background sound level will lead to "... widespread discomfort, property damage, and sleep deprivation." (UNU Merit Brief, p. 22.) Yet UNU put on no credible witness testimony to support this statement. Rather it relied extensively on the testimony of Richard James (UNU

Ex. 31A (Supp. 560)) even though he admitted he was not qualified to opine on medical judgments (TR 1428 (Supp. 208.))

UNU's claim that turbine noise will lead to discomfort, property damage and sleep deprivation are contrary to the conclusions of two researchers in Europe, Eja Pedersen and Kerstin Persson Waye. They concluded in a 2004 article that "[f]or wind turbine noise the main annoyance reaction is formed when spending time outdoors." (Pedersen and Persson Waye 2004 article, UNU Ex. 47, (Supp. 602.)) The authors also could not correlate wind turbine noise to sleep disturbances. As stated in the 2004 article, "[t]he number of respondents disturbed in their sleep [by turbine noise], however, was too small for meaningful statistical analysis, but the probability of sleep disturbance due to wind turbine noise can not be neglected at this stage." (UNU Ex. 47 at 3468 (Supp. 602.))

Pedersen and Persson Waye summarized a second study in another article, finding that:

> [i]n our study no adverse health effects other than annoyance could be directly connected to wind turbine noise. Reported sleep difficulties, as well as feelings of uneasiness, associated with noise annoyance could be an effect of the exposure, but it could just as well be that respondents with sleeping difficulties more easily appraise the noise as annoying.

(Pedersen and Persson Waye 2007 article, UNU Ex. 48, p. 485 (Supp. 610.)) These studies directly contradict UNU's supposition that noise levels five dBA over background will lead to "intolerable noise impacts." (UNU Merit Brief, p. 21.)

In fact, the Pederson and Persson Waye findings correlate with the opinion of the only health expert to testify in this proceeding, Dr. Kenneth A. Mundt. Dr. Mundt, an epidemiologist with over 20 years experience, testified that "[b]ased on my review of the relevant published peer-reviewed scientific literature, I found no consistent or well-

substantiated association between residential proximity to industrial wind turbines and any serious health effect." (BW Ex. 6 at 6-7 (Supp. 320-321.)) He also stated that "[i]t should be noted that some degree of noise is consistently perceived by residents living near wind turbines depending on the number of turbines, time of day, season, and level of background noise, and to a lesser extent shadow flicker, again, depending on time of day, season, and position of the turbine blades. However, exposures to turbine noise or shadows, while potentially distracting or irritating to some people, are not known to harm human health." (BW Ex. 6 at 7 (Supp. 320.))

The Board gave full consideration to this and other evidence (Certif. 48-64 (Appx. 101-117)) when concluding that "..the record does not support the adoption of absolute noise levels as requested by UNU." (Cerit. at 64 (Appx. 117.)) The record fully supports the Board's decision and this Court should not substitute its judgment for that of the Board. *Util. Serv. Partners, Inc. v. Pub. Util. Comm'n,* 124 Ohio St. 3d 284, 2009 Ohio 6764, 921 N.E.2d 1038, ¶ 35.

B. Sufficient evidence exists supporting the Power Siting Board's decision to reject UNU's proposed absolute noise standard of 35 dBA.

UNU next argues that "turbine noise above 35 dBA causes unacceptable annoyance, discomfort, and sleep disturbance." (UNU Merit Brief at 23.) UNU argues that an absolute standard of 35 dBA should be imposed for turbine operational noise levels at nonparticipating neighbors' property lines. (UNU Merit Brief at 25-26.) Contrary to the UNU Intervenors claim and as supported by the record, a standard of 35 dBA is extreme and not warranted.

For support, UNU references Mr. James testimony regarding noise limits in other countries. (UNU Merit Brief at 23-24.) That testimony, however, contains no citations and significantly does not distinguish whether the alleged standards are based on

average sound readings or an absolute not to exceed limit. (UNU Ex. 31A at A.26 (Supp. 562.)) More relevant to this proceeding and as Mr. Hessler testified, other jurisdictions in the United States commonly impose operational noise limits of 50 dBA. (BW Ex. 26 at A.10 and A.13 (Supp. 383-384.))

UNU also attempts to rely on a chart in the 2004 article by Eja Pedersen and Kerstin Persson Waye (UNU Ex. 47) to support their proposed 35 dBA standard. (UNU Merit Brief, p. 24.) At first glance, the chart indicates that wind turbine noise leads to higher annoyance at lower levels of sound exposure than transportation noise. (UNU Ex. 47 at 3468 (Supp. 602.)) However, in describing the chart, the authors wrote that "[t]he established curves describing annoyance from transportation noise are based on a large amount of data, and the wind turbine curve on only one study, so interpretations should be done with care." (UNU Ex. 47 at 3467 (Supp. 601.))

The authors also pointed out a significant distinction between their study and the transportation studies – that:

> An important difference between studies of transportation noise and wind turbine noise is however where the main annoyance reaction is formed. For most studies of transportation noises it can be assumed that annoyance is formed mainly as a reaction to the sound pressure levels perceived indoors, and hence the actual noise dose should be reduced by the attenuation of the façade. For wind turbine noise the main annoyance reaction is formed when spending time outdoors. The actual difference in noise dose could therefore, at least partly, explain the comparatively higher prevalence of noise annoyance due to wind turbines.

(UNU Ex. 47 at 3468 (Supp. 602.)) In fact, the authors expressly stated in their study that "[a] low number of respondents were annoyed indoors by wind turbine noise." (*Id.*) Thus, a careful reading of the 2004 Pedersen and Persson Waye article supports the Board's refusal to adopt UNU's absolute 35 dBA noise standard.

UNU claims at page 25 of its Merit Brief that Buckeye Wind's acoustic expert, David Hessler "minimized" the article's findings. But as Mr. Hessler explained on rebuttal cross-examination:

> I just recently kind of went through the paper just to try to clear up in my own mind why we were only seeing a handful of complaints in large populations and it looked like she was getting a high percentage of complaints. When you look at it in absolute terms rather than percentages, it kind of clears it up a little bit.

(TR 2349 (Supp. 278.)) When challenged as to his initial testimony on the graph at page 3468 of the study, Mr. Hessler responded:

> Yeah, and like I said before, I thought it was valid at that time, and then I went back and really looked at it and I think this grossly kind of – I think it has a tendency to overstate because it's not 35 percent of all people upset at 40 dBA, it's only 8 or 9 people of an initial starting point of 600-and-something.

(TR 2355 (Supp. 281.))

Mr. Hessler based his answer on the fact that 627 surveys were distributed in the Pedersen and Persson Waye study with 351 responses. (UNU Ex. 47 at 3461 (Supp. 595.)) Only seven households out of the 627 surveyed responded that they were rather annoyed or very annoyed at sound levels modeled to be 35 to 37.5 dBA. Four households out of the 627 surveyed responded that they were rather annoyed or very annoyed at sound levels modeled to be 37.5 to 40 dBA. And only 11 people out the 627 surveyed responded that they were rather annoyed or very annoyed at sound levels modeled to be greater than 40 dBA. (UNU Ex. 47 at 3465 (Supp. 599.)) As Mr. Hessler explained, these are very small numbers from a starting point of many hundreds of houses and correlates with the four detailed studies he has conducted on wind turbine complaints. (TR 2350-2351 (Supp. 279-280.))

Significantly, the Pedersen and Persson Waye study states, "[a] low number of respondents were annoyed indoors by wind turbine noise." (UNU Ex. 47 at 3468 (Supp. 602.)) Even more significant, Pedersen and Persson Waye did not find any correlation between wind turbine noise and sleep disturbance. Specifically, the authors noted that "[t]he number of respondents disturbed in their sleep [by turbine noise], however, was too small for meaningful statistical analysis, but the probability of sleep disturbance due to wind turbine noise can not [sic] be neglected at this stage." (*Id.*, emphasis added.) Thus, although the authors did not rule out that turbine noise may cause sleep disturbance, there was no meaningful evidence in the study to allow for a correlation.

UNU also claims that "Eja Pedersen determined that 12% of wind project neighbors are very or rather annoyed at 35 dBA, resulting in sleep disturbance, tiredness, and negative emotions." (UNU Merit Brief at 24-25, citing to UNU Ex. 48 at 484 (Supp. 609.)) To the contrary, out of the 754 respondents, only 11 persons who were annoyed with turbine noise reported sleep disturbance. (UNU Ex. 48 at 484 (Supp. 609.)) This correlates to 1.5 percent out of all respondents. (*Id.*) Moreover, again a careful reading of the article reveals the authors' statement that:

> [i]n our study no adverse health effects other than annoyance could be directly connected to wind turbine noise. Reported sleep difficulties, as well as feelings of uneasiness, associated with noise annoyance could be an effect of the exposure, but it could just as well be that respondents with sleeping difficulties more easily appraise the noise as annoying.

(UNU Ex. 48 at 485 (Supp. 610.)) In other words, it is quite possible that even this low percent of respondents reporting sleep disturbance could be influenced by other factors within those individuals' general health condition, and not solely, or even partly, by the wind turbine noise.

As a general comment, while Buckeye Wind recognized the possibility that wind turbine noise could be more perceptible than other sounds due to amplitude modulation characteristics (BW Ex, 1, Ex. K at 33 (BW Supp. 50)), there was no evidence presented in this case that would suggest that turbine noise will result in health impacts. UNU is simply making an unfounded jump from noise perception to health impacts.

Ironically, UNU's own exhibit, the Pedersen and Persson Waye 2004 article completely undercuts UNU's claim that "[t]he most significant health problem caused by wind turbine noise is the loss of sleep." As noted above, Pedersen and Persson Waye did not find any correlation between wind turbine noise and sleep disturbance. Specifically, the authors noted that "[t]he number of respondents disturbed in their sleep [by turbine noise], however, was too small for meaningful statistical analysis, but the probability of sleep disturbance due to wind turbine noise can not [sic] be neglected at this stage." (UNU Ex. 47 at 3468, emphasis added.) This finding correlates with the opinion of the only health expert to testify in this proceeding, epidemiologist Dr. Kenneth A. Mundt. (BW Ex. 6 at 6-7 (Supp. 320-321.))

UNU also claim that a literature review by the Minnesota Department of Health, support the conclusion that turbine noise over 35 dBA will "impair lives and property." (UNU Merit Brief at 25.) The Minnesota Department of Health, however, did not recommend any such limit, instead recommending that that wind turbine noise estimates include cumulative impacts of all wind turbines using 40-50 dBA contour lines (and not contour lines below 40). (UNU Ex. 49 at 26 (BW Supp. 81.))

UNU's absolute 35 dBA limit, as noted by the Board, is also contrary to recommendations issued by the World Health Organization in its WHO 2009 Night Noise Guidelines for Europe ("WHO Guidelines"). (Certif. at 63 (Appx. 116.)) The

WHO Guidelines state in regards to average outside noise levels of 30-40 dB, that "... even in the worst cases the effects [on sleep] seem modest. $L_{night,outside}$ of 40 dB is equivalent to the lowest observed adverse effect level (LOAEL) for night noise."[1] (BW Ex. 18 at XVII (Supp. 379.)) In regards to average night noise levels of 40 to 55 dB, the WHO Guidelines state "[a]dverse health effects are observed among the exposed population. Many people have to adapt their lives to cope with noise at night. Vulnerable groups are more severely affected." (BW Ex. 18 at XVII (Supp. 379.)) Mr. Hessler put these conclusions in perspective, explaining that the "higher and higher above 40, more and more of these adverse effects begin to appear, but I don't think what they're saying is when you get to 41, all of a sudden people are having to adapt their lives to cope." (TR 2373 (Supp. 284.))

Lastly, Mr. James' testimony went well beyond his expertise. He opines on the link between noise and sleep deprivation, claiming to cite studies by the University of Groningen and Goteborg University. However no such studies were included in the record and Mr. James not an expert on this topic considering his admission that he was not qualified to make any judgment about the quality of the body of research related to a causal link between wind turbines and adverse health effects. (TR at 1428 (Supp. 208.))

Given the lack of evidence supporting UNU's position, the Board correctly determined that "[b]ased on the information presented, noise below 40 dBA is not likely to result in health impacts, is unlikely to result in significant annoyance, and we believe not likely to cause numerous serious noise complaints." (Certif., p. 63 (Appx. 116.))

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[1] The WHO recommended night noise guideline is a long-term A-weighted average. (BW Ex. 18 at XVII, fn.1 (Supp. 379.))

C. Sufficient evidence exists supporting the Power Siting Board's decision to reject UNU's proposed absolute low frequency noise standard.

UNU next argues that Buckeye Wind did not comply with OAC 4906-17-08(A)(2)(b) in regards to modeling low frequency noise levels. (UNU Merit Brief at 26.) UNU then argues that the Board should have limited low frequency noise at a nonparticipating property line to the lesser of 60 dBC or a dBC component equaling 20 dB above the background L90 dBA plus 5 dB. (UNU Merit Brief, p. 28-29.) UNU's arguments are without merit and the record does not support such a standard.

As to UNU's claim that Buckeye Wind did not comply with OAC 4906-17-08 (A)(2)(b) , Chapter 4906-17 was not in effect when Buckeye Wind filed its Application. And nowhere in Chapter 4906-17 is an applicant required to model using a dBC scale. Rather, as currently required by Rule 4906-17-08(A)(2)(b) , the applicant simply must perform modeling and consider broadband, tonal and low-frequency noise levels. Buckeye Wind conducted such modeling for its Application even though it was not required and included a detailed discussion on low frequency noise levels in its Application. (BW Ex. 1 at Ex. K at 29 (BW Supp. 46); TR 806 (Supp. 174.))

Significantly, none of UNU's witnesses recommended a limit on low frequency noise levels. Upon redirect, counsel for UNU clarified with Richard James that nowhere in his direct testimony did he raise issues related to inaudible noise. Rather, as Mr. James stated, "[w]e were focused on the audible sounds." Mr. James repeated this statement when the UNU Intervenors' counsel asked him to review his September 29, 2008 letter to the Board in Case No. 08-1024-EL-ORD, in the record as BW Ex. 17. As asked by counsel, "Q. Did you recommend any or all of the recommendations of Exhibit 17 in your direct testimony in the Buckeye Wind case? A. I don't think we

looked at the qualifier for low frequency sound limit." (TR 1486-1487 (Supp. 214-215.))

Despite the fact that Mr. James did not recommend a low frequency limit for the Facility, UNU argues that the Board should have imposed a low frequency noise limit. However, the testimony of Buckeye Wind's expert, David Hessler, reflects why that low frequency noise limit is neither warranted nor practical. As Mr. Hessler testified:

> As long as there is an internet there will be widespread concern about supposedly harmful levels of low frequency noise from wind turbines. The fact of the matter is that wind turbines produce no significant low frequency or infrasonic noise. This mistaken belief apparently stems from the following:
>
> 1. Turbine rotors make a swishing sound about once a second, or with a "frequency" of 1 Hz. This phenomenon, also referred to as amplitude modulation, is a periodic rising and falling in sound level that, while a common cause of complaints, is not low frequency noise in the sense of a rumbling sound that induces windows to rattle or that can be felt rather than heard. Over the past 30 years our firm has investigated hundreds of genuine low frequency noise problems primarily associated with simple cycle combustion turbines. We are intimately familiar with low frequency and infrasonic noise. **However, the numerous first-hand measurements we have made of typical wind turbines agree with those of other investigators in that the levels of low frequency sound energy radiated by wind turbines are inconsequential and often difficult to differentiate from the natural background level in rural farming country.**
>
> 2. **Any casual measurement taken in a windy field, even with an oversized windscreen, will exhibit high levels of low frequency noise whether a wind turbine is present or not.** Wind blowing through the windscreen and over the microphone tip excites the low end of the frequency spectrum (only) with false-signal noise. This noise is not actually present and is an essentially unavoidable measurement error. Because of its fundamental relevance to our work with wind turbines we have quantified this effect (in terms of wind speed vs. frequency magnitude) by having a series of windscreens carefully tested in a wind tunnel in Germany. The results of this study were published last year in the Noise Control Engineering Journal, July-August 2008. The point is that measurements of wind turbines are often taken in windy conditions by investigators with no awareness of this systemic error, who then take the results at face value. The reality is that identical levels of low frequency noise would be found if the measurement were repeated under

the same wind conditions with the turbine shutdown. Fortunately, A-weighted sound levels are very insensitive to this error and can be accurately measured in moderately windy conditions.

3. Many years ago early wind turbines had a downwind rotor and a low frequency pulse was emitted every time a blade passed through the tower wake. This phenomenon no longer exists with the upwind rotor design used today.

Because there is no low frequency noise in the first place there is no need for a restriction on it. Moreover, the A-C differential method proposed by Mr. James would be impossible to implement because, for technical reasons too complex to adequately explain here, **C-weighted sound levels cannot be accurately measured in windy conditions because they are highly sensitive to, and greatly elevated by the wind-induced measurement error discussed in Item 2 above. Artificially high C-weighted sound levels and A-C differentials of 20 dB or more are commonly found during pre-construction background sound surveys when no turbines are obviously present.**

(BW Ex. 8, emphasis added (Supp. 350.))

On rebuttal, Mr. Hessler further explained why low frequency noise was not an issue stating that:

> The notion that wind turbines produce excessive and even harmful levels of low frequency and infrasonic noise is an idea that is cherished by wind project opponents but the reality is that the sound levels produced in the lower frequencies by typical modern wind turbines are inconsequential and of insufficient magnitude to cause such things as windows rattling, problematic interior resonances or physical sensations. These effects can and do happen with some other noise sources; most commonly simple cycle combustion turbines - with which we have decades of field experience – but a magnitude much higher than that produced by wind turbines is required before any of these adverse effects begin to occur. In Annex B of ANSI Standard B133.8 Gas Turbine Installation Sound Emissions the threshold for the onset of perceptible vibrations is given as a C-weighted sound level of between 75 and 80 dBC. Our own extensive experience with countless genuine low frequency noise problems indicates that complaints and annoyance due to low frequency sound completely stop at a level of about 70 dBC. At 1000 feet, a wind farm typically produces a C-weighted sound level in the vicinity of 58 to 60 dBC, which would not be an unusual C-weighted sound level for a rural area with no wind turbines whatsoever. In essence, any sound level from any source that is below a threshold

> of about 70 dBC becomes completely imperceptible and of no concern in terms of annoyance or any other adverse impact. ...

(BW Ex. 26 at 2 (Supp. 382.)) He also explained on rebuttal that the low frequency standard advocated by his father in an article (UNU Ex. 69) related to a one time incident dealing with a tonal low frequency problem with a gas compressor. (TR 2336 (BW Supp. 80.))

Mr. Hessler's testimony along with the operational noise study included in the Application as Exhibit K establish two points. First, the magnitudes of low frequency noise and C-weighted levels for wind turbines are very low. (TR 2321 (Supp. 270.)) Mr. Hessler explained this point on cross-examination, walking the listeners through a graph at page 30 of Exhibit K showing that there was no difference in low frequency measurements when a turbine was on and then turned off. (TR 2331-2332 (Supp. 272-273.)) This leads to the second point, that because low frequency measurements are omnipresent in our environment, the 20 dB differential between A-weighted readings and C-weighted readings can be exceeded even when the turbines are not running. (TR 2332 (Supp. 273.))

UNU also ignores Mr. Hessler's testimony that in his experience, noise levels below 45 dBA do not lead to complaints. Specifically, Mr. Hessler testified that "[t]here will always be some complaints if the project is audible at all, but I can only recall a few instances where a level of less than 45 dBA was considered a significant problem." (BW Ex. 26 at 4 (Supp. 384.)) Mr. Hessler's testimony and experience is consistent with the testimony of two residents from Benton County, Indiana, Jud Barce and Leon Cyr, who testified regarding the lack of noise complaints from 475 turbines operating in Benton County with 1,000 foot setbacks from residences. (BW Ex. 27; BW Ex. 28.) Notably, Mr. Cyr testified that his non-participating neighbor has not complained about

turbine noise even though one of Mr. Cyr's turbines is approximately 1,000 feet from the neighbor's house. (BW Ex. 28 at 4 (Supp. 390.))

The Board summarized these arguments at pages 57-58 of its March 22, 2010 Order and agreed with Buckeye Wind, finding that "the record does not support the adoption of absolute noise levels as requested by UNU. (Certif. at 64 (Appx. 117.)) The Board gave full consideration to UNU's request for a low frequency noise limit. (Certif. at 56, 62 (Appx. 109, 115.)) UNU simply disagrees with the Board's weighing of the evidence – evidence which supported the conclusion that the magnitude of low frequency noise and C-weighted levels for wind turbines is very low and does not rise to a "... level sufficient to override the construction of the proposed project." (Certif. at 64 (Appx. 117.))

D. The Power Siting Board did not abuse its discretion in formulating the certificate conditions related to operational sound levels.

UNU next argues that to effectively control noise, the Board should have included an "enforceable noise limit" in the Certificate. In support of this argument, UNU claims that the Board's requirement that "Buckeye operate the facility within the noise parameters as set forth in its noise study and presented in its application" will not limit the level of operational noise. (UNU Merit Brief at 30; Certif. at 83 (Appx. 136.)) UNU also makes the unsupported claims that UNU members will be "unable to comfortably engage in the numerous activities they currently enjoy on their land" and that "[t]hey will be unable to build new homes on land affected by the noise for themselves, their children, or anyone else." (UNU Merit Brief at 31.)

Contrary to UNU's argument and claims, the record supports the Board's decision to not adopt an absolute noise standard. First, the record does not support UNU's unsupported claims that turbine operational noise will lead to widespread

misery. Rather, as the Board found, the evidence leads to the conclusion that operational noise levels will not rise to a level that should preclude construction. (Certif. at 64 (Appx. 117.)) That evidence includes, but is not limited to, David Hessler's testimony (BW Ex. 8 (Supp. 350); BW Ex. 26 (Supp. 381)), Dr. Kenneth Mundt's testimony (BW Ex. 6 (Supp. 320)); and the Pedersen and Persson Waye articles (UNU Ex. 47 (Supp. 594); UNU Ex. 48 (Supp. 605)) .

Rather than adopt an absolute noise standard, the Board exercised its authority under R.C. § 4906.10(A) to impose an objective operational noise level on the project. Specifically, the Board adopted Condition 6 whereby "Buckeye shall operate the facility within the noise parameters as set forth in its noise study and presented in its application." (Certif. at 83 (Appx. 136.)) The Board also ensured that a complaint resolution process would be in place to address noise complaints. Condition 8(j) requires "[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 ." (*Id.* at 85 (Appx. 138.))

The Board explained the basis for its decision in its July 15, 2010 Entry on Rehearing, stating:

> Buckeye's noise assessment was reasonable, in light of the issues raised by UNU. Further, by requiring Buckeye to operate at the noise levels stated in its noise assessment as presented in the application, the Board negates the effect of the errors alleged by UNU. The Order, therefore, provides an objective operational noise level for the facility. The Board interprets Mr. Strom's testimony as an appropriate recognition of the intermittent nature of the wind and, therefore, the intermittent nature associated with the noise emanating from the wind turbines. As we recognized in the Order, the record does not support the adoption of absolute noise levels as requested by UNU; However, we expect that the proposed project will reasonably operate within the noise parameters presented in the application and recognize that, depending on weather conditions, the wind turbines may, for limited periods, operate at sound levels above that modeled in the application. The Board finds that it has

> thoroughly considered the evidence in the record on the noise impacts of the facility and UNU has not presented any new persuasive arguments not already considered. Accordingly, UNU's request for rehearing for the Board to adopt absolute, objective operational noise standards for the Buckeye project should be denied.

(Entry on Rehearing at 29 (Appx. 270.))

The objective operational noise level adopted by the Board is fully supported by Staff witness Raymond who testified that Buckeye would be expected to operate the turbines at the operational noise levels shown on the contour lines of the plots attached to the Application's noise study. (TR 1901-1902 (Supp. 244-245.)) He also noted that the intent was not to adopt an absolute standard, but rather that "... if under the normal course of operation over extended periods of time are found to be operating outside these parameters, then, yes, I think it would be a violation." (TR 1902 (Supp. 245.))

When pressed by UNU's counsel on how the objective noise levels would be enforced, Mr. Strom responded that the complaint resolution process "... would come into play." (TR 1902 (Supp. 245.)) Mr. Strom's responses on this subject were thorough and well thought out as evidenced by the hearing transcript. (TR 1902-1905 (Supp. 245-248.))

UNU ignores Mr. Strom's testimony (which the Board did not) and simply claims that conditions may occur where noise levels exceed the levels reflected in the sound plots attached to the Application. (UNU Merit Brief at 29-30.) This critique is irrelevant because as Mr. Strom testified, the issue is not a one-time exceedence but rather whether "... if under the normal course of operation over extended periods of time are found to be operating outside these parameters[.]" (TR 1902 (Supp. 245.))

Also irrelevant are UNU's points that another turbine model may have higher sound output levels and that a margin of error existed in Mr. Hessler's modeling. (UNU

Merit Brief at 31.) Regardless of the turbine model selected or a margin of error (which can be up or down), the Board's condition requires Buckeye to operate the facility within the sound levels predicted by a worst case scenario model. (Certif. at 83 (Appx. 136.))

The Board's adoption of Condition 6 and Condition 8(j) provide significant protection to non-participating neighbors. Non-participating neighbors can submit complaints pursuant to a Staff approved complaint resolution procedure. (Certif. at 83-85 (Appx. 136-138.)) As well, Staff will be able to review the number of complaints received. (*Id.*) In the event of a complaint, the location of the complaint can be identified on the noise contours and the level of operational noise compared to what was predicted for the worst case scenario. And as the Board noted, the more formal complaint process under R.C. § 4906.97 and OAC Rule 4906-9-01 is available to address any certificate violations. (Certif. at 79-80 (Appx. 132-133.))

UNU has not met its burden to show that the Board's refusal to adopt an absolute noise limit was "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.* (1977), 49 Ohio St. 2d at 238, 361 N.E.2d 436.

RESPONSE TO UNU PROPOSITION OF LAW NO. 2

Buckeye Wind's Application gave full consideration to low frequency noise levels.

UNU's second proposition of law fails for three simple reasons. First, Chapter 4906-17 of the Ohio Administrative Code ("OAC") did not apply to Buckeye Wind's Application. Buckeye Wind filed its Application on April 24, 2009 in accordance with

OAC Chapter 4906-13. The rules under Chapter 4906-17 of the OAC were not effective until May 5, 2009 and thus not applicable to Buckeye Wind's Application.

Second, the Board found Buckeye Wind's Application to be complete, satisfying OAC Rule 4906-5-05(A). As the Board noted, "the rules in Chapters 4906-13, or 4906-17, O.A.C., are filing requirements that do not necessarily become certificate conditions as UNU suggests." (Entry of July 15, 2010 at 26 (Appx. 267), hereinafter referred to as "Entry on Rehearing at ___.")

Third, although not required under the rules in Chapter 4906-13, Buckeye Wind did consider low frequency noise in its acoustic modeling. (BW Ex. 1, Ex. K at 29 (BW Supp. 46.)) When discussing the low frequency noise component in turbine sound, Mr. Hessler stated that:

> The model is concerned with the A-weighted sound level over the site. Low frequency noise is discussed in the text in the report. The model does consider low frequency noise in the sense that the input sound power level for the turbine includes the frequency spectrum starting at 31-1/2 hertz and going up from there. And the model is frequency dependent in its calculation. So it takes into account the full frequency content of the turbine.

(TR 806 (Supp. 174.))

UNU counsel followed up to Mr. Hessler's answer, asking "[b]ut that underestimates the amount of low frequency noise that would be predicted by the turbines, does it not?" (*Id.*) Mr. Hessler stated,

> A. No, not at all. No, it's got the sound level of the turbine as measured without A-weighting. That's the input to the model. The result of the calculation is the A-weighted sound contours. But the input incorporates the spectrum without modification.

(*Id.*) This testimony establishes that Buckeye Wind considered low frequency sound levels in its modeling. UNU's second proposition of law is without merit.

RESPONSE TO UNU PROPOSITION OF LAW NO. 3

The Power Siting Board did not commit reversible error in finding that the proposed facility satisfied Section 4906.10(A)(3)'s requirement that it represents the minimum adverse environmental impact.

For its third proposition of law, UNU argues that the Board should not have issued the Certificate because the Facility's setbacks are not sufficient to prevent operational noise from causing discomfort, annoyance and sleep deprivation. (UNU Merit Brief at 33.) As it does with other propositions of law, UNU is asking this Court to reweigh the evidence presented to the Board even though this function lies with the trier of fact and not the Court. *Util. Serv. Partners, Inc. v. Pub. Util. Comm'n,* supra; *Consumers' Counsel v. Pub. Util. Comm'n,* supra at ¶ 32. Regardless, as discussed in the other sections of this brief, the record fully supports the Board's analysis and determinations regarding operational noise and setbacks.

UNU not only ignores the evidence supporting the Board's decision, but also does not point to any evidence that renders the Board's determination "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.* (1977), 49 Ohio St. 2d at 238, 361 N.E.2d 436. For example, UNU claims that Buckeye Wind can simply relocate turbines to land Buckeye Wind has on lease in other areas. (UNU Merit Brief at 33.) UNU leaves out the fact that this land under lease by Buckeye Wind is located outside the project area (TR 106 (Supp. 62.)) Likewise, UNU does not mention Mr. Shear's testimony that the land proposed for the Facility in the Application was a "... combination of all the constraint factors that we have addressed[.]" (TR 182 (Supp. 72.))

In other words, they over-simplify the wind turbine siting process, ignoring the siting process outlined in the Application which clearly demonstrates a thoughtful, reasoned and responsible approach to siting. (BW Ex. 1 at 21 to 27 (BW Supp3-10.)) In fact, as Mr. Shears testified, Buckeye Wind could have sited twice as many turbines, roughly 70 turbines, if the project was designed using the Ohio statutory minimum setbacks. (TR 327 (BW Supp. 70.)) Instead, as Mr. Shear's testified, the average distance from a non-participating residence is 2, 000 feet. (TR 327-328 (BW Supp. 70-71.))

With no record citation, UNU claims that more than 4,000 people will be exposed to noise increases exceeding five dBA over background. (UNU Merit Brief at 33-34.) UNU simply comes up with this estimate assuming that four people live in every house. (*Id.*) It should also be noted that UNU incorrectly claims that Buckeye Wind admitted that the five dBA over background standard is appropriate to prevent "undue community harm." (UNU Merit Brief at 34.) Buckeye Wind made no such admission and significantly, UNU provides no citation to the record to support this claim.

Another misrepresentation is UNU's statement that David Hessler agreed that 5% to 40% of UNU's estimated 4,000 persons would be highly annoyed. (UNU Merit Brief at 34.) UNU cites to Mr. Hessler's initial interpretation of percents in a table in the 2004 Pederson and Persson Waye article (TR 851-852 (Supp. 183-184.)) omitting Mr. Hessler's rebuttal testimony where he stated:

> I just recently kind of went through the paper just to try to clear up in my own mind why we were only seeing a handful of complaints in large populations and it looked like she was getting a high percentage of complaints. When you look at it in absolute terms rather than percentages, it kind of clears it up a little bit.

(TR 2349 (Supp. 278.)) He then testified in regards to his initial testimony on the graph at page 3468 of the Pedersen and Persson Waye study, stating:

> Yeah, and like I said before, I thought it was valid at that time, and then I went back and really looked at it and I think this grossly kind of – I think it has a tendency to overstate because it's not 35 percent of all people upset at 40 dBA, it's only 8 or 9 people of an initial starting point of 600-and-something.

(TR 2355 (Supp. 281.))

UNU also attempts to claim that Buckeye Wind will use the "noisier Nordex 100 turbine[.]" (UNU Merit Brief at 34.) Nothing in the record indicates that Buckeye Wind has made a final decision on the type of turbine it will use for this project. In fact, Mr. Shears stated during cross-examination that Buckeye Wind had not yet selected a turbine model for the project. (TR 23 (BW Supp. 63.)) Mr. Shears also stated that "... the applicant is committed to selecting a turbine that will operate within the noise profiles set forth in the application. (TR. 284-285 (Supp. 86-87.))

To ensure this commitment, the Board adopted Condition 6 whereby "Buckeye shall operate the facility within the noise parameters as set forth in its noise study and presented in its application." (Certif. at 83 (Appx. 136.)) The Board also adopted Condition 49 in the Certificate whereby Buckeye Wind must ensure no additional impacts will occur regardless of the type of turbine it selects. (Certif. at 92 (Appx. 145.))

The falsity in UNU's claim is the basis for its premise – that operational noise levels 5 dBA over the L90 background level will lead to unacceptable noise impacts. As explained above in Buckeye Wind's response to UNU's first proposition of law (Part A), the expert testimony and evidence in this proceeding overwhelmingly indicated that operational noise levels from the Facility do not rise to a level that precludes

construction of the Facility. The record contains sufficient evidence supporting the Board's determination.

RESPONSE TO UNU PROPOSITION OF LAW NO. 4

The Power Siting Board's determination that the Facility will serve the public interest, convenience and necessity at the proposed setbacks was proper and not a basis for reversible error.

The Board devoted five pages of its March 22, 2010 Order to its analysis of the setbacks proposed for the Facility. (Certif. at 35-40 (Appx. 88-93.)) After reviewing the record and the arguments of the parties, the Board determined that the Facility's proposed setbacks "... adhere to the requirements set forth in the statute and support a finding that the proposed project is in the public interest, convenience, and necessity, provided that Buckeye addresses staff's concerns regarding Turbines 70 and 57." (*Id.*) Significantly, the Board determined that the setbacks satisfied any safety concerns, did not prohibit adjacent landowners from developing properties or constructing residences and would not impair property values. (*Id.*)

Although the evidence in the record firmly supports the Board's finding, UNU argues that the Board "has a duty to establish greater setbacks" than the minimum setbacks established by House Bill 562 and codified at R.C. § 4906.20. UNU claims that the Board should have considered setbacks greater than that required under R.C. § 4906.20 due to "its inexperience with industrial-scale wind energy facilities, its Staff's avowal that it considered the Projects 'worst-case impacts' in its recommendations to the Board, and a substantial body of evidence showing that those minimum setbacks are woefully inadequate to protect the health, safety, and welfare of individuals in the surrounding area." (UNU Merit Brief, p. 35.) This fourth proposition of law by UNU fails for several reasons.

First, the Board did not resort to the minimum setbacks set forth in R.C. § 4906.20 and OAC 4906-17-08(C)(1)(c)(i) and (ii). The Board noted in its March 22, 2010 Order that "[i]n the present case, the requirements of Rule 4906-17-08(C)(1)(i) and (ii), O.A.C., translate to a required setback of at least 541 feet from nonparticipating property lines, and 914 feet from residential structures. (Certif. at 35 (Appx. 88.)) The Board then noted that "... Buckeye states that, as proposed, the distance from each turbine to the nearest residential structure ranges from 873 to 4,503 feet, averaging 2,059. Only one turbine is currently sited within the 914 foot setback from a residence." (*Id.*) Thus, contrary to UNU's implication, the Board actually approved the Facility's construction based on setbacks that were greater than the minimum prescribed under R.C. § 4906.20 and the Board's rules.

The record firmly establishes that the Facility was designed above and beyond the minimum setbacks established by R.C. 4906.20(B)(2) . As Mr. Shears testified, the "key" to development of this project, and the siting of specific turbines, was to consider the noise threshold, not some "arbitrary" setback distance. (TR at 184-85, 327 (BW Supp. 67-68, 70.)) And as the Board noted in at page 35 of its March 22, 2010 Order, Mr. Shears testified that the average turbine setback for the project was over 2,000 feet—well above the minimums established by the General Assembly. (TR at 184-85, 328 (BW Supp. 67-68, 70.))

UNU's fourth proposition of law also fails because the evidence in the record overwhelmingly supports the Board's determination. Dr. Kenneth A. Mundt's testimony provided the only expert testimony on potential health effects related to wind turbines and associated setbacks. When asked the question "[d]o you believe that

setbacks greater than that proposed in the application are warranted," Dr. Mundt, an epidemiologist with over 20 years of experience, opined that:

> [a]t the proposed setbacks, ... there is no reason to believe, based on the available evidence, that health will be harmed. There may be a variety of non-health reasons to recommend specific minimal setbacks; including those unrelated to health concerns; however, based on the available scientific evidence, those proposed in the application appear to be adequately protective of health as well as reduced levels in frequency of annoyance factors.

(BW Ex. 6 at 16 (Supp. 330.))

In a series of questions by Staff's counsel, Dr. Mundt reiterated his opinion that the proposed setbacks were adequate and that there is no reason to establish a setback greater than that proposed in the Application. (TR at 586-587 (Supp. 151-152.)) In fact, Dr. Mundt testified that in the state where he resides, a high school is located directly under a wind turbine. (TR at 587 (Supp. 152.))

Dr. Mundt's opinion carries significant weight because epidemiology is used to determine causal links. As Dr. Mundt testified, "[e]pidemiological evidence is key to determine the causal relationship, if any, between various risk factors and the occurrence of disease." Dr. Mundt also testified that

> [e]pidemiological evidence is fundamentally relied upon for determining causes of disease in humans, and serves as a scientific basis for a wide range of decision-making, including identifying and evaluating public health interventions, deriving occupational and environmental exposure limits; determining drug and consumer product safety; guiding medical treatment decisions; supporting policy in litigation decisions, etc.

(BW Ex. 6 at 5 (Supp. 319.))

Using his experience as an epidemiologist, Dr. Mundt opined in his direct testimony that "[b]ased on my review of the relevant published peer-reviewed scientific literature, I found no consistent or well-substantiated association between residential

proximity to industrial wind turbines and any serious health effect." (BW Ex. 6 at 6-7 (Supp. 320-321.)) He also testified that:

> It should be noted that some degree of noise is consistently perceived by residents living near wind turbines depending on the number of turbines, time of day, season, and level of background noise, and to a lesser extent shadow flicker, again, depending on time of day, season, and position of the turbine blades. However, exposures to turbine noise or shadows, while potentially distracting or irritating to some people, are not known to harm human health."

(BW Ex. 6 at 7 (Supp. 321.))

Other witnesses supported the setbacks for the Facility. Christopher Shears, an officer of Buckeye Wind with over 15 years experience in the wind industry (BW Ex. 4 at 2 (Supp. 291.)), testified that "I have seen no scientific evidence, or had any feedback from neighbors to projects I have developed, that there are any direct health effects caused by the operation of wind turbines." (BW Ex. 4 at 22 (Supp. 311.)) He further testified that:

> There are now many thousands of wind turbines operating around the world and a handful of possible cases have been raised by opponents of wind energy as examples that there is a link between health issues and wind turbines. That is not to say that there are some people who do not like wind turbines, there clearly are, just like there are opponents for any other form of development. However, being annoyed and upset at having a turbine in a neighboring field, or an apartment block for that matter, is very different to a scientific health impact. (*Id.*)

Leon Cyr, a Benton County, Indiana resident with a turbine approximately 1,000 feet from his house, testified that he has no trouble sleeping and had not experienced any pressure or palpitations in his chest. (BW Ex. 28 at 3 (Supp. 389.)) He also testified that as a County Commissioner he had not received any formal or informal complaints regarding noise or shadow flicker. (*Id.* at 4 (Supp. 390.)) All of this evidence supports the Board's decision and contradicts UNU's unsupported claim that "a substantial body of evidence [shows] that those minimum setbacks are woefully inadequate to protect the

health, safety, and welfare of individuals in the surrounding area." (UNU Merit Brief at 35.)

The record also does not support UNU's claims that the setbacks for the Facility do not address blade shear and ice shedding. The Board determined that "... Buckeye has sufficiently demonstrated that the setbacks, as currently configured, when combined with advances in wind turbine technology, are sufficient to protect residents from any risk of blade shear." (Certif. at 42-43, (Appx. 95-96.)) As to ice shear, the Board noted that "... safeguards, both automatic and manual, will be sufficient to protect those residing in the surrounding area from the risk of ice throw." (*Id.* at 43 (Appx. 96.)) The Board based these determinations on Staff's conclusion in the Staff Report (Staff Ex. 2 (supp. 397)) and on the information contained in Buckeye Wind's Application explaining the advances in technology, turbine safety systems and the fact that there has never been a member of the public injured by a thrown blade. (See Certif. at.41-43 (Appx. 94-96); Buckeye Ex. 1 at 105-107 (BW Supp. 11-13); TR. 80-81 (BW Supp. 64-65.))

Significantly, UNU had the opportunity to submit expert testimony to the Board to support its argument that the project's setbacks are inadequate, but failed to do so. There was simply no evidence adduced at the hearing to provide justification or a reasonable explanation for UNU's position. In fact, instead of providing concrete evidence that the proposed turbine locations are not protective of neighboring residences due to noise, blade throw, ice throw, shadow flicker, or otherwise, UNU refers to general literature from manufacturers suggesting larger setback distances. (UNU Merit Brief at 35-36.)

Although UNU suggests that the general literature should control the design of the Facility, a closer look reveals nothing of the sort. Instead, these are merely sales material and general guides, not particular recommendations regarding a specific facility and not definitive. For example, as Mr. Shears testified, the Nordex micrositing document (UNU Ex. 12 (Supp. 535)) was simply a "general guidance for a starting point for someone who's interested in the wind energy business." (TR at 104 (BW Supp. 66.)) Staff witness, Mr. Siegfried, correctly noted that UNU Ex. 11 (Supp. 534) and UNU Ex. 13 (Supp. 536) related to turbine manufacturers other than those being considered for the Facility. (TR 1825 (supp. 224.)) Based solely on these documents, UNU claim that the Board should have ignored the expert testimony in the proceeding and ruled in UNU's favor to setbacks much greater than proposed by the Applicant.

The General Assembly, however, has spoken on the issue of minimum setbacks. And contrary to the intent of the General Assembly, the 1.25 mile setbacks proposed by UNU before the Board would preclude the siting of any turbines in the project area. (BW Ex. 26 at 1 (Supp. 381.)) Notably, UNU does not argue that the proposed turbines violate the minimum setbacks established by R.C. 4906.20(B)(2) or the Board's rules under Chapter 4906-17. UNU's argument lies with the General Assembly, not the Board.

Simply put, UNU did not put forth any credible evidence suggesting that the turbine setbacks as proposed are not sufficient. Instead, they try and argue to this Court that the Board "summarily" concluded that the minimum setbacks are adequate without relying on any evidence. To the contrary, the Board conducted a thorough review of the evidence in the record to reach its determination that the setbacks proposed for the Facility supported the Board's finding that the proposed project is in the public interest,

convenience and necessity. (Certif. at 35-43 (Appx. 88-96); Entry on Rehearing at 35-36 (Appx. 276-277) UNU's fourth proposition of law should be rejected.

RESPONSE TO UNU PROPOSITION OF LAW NO. 5

The Power Siting Board may admit opinion evidence of an expert where the record reflects the witness has years of experience and sufficient knowledge.

At pages 39-40 of its Merit Brief, UNU argues that Buckeye Wind witness Christopher Shears should not have been allowed to sponsor exhibits and studies addressing shadow flicker, property values, pollution offsets and socioeconomic values. (UNU Merit Brief at 39.) To the contrary, the Board properly affirmed the decision of the administrative law judge to deny UNU's motion to strike specific portions of the direct testimony of Buckeye Wind witness Christopher Shears and exhibits from the Application. (Certif. at 13 (Appx. 66.))

Mr. Shears' testimony on direct and cross supports the Board's decision on this evidentiary issue. As the Board recognized, Mr. Shears has a long history in the wind industry. (*Id.*) He has been involved in the wind industry since 1994, having been involved in the development of over 60 wind farm projects. (BW Ex. 4 at A.3 (Supp. 291.)) He has offered testimony before the British House of Lords, was chairman of the British Wind Energy Association from 2005 to 2007, was Vice Chairman for two terms and sat on the board of the British Wind Energy Association for 10 years. (*Id.*)

As to pollution offsets, Mr. Shears testified at length on cross examination regarding emission displacements resulting from the operation of the facility (TR 30-52 (Supp. 24-46)), stating that he was very comfortable with Buckeye Wind's analysis from the numbers that he saw and that these numbers were broadly what he would expect (TR 36 (Supp. 30)). With respect to socioeconomic benefits, Mr. Shears testified on the economic output related to the project in response to questions from UNU's counsel

explaining that the $788,000 to $1.4 million in power sales estimated in Exhibit R were based on turbine size. (TR 176 (Supp. 71.)) In addition to his direct testimony, he also responded to questions regarding the creation of construction and permanent jobs. (TR 54-64 (Supp. 48-58) and see BW Ex. 4 at A.14 (Supp. 296.))

Mr. Shears also gave detailed testimony on shadow flicker and ways to mitigate excessive shadow flicker. (BW Ex. 4 at A.19 (Supp.301); TR 124-131 (Supp. 63-70)). As to property values, Mr. Shears provided direct testimony on this issue noting that "[t]here have been a number of attempts to analyze the impact of wind turbines on property value, and results from appropriately conducted real estate research have shown an absence of measureable effects of wind farm visibility on property transaction values. (BW Ex.4 at A.19 (Supp. 301.)) He also answered questions on property values from counsel for the Urbana Country Club (TR 242-244 (Supp. 83-85.))

Mr. Shears' testimony not only supports the Board's decision to affirm the administrative law judge's decision, but comports with the Board's procedure of allowing an experienced employee of an applicant sponsor an application. *In re Application of Am. Transm. Sys., Inc.*, supra. at ¶ 17 (noting that the Board has discretion to manage its procedural matters). As the Board stated, this is an "...efficient method by which to introduce large amounts of data necessary to process certificate applications." (Certif. at 12 (Appx. 65.) UNU's fifth proposition of law is without merit.

RESPONSE TO UNU PROPOSITION OF LAW NO. 6

The Power Siting Board did not abuse its discretion in requiring live witnesses.

For its sixth proposition of law, UNU claims that "[i]t was inequitable to allow Buckeye Wind to introduce volumes of unsupported hearsay, while the intervenors were

required to produce live witnesses. (UNU Merit Brief at 40.) UNU, though, has made no showing that Buckeye Wind introduced "volumes of unsupported hearsay" especially considering that the record shows that Christopher Shears had the requisite experience and knowledge to answer material questions about the Application. Moreover, Mr. Shear's sponsoring of the Application followed the Board's "... long-standing practice in Board proceedings for an applicant to sponsor exhibits to an application through the testimony of a witness that is an officer or experienced employee of the applicant." (Certif. at 12 (Appx. 65))

UNU was also not prejudiced by the administrative law judge's requirement that all witnesses appear live for cross-examination. Only two witnesses filing direct testimony failed to appear at the hearing for live cross examination. UNU witness Sandra McKew was unable to appear at the hearing because of a medical emergency. (Certif. at 10 (Appx. 63); TR 1061 (BW Supp.73.)) By agreement of the parties, the administrative law judge admitted Ms. McKew's direct testimony and deposition into evidence. (TR 1163-1164 (BW Supp. 74-75.))

This was not the case with Dr. Nissenbaum. Dr. Nissenbaum offered his services to UNU contingent on him not having to offer testimony in person. (Certif. at 10, Appx. 63.)) UNU represented to the Board that Dr. Nissenbaum was unable to hire a replacement radiologist for a period less than one week. (*Id.*) Significantly, UNU never took Dr. Nissenbaum's deposition even though it claims it should be admitted into evidence. Instead, UNU filed Dr. Nissenbaum's direct testimony and when Dr. Nissenbaum did not appear at the hearing, requested a telephone cross-examination. (TR 1631-1634 (Supp. 218-221); Certif. at 10 (Appx. 63.))

The administrative law judge properly denied this request. As she stated:

> The Board is not in the practice of permitting cross-examination of any witness by telephone, nor did I find it – nor did the Bench find it appropriate to permit Dr. Nissenbaum to be cross-examined through deposition because it was based on a willingness not to offer testimony, we find that – not to offer live testimony here in front of the Board for the bench to have the opportunity to cross-examine that witness.
> We find it dissimilar from the situation that you are faced with Ms. McKew who was ill and needed to be hospitalized and, therefore, we believed that she was unavailable For that reason we accepted the deposition and the direct testimony of Ms. McKew as part of the record in this case.

(TR 1633-1634 (Supp. 220-221.)) As the Board noted, this finding was not prejudicial to UNU because UNU presented testimony from other witnesses on alleged health effects from turbines. (Certif. at 10 (Appx. 63.))

The administrative law judge also acted appropriately by not allowing UNU to admit an affidavit from Dr. Nissenbaum into the record. "At the public hearing, a witness requested that the affidavit of Dr. Nissenbaum be placed in the evidentiary record (Public Hearing Tr. at 40-41)." (Certif. at 9, (Appx. 62.)) However, Dr. Nissenbaum was not present at the public hearing and not available for cross-examination on his affidavit. Therefore, the administrative law judge acted appropriately by submitting the affidavit to the public docket as correspondence along with the other personal statements submitted at the public hearing. (TR 1638 (Supp. 222A.))

As the Board has discretion on how best to manage hearings, including allowing company witnesses to sponsor applications and requiring witnesses to testify in person (*In re Application of Am. Transm. Sys., Inc.*, supra, ¶ 17), UNU's sixth proposition of law should be rejected.

RESPONSE TO UNU PROPOSITIONS OF LAW NO. 7, 8, 9 AND 10

The Power Siting Board has statutory authority to set forth the terms and conditions upon which an application for a certificate of environmental compatibility and public need may be granted.

For its remaining propositions of law, UNU has split the ground for rehearing at page 67 of its application for rehearing into four propositions of law. (Appx. 229.) None of the four propositions of law have merit.

Seventh Proposition of Law

UNU argues that the Board relieved Buckeye Wind of its burden of proof by incorporating Conditions 8(j), 33, 40, 45, 46 and 49 in the Certificate. (UNU Merit Brief at 41.) UNU claims that the conditions "...defer consideration of important Project information, siting considerations, and compliance /mitigation measures until after the evidentiary hearing has concluded and the Certificate is issued." (*Id.* at 42.) This argument is contrary to the Board's authority under R.C. § 4906.10(A) and contrary to the evidence in the record.

First, the General Assembly has given the Board express authority and discretion to grant an application "... upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate." R.C. § 4906.10(A) (emphasis added). The Board's ability to impose terms and conditions is very important because the Board evaluates applications for proposed projects, not constructed projects. *See* R.C. § 4906.04 ("No person shall commence to construct a major utility facility in this State without first having obtained a certificate for the facility.")

Second, the Board had sufficient evidence on the issues underlying Conditions 8(j), 33, 40, 46 and 49 prior to issuing its decision. For example, Staff witness Raymond

Strom testified regarding the usefulness of a complaint resolution process. (TR 1902-1904 (Supp. 245-247.)) He also explained, based on his experience, that requiring an applicant to submit a complaint resolution procedure can lead to ideas not considered by Staff. (TR 1861-1862 (BW Supp. 76-77.)) The Board agreed with his testimony, adopting Condition 8(j). (Certif. at 80, 84 (Appx. 133, 137.))

As to blade shear, the Board found convincing Buckeye Wind's evidence that no member of the public has ever been injured as a result of blade shear, that turbine technology has advanced and that turbines will include two independent braking systems and will automatically shutdown at wind speeds over the manufacturer's threshold. (Certif. at 42 (Appx. 95.)) Buckeye Wind also provided evidence showing that the turbines will cease operation if significant vibrations or rotor blade stress is sensed by monitoring systems. (*Id.*; Buckeye Ex. 1 at 105-107 (BW Supp.11-13.)) As to UNU's unsupported claim that Buckeye Wind possessed a formula for blade shear and ice throw prior to the hearing, Buckeye Wind expressly stated in its responses to Staff's data requests that it was not aware of any formula to calculate ice throw or blade throw. (UNU Ex. 43 (Supp. 578, 580)).

The Board also noted that Buckeye Wind had estimated the impact on microwave telecommunication systems in its Application. (Certif. at 66 (Appx.119.)) Under a worst case scenario analysis, only Turbine 37 was shown to cause any potential interference. (*Id.*) Buckeye Wind's Application stated that mitigation could consist of a slight shift in the turbine or by simply eliminating the turbine. (*Id.*; BW Ex. 1 at 194 (BW Supp.14.)) Buckeye Wind informed Staff in a data request response that any shift in location would be approximately 30 meters. (UNU Ex. 43 (Supp. 575)). With this information, the Board adopted Condition 40 and properly determined that the project

"will have minimal impact on local communications systems and, therefore, it will not negatively impact the public interest or convenience." (Certif. at 67 (Appx. 120.))

As discussed above in this brief, Buckeye Wind also presented evidence supporting the Board's setback determinations. (See Certif. at 35-40 (Appx. 88-93.)) As part of its findings, the Board adopted Conditions 45 and 46 to ensure Staff's concerns on the locations of turbines 57 and 70 were addressed. (*Id.* and see Staff Ex. 2 at 38 (Supp. 440.)) The Board also adopted Condition 47 whereby "Buckeye shall comply with all setback requirements as prescribed by the Board." (Certif. at 92 (Appx. 145.)) Taken as a whole, these conditions ensure that the Facility as constructed is in accord with the Board's determination that the proposed setbacks support a finding that the "proposed project is in the public interest, convenience, and necessity[.]" (*Id.* at 40 (Appx. 93.))

Likewise, substantial evidence was presented to the Board that operational noise from the Facility would not rise to a level sufficient to preclude construction. (Certif. at 64 (Appx. 117.)) As part of the Certificate, the Board adopted Condition 6 requiring Buckeye Wind to operate within the noise parameters presented in the application. (*Id.* at 83 (Appx. 136.)) To ensure compliance with that condition, the Board also adopted Condition 49 requiring, in part, that Buckeye Wind notify the Board of the turbine model selected for the project in addition to providing assurances that "no additional negative impacts would be introduced by the model selected." (Certif. at 92 (Appx.145.)) As the Board stated:

> [w]e also note that, as is the process in all other certificate proceedings before the Board, one aspect of staff's duties is to verify that Buckeye's design plan and equipment, including the wind turbine model to be installed, comply with the Board's Order and the conditions of the certificate issued. *** The Board's intent with the adoption of Condition 49, and the directive that we reasonably expect the proposed project to

> operate within the noise parameters presented in the application, was to effectively foreclose Buckeye from selecting a noisier wind turbine than it evaluated in the noise assessment analysis.

(Order on Rehearing at 19 (Appx.260) citing Certif. at 64, 92 (Appx. 117, 145.))

Accordingly, the Board had sufficient evidence to rule on the issues underlying Conditions 8(j), 33, 40, 45, 46 and 49. UNU's seventh proposition of law is without merit.

Eighth Proposition of Law

UNU also argues that the "deferred information is relevant to the Board's evaluation of the certification criteria of R.C. 4906.10(A) and should have been considered by the Board before a certificate is issued in this case." (UNU Merit Brief at 44.) To the contrary, as described in detail above, the Board thoroughly considered blade shear, setbacks and operational noise levels when making its determinations under R.C. § 4906.10(A) . For example, the Board made an independent determination that the setbacks and advances in turbine technology were sufficient to protect residents from the risk of blade shear. (Certif. at 42-43 (Appx. 95-96.)) Likewise, the Board conditioned operation of the Facility on compliance with the modeled noise contours presented in the Application regardless of the type of turbine model used for the project. (*Id.* at 6 (Appx. 59.)) The record simply does not support UNU's claims that the Board circumvented its responsibilities under R.C. § 4906.10(A) .

Ninth Proposition of Law

In its Ninth Proposition of Law, UNU argues that they were deprived of their statutory right to call and examine witnesses at the evidentiary hearing as a result of Conditions 33, 45, 46 and 49. To the contrary, UNU had every opportunity to present testimony and cross-examine witnesses on the issues underlying these conditions.

(Certif. at 35- 41 and 48-64 (Appx. 88-94 and 101-117.)) Moreover, Buckeye Wind's submittal of information required by the Certificate's conditions does not amend the Certificate. Rather, its compliance with the conditions is intended to ensure that the Facility is constructed in accordance with what the Board approved for the proposed project. (Certif. at 81-82 (Appx. 134-135.))

Lastly, it is the Board's role and not UNU's role to ensure compliance with the conditions of the Certificate. As to any argument that Staff cannot be involved with that role and as recognized by this Court:

> R.C. Chapter 4906, the board's enabling statute, expressly allows the board to delegate many responsibilities to subordinates. * * * More generally, R.C. 4906.02(C) states, "The chairman of the public utilities commission may assign or transfer duties among the commission's staff." * * * One responsibility, however, cannot be delegated: "the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself." R.C. 4906.02(C).

In re Application of Am. Transm. Sys. Inc., 125 Ohio St. 3d at 336, 2010-Ohio-1841 at ¶ 17. UNU's ninth proposition of law is without merit.

Tenth Proposition of Law

At pages 46-48 of its brief, UNU argues that the Board's and/or Staff's consideration of Buckeye Wind's preconstruction information submittals somehow deprives the interveners of procedural due process. UNU equates this information with "evidence" and cites several cases for the proposition that such conditions violates procedural due process. The cases cited by UNU are simply not applicable and reveal a complete misunderstanding of the process that the General Assembly has approved.

UNU cites *Mathews v. Eldridge* (1976), 424 U.S. 319 along with other cases for the proposition that administrative proceedings must comport with due process. (UNU Merit Brief at 46.) As an initial point, the holdings in these cases are not applicable to

the matter at bar because all found no due process violation. *Mathews v. Eldrige*, supra at 349; *LTV Steel Co. v. Indus. Comm.* (2000), 140 Ohio App. 3d 680, 692-693; and *Egbert v. Ohio Department of Agriculture* (2008), 2008-Ohio-5309; ¶39 .

UNU also cites to *Seitz v. All Creatures Animal Hosp.* (Nov. 15, 1985), Ashtabula App. No. 1192, LEXIS 9306. However, the *Seitz* case involved the conduct of a hearing referee who considered post-hearing statements as evidence made against the applicant's interest without notice or knowledge of the appellant and without any opportunity to confront or cross-examine the witnesses who made the statements against her. *Id.* at *2. In the matter at bar, the Board has made its determinations under R.C. § 4906.10(A) and pursuant to its statutory authority, imposed terms and conditions in the Certificate.

The fact that Buckeye Wind must submit information to the Board and/or its Staff as a condition of the Certificate does not rise to the level of a governmental decision warranting the protections of due-process. *Mathews v. Eldrige*, supra at 332 ("[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.") Moreover, unlike the circumstances in the *Seitz* case, the Board has already held an evidentiary hearing and has issued its decision on the statutory criteria under R.C. § 4906.10(A) . Buckeye Wind's submission of information, as required by the Certificate's conditions, is intended to ensure compliance with the Certificate. This is not the equivalent of a governmental decision entitling UNU to the right of an evidentiary hearing.

In making its due process argument, UNU ignores the process set up by the General Assembly and certain statutory principles that the Board must follow. First,

R.C. § 4906.04 provides, in part, that "[n]o person shall commence to construct a major utility facility in this State without first having obtained a certificate for the facility." Because an applicant cannot construct a facility without a certificate, this means that the Board must evaluate proposed projects, not those already built. The Board must evaluate the criteria set forth in R.C. §4906.10 with respect to the estimated impacts of such proposed projects and may impose any terms and conditions it believes necessary.

Second, the Board has a mandate to conclude proceedings involving applications for certificates as expeditiously as practicable. Section 4906.07(A), Revised Code, provides "[u]pon the receipt of an application complying with section 4906.06 of the Revised Code, the Power Citing Board shall promptly fix a date for a public hearing thereon, not less than 60 nor more than 90 days after such receipt, and shall conclude the proceeding as expeditiously as practicable." The Board recognized this in its Certificate at pages 81-82 when it stated:

> The Board notes that it is the Board's longstanding policy to require the applicant to hold a pre-construction conference with the staff, to demonstrate compliance with the associated requirements of other state and federal agencies, and other specific particulars of construction after the certificate is issued for efficiency of the certificate process and the use of Board resources. The certificate conditions also require the applicant to demonstrate that the final construction plans for the facility comply with the Board's opinion, order, and certificate and the conditions thereof, as adopted by the Board. The certificate conditions also may require the applicant to have in place certain procedures, like the complaint procedures proposed in this case, that the Board finds appropriate for the construction of the project or to address public interest concerns without unduly delaying the certification process.

(Certif. at 81-82 (Appx. 134-135.))

Thus, the Board must develop a process whereby it evaluates all the evidence and issues with respect to an application proposing construction of a major utility facility, but at the same time must conclude the proceeding as expeditiously as

practicable. Not every construction detail can be proposed or analyzed at the time of the application and hearing. But by imposing these conditions and requiring information as part of the post-certificate process, the Board is able to continue to ensure that the proposals contained in the application are not materially changed or substantially modified.

Finally, applying the three part test in *Mathews* demonstrates the constitutional adequacy of the Board's administrative proceeding in issuing the Certificate. The "private interest at stake" was already considered by the Board in the evidentiary hearing which resulted in the conditions set forth in the Certificate. For example, the adequacy of turbine setbacks was fully litigated and considered by the Board. (Certif. at 35-40 (Appx. 88-93.)) The post-certificate information is designed to protect that private interest by making sure that the Applicant has complied with the conditions imposed.

With respect to the risk of erroneous deprivation of that interest and the probable value of additional procedural safeguards, there is no risk of an erroneous deprivation. The purpose of the post-certificate information is to ensure compliance with the conditions imposed in the certificate including Condition 47 which mandates that Buckeye Wind must comply with all setback requirements prescribed by the Board. (Certif. at 92 (Appx.145.))

With respect to the government's interest, requiring an evidentiary hearing on information submitted in compliance with the Board's Certificate Conditions would impose significant fiscal and administrative burdens on the Board and its Staff far outweigh any countervailing benefits. It should also be noted that as the Board recognized, UNU is fully entitled to follow the formal complaint process already provided in R.C. §§ 4906.97 and 4906.98 and OAC Rule 4906-9-01 if any complaint is

not resolved by the informal complaint process required under the Certificate. (Certif. at 79 (Appx.132.))

UNU has no basis for claiming that the Certificate's conditions calling for information submittals rises to the level of a due process violation. This Court should reject UNU's tenth proposition of law.

RESPONSE TO COUNTY/TOWNSHIP PROPOSITION OF LAW NO. 1

A condition in a certificate of environmental compatibility and public need requiring the submittal of road bonds for construction and decommissioning subject to the approval of the Power Siting Board's Staff and the Ohio Department of Transportation adequately serves the public interest, convenience and necessity.

The Board recognized in its March 22, 2010 Order that local roads could be damaged as a result of traffic related to construction and decommissioning of the project. Specifically, the Board stated that:

> [r]ecognizing the potential damage to the local roads that may occur due to the increase of construction traffic, through the decommissioning stages of this project, the Board agrees that, as a condition of the certificate, Buckeye should procure a bond in order to provide adequate funds to repair any damage to the public roads. Accordingly, the Board concludes that, with this condition in place, the County's concern has been addressed and the public interest, convenience, and necessity will be served.

(Certif. at 70 (Appx.123.)) The Board then approved Condition 56 in the Certificate whereby:

> Prior to the commencement of construction. Buckeye shall secure a road bond(s), or other similar surety, through the Champaign County Engineer's Office to provide adequate funds to repair any damage to public roads resulting from the construction or decommissioning of the proposed facility. Buckeye shall submit proof of the bond or other similar surety, for staff's approval in coordination with ODOT.

(*Id.* at 93 (Appx.146.))

Champaign County and the townships of Goshen, Salem, and Union (collectively the "County and Townships") claim that this condition is inconsistent with the statutory

authority of counties and townships. The County and Townships also argue that requiring the Board's Staff in coordination with the Ohio Department of Transportation ("ODOT") to approve the bond is adverse to the public interest. These arguments have no merit.

First, nothing in Chapter 4906, Revised Code, gives a county engineer authority to approve the amount or form of a financial assurance requirement in a condition imposed by the Board. Likewise, nothing in Chapter 315, Revised Code, gives a county engineer the right of approval over any condition adopted by the Board. Rather, the General Assembly has granted to the Board unfettered authority to impose terms and conditions in a certificate of environmental compatibility and public need. R.C. § 4906.10(A) . For this reason alone, the County and Townships' first proposition of law fails.

This proposition of law also fails because, as the Board stated, " ... [n]othing in the record suggests that a bond approved by staff and ODOT will not be sufficient to protect the interests of the County." (Order on Rehearing at 14 (Appx.255.)) The County and Townships claim that the Board's Staff is not competent to determine the amount of such bond. (County/Township Merit Brief at 13.) However, the County and Townships only point to testimony related to the necessity of a road bond. They do not point to any evidence that shows an inability on the part of Staff to determine whether the proposed financial assurance is sufficient. Moreover, the County and Townships ignore the Board's express requirement in Condition 56 that Staff consult with ODOT. The fact that Staff must review the financial assurance with ODOT should end any inquiry over whether that review will not be in the public interest.

RESPONSE TO COUNTY/TOWNSHIP PROPOSITION OF LAW NO. 2

The Power Siting Board's discretion under R.C. § 4906.10(A), to impose terms and conditions in a certificate of environmental compatibility and public need does not conflict with the express language of R.C. § 5727.75.

In their second proposition of law, the County and Townships argue that the Board did not have the authority to impose Condition 56 in the Certificate because allegedly that condition is contrary to the General Assembly's intent in enacting R.C. § 5727.75. (County/Township Merit Brief at 14.) In doing so, the County and Townships fail to recognize that (1) they did not raise this argument in the Board proceedings; (2) the Certificate was issued prior to the effective date of R.C. § 5727.75; (3) Nothing in the record suggests that Buckeye Wind has applied for tax relief under R.C. § 5727.75 and (4) the plain language of R.C. § 5727.75 imposes no restriction on the Board's express authority under R.C. § 4906.10(A) to impose terms and conditions in a certificate of environmental compatibility and public need.

First, as an initial point, the County and Townships did not raise this argument before the Board at the administrative proceeding or on rehearing. "On an appeal from an order of the Public Utilities Commission, the Supreme Court cannot consider any matter which was not specifically set forth in an application to the commission for a rehearing as a ground on which the appellant considered the order of the commission to be unreasonable or unlawful." *City of Cincinnati v. Public Utilities Commission of Ohio et al.* (1949) 151 Ohio St. 353, 86 N.E. 2d 10 (paragraph 17 of the syllabus); R.C. § 4903.10. For this reason alone, this proposition of law is not properly before this Court.

Second, R.C. § 5727.75 was effective on June 17, 2010. This date is well after the Certificate's March 22, 2010 issuance date. Moreover, R.C. § 5727.75 contains no

language giving it retroactive effect. "Statutes are presumed to apply only prospectively unless the General Assembly specifically indicates that a statute applies retrospectively." *State v. Ferguson* (2008), 120 Ohio St. 3d 7, ¶15 (citations omitted); R.C. § 1.48. Thus, the County and Township's second proposition of law fails because the Board issued the Certificate prior to the effective date of R.C. § 5727.75.

Third, nothing in the record indicates that Buckeye Wind has applied to the Ohio Department of Development for certification under R.C. § 5727.75 as a "qualified energy project." To be eligible for the tax exemption under R.C. § 5727.75(B)(1) , the owner or lessee of a energy project must "apply to the director of development for certification of an energy project as a qualified energy project ... [.]" R.C. § 5727.75(E)(1)(a) . The County and Townships cannot point to any part of the record evidencing that Buckeye Wind has applied to the Department of Development to certify its generation facility as a "qualified energy project" under R.C. § 5727.75. Thus, the County and Township's second proposition of law is not ripe and not properly before this Court. *Keller v. Columbus*, 100 Ohio St. 3d 192, 2003 Ohio 5599, 797 N.E.2d 964, ¶26 ("[i]In order to be justiciable, a controversy must be ripe for review").

Fourth, the County and Township's second proposition of law fails because nothing in the clear and unambiguous language of R.C. § 5727.75 restricts the Board's authority under R.C. § 4906.10(A) to add terms and conditions to a certificate. See R.C. § 5727.75(F) (imposing construction road bond requirement on applicant for tax exemption). Accordingly, this Court should not infer terms not expressly written into a statute. *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St. 3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶ 14 *quoting Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14 ("where the language of a

statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom").

The County and Townships claim that double bonding could result if the Board's authority is not restricted by this Court. For support, the County and Townships point to *Ohio Edison Co. v. Power Siting Commission* in which this Court noted that the General Assembly "'will not be presumed to have intended to enact a law producing unreasonable or absurd consequences,'" and that "'[i]t is the duty of the courts, if the language of a statute fairly permits ... to construe the statute as to avoid such a result.'" *Ohio Edison Co. v. Power Siting Commission* (1978), 56 Ohio St. 2d 212, 215-216, 383 N.E.2d 588 *quoting Canton v. Imperial Bowling Lanes* (1968), 16 Ohio St. 2d 47, 242 N.E.2d 566. However as noted above, the language of R.C. § 5727.75 is clear and unambiguous, leaving no room for construction or interpretation by this Court. *Wingate v. Hordge* (1979), 60 Ohio St. 2d 55, 58, 396 N.E. 2d 770, 772 *quoting Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101, 304 N.E. 2d 378 ("[i]t is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation").

Indeed, the County and Townships would receive less protection if this Court were to accept their argument and restrict the Board's authority to impose a road bond condition during construction. The road financial assurance requirement in R.C. § 5727.75 only applies if the holder of the Board certificate applies to the Department of Development for the tax exemption. R.C. § 5727.75(E)(1)(a) . If the certificate holder elects to not apply and seeks an alternate means of receiving a tax exemption (such as forming an enterprise zone under R.C. § 5709.61 *et seq.* or qualifying as an air quality project under R.C. § 3706.15), the result will be that no financial assurance will exist for

roads during construction if the Board cannot impose a road bond condition. The General Assembly surely did not intend such a result when enacting R.C. § 5727.75 and this Court should not create a loophole where none exists.

RESPONSE TO COUNTY/TOWNSHIP PROPOSITION OF LAW NO. 3

The Power Siting Board did not commit reversible error when it ordered Buckeye Wind to post and maintain a bond equal to $5,000.00 per turbine from the commencement of construction until the facility is operational for one year.

In this proposition of law, the County and Townships argue that the Board committed a reversible factual error by imposing a $5,000.00 per turbine decommissioning financial assurance requirement on the Facility from construction through the first year of the turbine's operation. Contrary to the County and Townships' claim, this determination by the Board was not "manifestly against the weight of the evidence" and was not "so clearly unsupported by the record to show misapprehension, mistake or willful disregard of duty." *Chester Twp. v. Power Siting Comm.* (1977), 49 Ohio St. 2d at 238, 361 N.E.2d 436.

The specific condition at issue (Condition 69) states that "[p]rior to construction of each turbine. Buckeye shall post and maintain financial assurance for said turbine in the amount of $5,000. This financial assurance shall be in place until such time that the facility has been operational for one year." (Certif. at 95 (Appx.148.)) As the Board noted in its decision on rehearing, Condition 69 " ... represents the balancing of competing evidence and viewpoints that were represented to the Board during the evidentiary hearings, as summarized in the subsequent briefs." (Order on Rehearing at 11 (Appx.252.))

The record fully supports the competing evidence and viewpoints presented to the Board. Buckeye Wind witness Christopher Shears, who was the chairman of the

British Wind Energy Association from 2005-2007, was vice-chairman for two terms and sat on the Board of the British Wind Energy Association for 10 years (TR 40-41 (Supp. 34-35)), testified that it is "inconceivable" that the project will need to be decommissioned within the first five years. (TR 192 (BW Supp.69.) and see Certif. at 72 (Appx.125.)) Likewise, Staff concluded in the Staff Report that a decommissioning bond is "not always required to be in place at the onset of construction." (Staff Ex. 2 at 52-53 (Supp.454-455.)) Rather, it varies from state-to-state: "[s]ome states allow five to ten years of operation before a bond or other financial assurance must be secured for decommissioning; others require it initially." (*Id.*)

Disagreeing with Buckeye Wind's position, UNU argued that Buckeye Wind should post a decommissioning bond prior to construction and that the bond amount should be as much as $300,000 per turbine. (Certif. at 74 (Appx.127.)) Likewise, the County and Townships supported the imposition of a bond at the onset of construction. (Certif. at 74 (Appx.127.)) Thus, faced with competing testimony, the Board properly exercised its discretion under R.C. § 4906.10 to adopt Condition 69 in the Certificate and require the $5,000 per turbine decommissioning financial assurance.

The County and Townships claim that the Board justified Condition 69 because it conformed with stipulations from other cases. (County/Townships Merit Brief at 17.) To the contrary, the Board expressly stated that it " ... does not find it appropriate to grant rehearing for the purpose of bringing our decision in this case, which was based on our careful consideration of the evidence presented in this heavily litigated case, into conformity with stipulations negotiated by different parties in other cases." (Entry on Rehearing at 11 (Appx. 252.)) The Board weighed the evidence and adopted a condition that it felt best fit with the testimony. Indeed, the Board could have just as easily found

that it is "inconceivable" that the project will need to be decommissioned within the first five years. (TR 192 (BW Supp.69.))

The County and Townships' third proposition of law should be rejected.

CONCLUSION

For the foregoing reasons, Buckeye Wind respectfully requests that this Court reject all propositions of law asserted by UNU and the County and Townships and affirm the Board's March 22, 2010 Opinion, Order and Certificate.

Respectfully submitted on behalf of,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served via via U.S. first class mail, postage prepaid, upon the following persons this 5th day of January 2011:

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