

ORIGINAL

IN THE
SUPREME COURT OF OHIO

**Union Neighbors United, Robert
McConnell, Diane McConnell, and Julia
F. Johnson, et al.**

Appellants,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

Case No. 2013-1874

On Appeal from the Ohio Power
Siting Board, Case No. 12-160-EL-
BGN, *In the Matter of the Application
of Champaign Wind, LLC, for a
Certificate to Construct a Wind-
Powered Electric Generating Facility
in Champaign County, Ohio.*

**AMICUS CURIAE BRIEF OF THE AMERICAN WIND ENERGY ASSOCIATION
IN SUPPORT OF APPELLEE**

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INTRODUCTION

The American Wind Energy Association (“AWEA”) respectfully submits this *amicus curiae* brief in support of Appellee, Ohio Power Siting Board (“Board”), regarding challenges brought by Union Neighbors United, Inc. (“UNU”), Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively, “UNU”); Champaign County; and Goshen, Union, and Urbana Townships that the Board’s decision that Champaign Wind, LLC’s wind energy project, Buckeye II Wind Farm, in Champaign County, Ohio, is in the public interest, convenience, and necessity was made in error. We respectfully request that this Court affirm the Board’s decision as reasonable and lawful.

STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS

AWEA is a national organization dedicated to the interest of promoting wind energy as a clean source of electricity for American consumers. We support Appellee in this action because it is unnecessary for this Court to rule on the constitutionality of the Ohio Alternative Energy Portfolio Standard (“AEPS”), R.C. 4928.64(B), which requires “at least one-half of the renewable energy resources implemented by the utility or company” to be met through facilities located in Ohio.

BACKGROUND

Champaign Wind proposed to build a wind generation facility consisting of 56 wind turbines, along with access roads, underground and overhead electric collection cables, a facility substation, up to three construction staging laydown yards, an operations and maintenance facility, and up to four meteorological towers in the townships of Goshen, Rush, Salem, Union, Urbana, and Wayne in Champaign County, Ohio. On May

15, 2012, pursuant to R.C. 4906.01(B)(1), Champaign Wind applied to the Ohio Power Siting Board for a Certificate of Environmental Compatibility and Public Need for the wind generation facility. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN (Opinion, Order, and Certificate at 2) (Order) (May 28, 2013, UNU App. at 13-14.¹

The Ohio Power Siting Board Staff conducted an investigation regarding the application. The Administrative Law Judge for the Ohio Power Siting Board held a full evidentiary hearing on whether it should issue the certificate for the construction of the proposed wind facility. The Board issued an elaborate 106-page Opinion, Order and Certificate on May 28, 2013 ordering that the certificate be issued to Champaign Wind, as modified pursuant to the Board's Opinion, Order and Certificate. *Champaign Wind* (Order at 102) (May 28, 2013), UNU App. at 113.

Intervenors UNU, the Board of Commissioners of Champaign County, Ohio, and the Boards of Trustees of the townships of Union, Urbana, and Goshen filed Applications for Rehearing on June 27, 2013. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN (Entry on Rehearing) (Sep. 30, 2013), UNU App. at 116. On rehearing, UNU claimed that the project does not serve the public interest, convenience, and necessity because, *inter alia*, the Board improperly relied upon R.C. 4928.64(B). UNU Merit Brief at 12. UNU asserts that the Board cannot rely on

¹ References to Appendix to Merits Brief of Appellants UNU, Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively, "UNU") are denoted "UNU App. at ____."

R.C. 4928.64(B) because it is unconstitutional. UNU App. at 238. In support of this assertion, UNU maintained that R.C. 4928.64(B) mandates Ohio utilities to purchase alternative energy generated in Ohio in violation of the dormant commerce clause of the U.S. Constitution. *See* UNU App. at 250.

On September 30, 2013, the Board issued an Entry on Rehearing denying in part and granting in part the Applications for Rehearing to the extent set forth in Findings (17) and (43), each of which further modify the application's conditions for certification. *Champaign Wind* (Entry on Rehearing at 48), UNU App. at 162. Further, the Board found that it lacked the jurisdiction to adjudicate the constitutionality of R.C. 4928.64(B) and that even without reference to that provision the Board would still have found that the project serves the public interest, convenience, and necessity to approve the certificate. *Champaign Wind* (Entry on Rehearing at 48), UNU App. at 134.

On November 26, 2013, the Appellants Champaign County and Goshen, Union, and Urbana Townships filed a Notice of Appeal from the Board's May 28, 2013, Opinion, Order and Certificate and from the September 30, 2013 Entry on Rehearing. Townships Merits Br. at 20–24.² Likewise, on November 27, 2013, Appellants UNU, filed a Notice of Appeal from the Board's May 28, 2013, Opinion, Order and Certificate and from the September 30, 2013 Entry on Rehearing. UNU App. at 1–8. Appellants UNU contend that the Board erred in issuing its May 28, 2013 Opinion, Order and Certificate and its September 30, 2013 Entry on Rehearing because, *inter alia*, the Board relied upon R.C. 4928.64(B), which Appellants maintain violates the dormant Commerce

² References to the Merits Brief of Appellants Champaign County and Goshen, Union, and Urbana Townships, including its appendix, are denoted "Townships Merits Br. at ____."

Clause. UNU Merits Br. at 12–16.³

ARGUMENT

Proposition of Law: *The Court should not reach the question of R.C. 4928.64(B)'s constitutionality because other issues apparent in the record dispose of the case on its merits.*

Limiting Principles Established by this Court for Constitutional Analysis Preclude the Court from Considering the Constitutionality of R.C. 4928.64(B).

This Court should not consider the question of the constitutionality of a challenged statute when a matter in litigation can be determined based on evidence in the record without reaching the constitutional question presented. *Greenhills Home Owners Corp. v. Greenhills*, 5 Ohio St. 2d 207, 212, 215 N.E.2d 403 (1966) (“a court will not exercise its power to determine the constitutionality of a legislative enactment . . . where other issues are apparent in the record which will dispose of the case on its merits.”) (citing *State, ex rel. Lieux, v. Village of Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951) and *Crowell v. Benson*, 285 U.S. 22 (1932)); *see also State ex rel. Yellow Freight Sys. v. Industrial Comm'n*, 71 Ohio St. 3d 139, 642 N.E.2d 378 (1994). In addition, this Court need not reach the constitutional implications of a question if it does not affect the outcome of a case. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, 931 N.E.2d 1061, ¶20 (“If error occurred, it does not affect the outcome of this case Therefore, we need not decide this question and its constitutional implications, as it is not necessary to do so.”). In the instant case, based on the evidence in the record, it is not necessary for this Court to consider the constitutionality of R.C. 4928.64(B) as it is neither necessary for rendering a judgment in this matter and, therefore, this Court should decline to decide nor affects the

³ References to the Merits Brief of Appellants Union Neighbors United (UNU), Robert McConnell, Diane McConnell, and Julia Johnson at denoted “UNU Merits Br. at ____.”

outcome of the case. Therefore, the Court should decline to reach that issue. To grant a certificate for a major utility facility, the Ohio Power Siting Board must find, *inter alia*, that the project is in the public interest, convenience, and necessity. R.C. 4906.10(A)(6), App. at 2.⁴ UNU erroneously claims that the “only basis” for the Board’s granting of the certificate was based on R.C. 4928.64(B)(3), which, as noted, requires “at least one-half of the renewable energy resources implemented by the utility or company” to be met through facilities located in Ohio. UNU Merit Brief at 12.

Contrary to UNU’s assertion, the Board specifically stated that the in-state renewable energy requirement merely “add[ed] support” to its finding that the project is in the public interest, convenience and necessity. *Champaign Wind* (Order at 35) (May 28, 2013), UNU App. at 46. Indeed, the Board’s factual determinations in its Order, Opinion and Certificate dated May 28, 2013 were adequately supported by the evidence in the record and were clearly not based on its cursory allusion to R.C. 4928.64(B)(3).

The Board’s decision was based on its findings that the proposed project adheres to the minimum statutory requirements for property line and residential setbacks; protects the public from potential blade shear, turbine fire hazards, ice throw, and low frequency noise; exceeds manufacturer recommended setbacks; and does not have an excessively negative aesthetic impact or shadow flicker, as long as the project certificate issued reflects the Conclusions and Conditions set out in the Opinion, Order and Certificate. *Champaign Wind* (Order at 37, 41–42, 44–45, 47, 52, 64–65) (May 28, 2013), UNU App. at 48, 52–53, 55–56, 58, 63, 75–76. The Board further concluded that the project’s potential effect

⁴ R.C. 4906.10(A)(6) does not provide how the Board is to make this determination.

on property value does not make it contrary to the public interest. *Champaign Wind* (Order at 54) (May 28, 2013), UNU App. at 65.

In its Opinion, Order and Certificate, the Board also emphasized the benefits the project will have on the environment and consumers. *Champaign Wind* (Order at 72) (May 28, 2013), UNU App. at 83. In particular, the Board noted the project will have minimal adverse environmental impacts, will avoid altering the availability of resources to the community, and will provide appropriate financial assurances that the community is not harmed by the construction, operation, maintenance, or decommissioning of the project. *Champaign Wind* (Order at 73) (May 28, 2013), UNU App. at 84.

The Board ultimately held that the project was in the public interest, convenience, and necessity based on its aforementioned findings regarding setbacks, public safety, aesthetics, environmental impacts, and community impacts. *Champaign Wind* (Order at 102) (May 28, 2013), UNU App. at 113. Having made that determination, the Board merely noted that the project “*could* help affected entities comply with their statutory requirements under [R.C. 4928.64(B)]” and that this provision “*adds* support to [the Board’s] finding that the proposed project is in the public interest, convenience, and necessity.” *Champaign Wind* (Order at 35) (May 28, 2013), UNU App. at 46 (emphasis added).

In its Entry on Rehearing, the Board also stated, “even if Section 4928.64(B), Revised Code, were not at issue, the Board finds that the project serves the purpose of delivering energy to Ohio’s bulk power transmission system in order to serve the generation needs of electric utilities and their customers” *Champaign Wind* (Entry on Rehearing at 20–21) (Sep. 30, 2013), UNU App. at 134–35. Thus, the Board did not base its decision

on the statute's in-state preference provision and, therefore, the Board's decision would not be affected even were this Court to find, assuming *arguendo*, that R.C. 4928.64(B)(3) is unconstitutional. Consequently, this Court need not reach that constitutional issue.⁵

Spitznagel at ¶20; *see also See Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St.2d 206, 210, 4 O.O.3d 390, 364 N.E.2d 852 (1977).

Under the “unlawful or unreasonable” standard of R.C. 4903.13, this Court should not reverse or modify the Board's determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Chester Twp. v. Power Siting Comm.*, 49 Ohio St. 2d 231, 238, 361 N.E. 2d 436 (1977). Because the Court has consistently refused to substitute its judgment for that of the Board on evidentiary matters, *see, e.g., Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006), it should decline to do so here as well, when the evidence in the record, apart from consideration of R.C. 4928.64(B)(3), is dispositive on the merits and supports the Board's conclusion that the proposed project meets the public interest, convenience, and necessity requirement. Moreover, deference should be shown to Board determinations where, as here, the Board applies its specialized expertise and discretion in making that determination. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000).

In sum, it is not necessary for this Court to consider the constitutionality of R.C. 4928.64(B) because it neither affects the outcome of this case nor is absolutely necessary for

⁵ We also note that the project would continue to satisfy the alternative energy benchmarks in R.C. 4928.64(B)(1) and (2) even if the Court were to find R.C. 4928.64(B)(3) unconstitutional.

rendering a judgment in this matter, and this Court should decline to decide it.

CONCLUSION

An examination of the record in this case shows that the Board's determination that the project is in the public interest, convenience, and necessity was not based on R.C. 4928.64(B) but instead based on other sufficient evidence in the record. Because the constitutionality of R.C. 4928.64(B) does not affect the outcome of this case and it is not necessary for this Court to determine the constitutionality to decide the merits of this case, we respectfully submit that this Court decline to reach that issue, consistent with the "enduring value of the rule restraining precipitous constitutional determinations," *Greenhills Home Owners Corp. v. Greenhills*, 5 Ohio St. 2d at 212.

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