ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Champaign Wind LLC for a Certificate to Construct a Wind Powered Electric Generating Facility in Champaign County, Ohio	))))))	**Case No. 13-1874** **On Appeal from the Ohio Power Siting Board, Case No. 12-160-EL-BGN**

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INTRODUCTION

The decision of the Ohio Power Siting Board ("OPSB") for Buckeye Wind II ("BW II") is 103 pages long, so the Court must affirm it. At least, that is what Appellees repeatedly argue.

But quantity should not be confused with quality. The paper exercise of "meticulously" summarizing the parties' arguments does nothing to prevent public harm if OPSB ignores the perils revealed by the record. And writing 72 certificate conditions will not protect the public if they are overly lenient or ineffective. After all, a Timber Road II turbine still hurled its blades onto neighbors' properties even though its certificate approved the same safety features as BW II. Rather than using that experience to bolster the safety of BW II, OPSB has disregarded the actual extent of the danger at Timber Road II and has repeated the same mistakes for BW II. The pro-development tone of OPSB's brief shows that its overzealous promotion of wind power has clouded its judgment about hazards that R.C. Chapter 4906 has entrusted OPSB to address.

Several pro-wind organizations have filed amicus briefs extolling wind energy. Their "facts" about wind energy were not vetted at the hearing nor contained in the record. Amici do not disclose that only two of the 12 OPSB-approved wind projects are operational, casting doubt on whether Ohio actually needs more wind energy. *See* the links for "approved" and "operational" cases on OSPB's web site at http://www.opsb.ohio.gov/opsb/. Nevertheless, Union Neighbors United ("UNU") has neither the space in this brief nor the inclination to engage in political rhetoric over the pros and cons of wind power. And, while state law authorizes the development of wind energy, it does not allow this development at all costs. Unless BW II is properly designed, UNU's members and 200 other families will bear that cost.

ARGUMENT ON PROCEDURAL AND LEGAL ERRORS

UNU and other parties presented a large number of witnesses and exhibits to deal with the many hazards of this poorly designed project. But filling a long transcript has no purpose if

OPSB excludes critical information. OPSB's rulings restricted UNU's opportunities to portray a complete picture of the project's hazards. Although Appellees urge the Court to defer to OPSB's determinations, these procedural errors are legally erroneous and do not hinge on witness credibility or experts' disputes. The Court should not defer to these errors.

I. The Board Applied An Unreasonable Standard Of Relevance To UNU's Discovery And Cross-Examination [Related To Proposition of Law Nos. 2, 3, 8, and 10].

Reasoning that "the Board is only considering the application that is before it," OPSB repeatedly used the final application and final Staff Report as an inappropriate measure of relevance that prevented UNU from discovering evidence, impeaching claims in the application, and testing the Staff's recommendations. (Entry of Oct. 22, 2012 at ¶ 23, (Appx. 174))

A. Drafts Of Application And Staff Report [Related to Proposition of Law No. 10].

OPSB invoked "the application before it" as the limit of relevance to bar discovery and cross-exam about drafts of the application and Staff Report. *See* Tr. 2556:12-17 (Supp. 253) ("We are only looking at the Application before us and the Staff Report before us."); Certif. at 12 (Appx. 23) ("The sole consideration of the Board is on the application, as filed.") But if earlier drafts contradict the final application or reveal evidence of project impacts that was later removed, that evidence is relevant to the project's impacts and approvability. And cross-exam about a draft's inconsistent statements can impeach a witness' assessment of project hazards.

Notwithstanding OPSB's protest (at 19), *Ohio Consumers Counsel v. PUCO* holds that PUCO's discovery rule is analogous to Civil Rule 26(B)(1), which "has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding." 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 83. Contrary to OPSB's assertion (at 20), UNU did not cite that case for the point that drafts are discoverable. But, just

as drafts were found relevant and discoverable in *Shore* and *Golden Valley* (*see* UNU's opening brief at 49), drafts of the application and Staff Report are discoverable and admissible herein.

B. Subpoenas And Cross-Examination About Blade Throw Hazard And Noise [Propositions of Law Nos. 2, 3, and 8].

The same unreasonable standard anchored OPSB's ruling quashing the subpoenas on the grounds they were "not tailored in any way to the proposed project." (Entry of Oct. 22, 2012 at ¶¶ 22-23 (Appx. 173-174)) Appellees used this argument to block UNU's discovery of the frequency, causes, and distances of blade throws at other projects, while arguing that UNU lacks adequate data on these points. Appellees repeatedly state that flying blades have not injured anyone, while preventing UNU from obtaining that very information. Appellees have thwarted UNU's attempts to subpoena noise complaints at other wind projects, while defending their noise limit on the flawed premise that noise complaints are rare at other projects.

In addition, the Board affirmed the ALJ's quashing of the subpoena to EDP, stating:

> [W]hile UNU's request pertaining to a blade shear incident at a wind farm certificated by the Board was not overbroad . . . , the request related to turbine models that are not under consideration in the proposed project before us.

(Certif. at 9 (Appx. 20)) (emphasis added.) The ALJ also quashed subpoenas to General Electric ("GE") and Gamesa because the requested information "encompasses turbines not included in the proposed project and outside the scope of this proceeding." (Entry of Oct. 22, 2012 at 11, ¶ 23 (Appx. 174)) The ALJ ruled that "any information pertaining to turbines that were considered but ultimately not selected for the proposed project are irrelevant to the current proceeding, as the Board is only considering the application that is before it." *Id.*

Notably, the record does not contain a single fact about the safety and noise history of the turbine models listed in the application. Instead, Appellees' testimony and OPSB's decision focus entirely on their flawed perception of safety and noise data across the entire wind

industry. Thus, Mr. Speerschneider acknowledged that noise and noise complaints at other projects are relevant because other turbine models are similar. (Tr. 316:21-317:2, 341:8-342:21 (Supp. 34-35, 39-40)) He agreed that blade throw data from turbines worldwide is relevant, since "[t]here's a lot of similarity in turbines in the industry with different manufacturers." (Tr. 300:17-21, 303:10-12 (Supp. 29, 31)) He said that it is customary to look at blade throw events "across the industry to be able to make a determination of the risk involved with those types of events." (Tr. 316:15-20 (Supp. 34)). Both applicant and Staff opined about the wind industry's general blade safety record, and OPSB admitted that testimony into evidence over UNU's objections. *See* UNU's Opening Brief at 21-22. This double standard is an abuse of discretion.

In their briefs, Appellees could not defend OPSB's unreasonably narrow view of relevance, so instead they attacked UNU's subpoenas as burdensome. This is a straw man argument. The ALJ found the requests for blade safety and noise records overbroad only because they sought information about turbine models not included in the application. (Appx. 173-175, ¶¶ 21-23) Champaign Wind quotes a records request (at 16) that it deems burdensome, but OPSB opined only that this request sought too much data on shadow flicker. (Certif. at 8 (Appx. 19)) Shadow flicker is not an issue in this appeal, and UNU has not appealed the quashing of that request. The requests under appeal are quoted in UNU's opening brief (at 18, 19, 45), are concise, and are related to the noise and blade safety hazards at issue.

Furthermore, even if some subpoena requests were unduly burdensome, that did not justify the quashing of entire subpoenas. Subsection (D) of the OPSB's subpoena rule, Ohio Adm.Code 4906-7-08, subjects subpoenas to the protective order provisions of Ohio Adm.Code 4906-7-07(H). Subsections (1)(d) and 1(e) of the latter rule authorize OPSB to quash portions of a subpoena while preserving the remainder. In fact, the ALJ used this approach on the Gamesa and GE subpoenas, but he erroneously quashed everything except requests for records

related to turbine models in the application. (Appx. 174-175) That made the subpoenas useless, since these relatively new models have no significant track record to discover. (Supp. 33A)[1] Indeed, this is why the Appellees relied on information about different models.

OPSB argues (at 14) that UNU offered to reduce the subpoenas' burden on the subpoenaed companies, and UNU should have revised the subpoenas to narrow the requests. UNU actually stated that UNU had contacted the subpoenaed companies that had filed motions to quash and offered to narrow the requests if they proved to be burdensome. (Mem. Contra Motion to Quash, ICN 76, pp. 15-16) These companies declined to engage in such a discussion. OPSB then quashed the subpoenas, even the subpoena to which GE had not objected.

Moreover, revising the subpoenas would not have cured the grounds for OPSB's ruling to quash. Tellingly, even for the EDP subpoena that OPSB conceded was not overbroad, the Board still affirmed the ALJ's ruling because "the request related to turbine models that are not under consideration in the proposed project before us." (Certif. at 9 (Appx. 20))

Champaign Wind argues (at 16) that UNU should have filed an interlocutory appeal of the ALJ's ruling to the Board. However, this ruling did not qualify for interlocutory appeal under Ohio Adm.Code 4906-7-05(A) and (B), nor are such appeals mandatory even when authorized. Moreover, the Board's subsequent refusals to correct these errors in its decision and entry on rehearing show that an interlocutory appeal would have been futile.

Similarly, at hearing, the ALJ barred the cross-examination of Staff witness Conway about the blade throw incident at Timber Road II, which was relevant to his recommendations for the BW II setbacks. UNU Opening Brief at 23. Affirming the ALJ, the Board reasoned:

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[1] OPSB quotes (at 13) UNU's brief (at 20) out of context, arguing that UNU stated the records it sought would not represent the problems experienced by wind turbines. Actually, UNU wrote that the limited information available on the new models would not be representative of the industry's problems, thus necessitating discovery of the safety history for other models.

> The distance in which turbine blades traveled at a different wind farm with a turbine model that is not under consideration in this proceeding is not a fact of consequence in determining whether the proposed setbacks . . . are reasonable; thus, it is irrelevant.

(Certif. 9 (Appx. 20) Champaign Wind cannot credibly argue (at 10) that the blade travel distance at Timber Road II "has no bearing" on BW II, when its own witness conceded it is customary to look at blade throws "across the industry to be able to make a determination of the risk involved with those types of events." (Speerschneider, Tr. 316:15-20 (Supp. 34))

Notably, unlike *In re Black Fork Wind*, 138 Ohio St.3d 43, 2013-Ohio-5478, this is not a situation in which a witness failed to appear because he was not subpoenaed. Mr. Conway sat in the witness chair, but he was directed not to reveal his most important knowledge about blade travel distance. Surely, if he had no information damaging to Appellees' position, Appellees would not have fought so strenuously to conceal it. Nor does it suffice that UNU could ask him about "the Staff's determination of appropriate setbacks in the instant application," Certif. at 9, since UNU was entitled to the barred evidence to test that determination.

In its brief (at 40), OPSB asks the Court to accept that "blade throw is a very remote risk." How can OPSB offer this assurance after it thwarted all efforts to vet the wind industry's safety record? When UNU made reasonable efforts through discovery or at hearing to probe that record, OPSB repeatedly quashed those efforts and refused to look beyond the four corners of "the application before it." (Certif. 8-9 (Appx. 19-20)) On a matter of public safety in an industry relatively new to Ohio, OPSB's position is not only unreasonable, it is unconscionable.

II. <u>The Excluded Testimony Based On The Caithness Database Was More Reliable Than The Hearsay OPSB Used To Set Blade Safety Setbacks [Related To Proposition of Law No. 4].</u>

Appellees acknowledge that experts are permitted to express opinions based on expertise obtained from hearsay sources, and their experts did so. Yet, contrary to that principle, OPSB struck the expert testimony of William Palmer based on the Caithness database. Mr. Palmer

was well-qualified to provide this testimony, since he handled safety issues for the power industry for 30 years. (UNU Exh. 22 (Supp. 393-396)) He has another nine years of experience on wind turbine safety, including expert testimony and his personal inspection of turbine setbacks in 13 countries, as compared to the 10 years of wind company experience that OPSB touts (at 40) as proof of Mr. Speerschneider's expertise on turbine safety. (*Id.* (Supp. 395-397))

UNU's opening brief (at 26) explains that OPSB had no record evidence that the Caithness database is an online forum to which anyone can add data. This is an abuse of discretion, because an OPSB order must show the facts in the record upon which the order is based. *Indus. Energy Users-Ohio v. PUCO* (*IEU*), 117 Ohio St.3d 486, 2008-Ohio-990, ¶30. OPSB compounded this error by excluding Mr. Palmer's testimony about the database's reliability. While Champaign Wind states (at 13) that this testimony is not properly before the Court, UNU has appealed the exclusion of this testimony and thus must discuss it.

Champaign Wind also argues that Appellee witnesses Poore and Conway could identify the authors of reports they used for their testimony, but that Mr. Palmer did not know who authored the Caithness database. To the contrary, Mr. Palmer is a member of the group that prepares the database. (UNU Exh. 22 at 9:29-10:3, 11:25-12: (Supp. 400-402))

OPSB cites (at 18-19) what it regards as testimony about the database's lack of detail. In two cited passages, Mr. Palmer testified that the lack of travel distances for some blade throws actually understated the scope of the problem. (Tr. 1480:21-1481:6, 1484:17-1485:8 (Supp. 210-212, OPSB Supp. 129)) In another passage, Mr. Conway said someone told him "some" links to press reports were broken. (OPSB Supp. 2507) That the links for "some" of the 1292 reported accidents no longer function is no indication that the data are inaccurate.

In contrast, OPSB admitted Mr. Poore's testimony based on two power point presentations of other people who obtained their information from unproduced surveys of

unidentified consultants, developers, and wind companies. (Co. Exh. 9 at 4 (Supp. 324)) OPSB admitted Mr. Conway's testimony about a report whose author utilized two unproduced databases of information from unknown persons. (Supp. 243-245) Moreover, OPSB allowed Mr. Poore to opine on the supposed infrequency of blade throw based on "[w]ord of mouth or the press or other things" and on his assumption that "if a blade injures someone, we'll hear about it in the press." (Supp. 60) Then OPSB based its decision on this opinion. (Appx. 53) OPSB is allowed to consider hearsay, but not arbitrarily. OPSB's double standard has deprived UNU of a fair hearing and has produced a flawed decision on blade setbacks.

ARGUMENT ON SUBSTANTIVE ERRORS

While Appellees argue that the length of OPSB's decision shows it carefully analyzed the evidence, the decision consists mostly of rote recitations of the parties' arguments. OPSB's own findings of fact on noise and blade safety setbacks filled only five pages. (Appx. 52-53, 72-75) OPSB's substantive errors should not be ignored just because its decision is long.

Although UNU's experts have considerable wind turbine experience, this appeal does not require the Court to evaluate expert credibility or weigh conflicting expert testimony. On substantive issues of blade safety and noise, Appellees' testimony confirms UNU's positions or leaves them uncontroverted. Since Champaign Wind has the burden to prove its project complies with R.C. Chapter 4906, its failure to supply this evidence necessitates reversal.

I. OPSB's Finding Of Public Need Rested Solely On An Unconstitutional Mandate. [Related To Proposition of Law No. 1]

A. Appellees Waived Any Argument That UNU Lacks Standing.

UNU raised the constitutionality of R.C. 4928.64(B)(3) in its application for rehearing. (Applic. for Rehearing at 14, Appx. 259). Since neither Appellee claimed below that UNU lacked standing to raise this issue, they waived that defense.

UNU's standing to raise its Commerce Clause challenge is not a jurisdictional question. In Ohio courts, standing is a "self-imposed rule of restraint." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 470 (1999). Thus, the standing principle cited by Appellees is prudential. *Galbraith v. Medina Fire Dep't*, 2006-Ohio-4410, ¶ 5 (9th Dist.); *Progressive Preferred Ins. v. Certain Underwriters*, 2008-Ohio-2508, ¶ 9 (11th Dist.). Jurisdictional defenses may be raised any time, but prudential standing is waived if not raised below. *E.g., State v. Morris*, 42 Ohio St.2d 307, 311 (1975). Standing is jurisdictional "only in limited cases involving administrative appeals, where parties must meet strict standing requirements in order to satisfy the threshold requirement for the administrative tribunal to obtain jurisdiction." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, fn. 4 (1998). Those cases considered standing to appeal under laws not at issue in this case. *E.g., New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216 (1987); *Buckeye Foods v. Cuyahoga Cty.*, 78 Ohio St.3d 459 (1997).

Thus, the prudential standing defense may not be raised for the first time on appeal. *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 2010-Ohio-4573, ¶ 55 (7th Dist.); *Horizon Home Loan Corp. v. Roberts*, 2010-Ohio-60, ¶¶ 9-10 (8th Dist.); *Portfolio Recovery Assoc., LLC v. Thacker*, 2009-Ohio-4406, ¶ 14 (2nd Dist.); *Mid-State Trust IX v. Davis*, 2008-Ohio-1985, ¶ 58 (2nd Dist.); *Discovery Bank v. Poling*, 2005-Ohio-1543, ¶ 1 (10th Dist.). Appellees have waived their objections to UNU's Commerce Clause argument by failing to assert them below.

The Court is not compelled to take up prudential standing *sua sponte*, and UNU submits that it should not. The Court is free to reject "procedural frustrations" in favor of the just and expeditious determination of important issues. *Ohio Academy of Trial Lawyers*, 86 Ohio St.3d at 470. A ruling on the constitutionality of R.C. 4928.64(B)(3) is necessary not only to judge the validity of the BW II Certificate, but because it is a matter of statewide importance. OPSB has relied on the in-state renewable energy mandate to determine public need for every wind

power facility approved since 2012.[2] *See Matter of Hardin Wind LLC*, OPSB No. 13-1177-EL-BGN, 2014 WL 1267676, at *17 (March 17, 2014); *Matter of Northwest Ohio Wind Energy, LLC,* OPSB No. 13-197-EL-BGN, 2013 WL 6813396 at *15 (December 16, 2013); *Matter of Black Fork Wind Energy, LLC,* OPSB No. 10-2865-EL-BGN, 2012 WL 344874 (Jan. 23, 2012). Given the significance OPSB places on the in-state mandate, a ruling on its validity is in the public interest to ensure that OPSB's siting policy is constitutionally sound.

B. Because R.C. 4928.64(B)(3) Discriminates Against Interstate Commerce And No Showing Has Been Made That The State's Interests Cannot Be Served By Non-Discriminatory Means, The Statute Is Unconstitutional.

No party or amicus disputes that R.C. 4928.64(B)(3) discriminates against interstate commerce by requiring Ohio utilities to obtain some of their renewable energy allotment from in-state sources. Discrimination against interstate commerce in favor of local business or investment is *per se* invalid unless the State can demonstrate "under rigorous scrutiny that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994). No party has made that showing here.

PPL Energyplus LLC v. Nazarian, cited by Environmental Amici (at 16), is inapposite. There, a state order for constructing a new power plant did not discriminate against interstate commerce. D. Md. No. MJG-12-1286, 2013 WL 5432346 at *51 (Sept. 30, 2013). Power purchasers would continue to buy from the wholesale market, and were not forced to purchase power from the new plant. *Id.* at *51, *53. The court distinguished that order from laws struck in cases such as *Wyoming v. Oklahoma*, 502 U.S. 437, 455-56 (1992) and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), since those laws set mandates based on geographic boundaries and thus discriminated against interstate commerce. *PPL* at *51. R.C.

[2] As in its opening brief, UNU uses the term "public need" herein in reference to the certification criterion of R.C. 4906.10(A)(6), which requires a Board finding that the facility "serves the public interest, convenience and necessity."

4928.64(B)(2) is akin to the invalidated laws, since it explicitly directs sellers of electricity in Ohio to purchase a specified amount of their power from in-state sources to the exclusion of interstate sources.

Environmental Amici try to excuse the law's discriminatory effect as "insubstantial," but this is both factually incorrect and legally inconsequential. Although they claim (at 7) that the mandated in-state renewable energy benchmark was one percent of the total Ohio electrical supply in 2013, they fail to note that this benchmark will rise to 6.25% by 2024. R.C. 4928.64(B)(2). Moreover, "neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown" to invalidate a law that discriminates against interstate commerce. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988).

Environmental Amici incorrectly argue (at 19) that there is evolving, new Commerce Clause jurisprudence "providing more room for state action." The cases they cite in support of that proposition -- *Sebalius, Morrison,* and *Lopez* -- address the power of Congress under the Commerce Clause, not whether states can discriminate against interstate commerce. *United Haulers* and *McBurney* addressed nondiscriminatory state laws that were not subject to strict scrutiny. And though (at 21) they cite *Dep't of Revenue. v. Davis*, 553 U.S. 328 (2008) for the proposition that the strict-scrutiny test should, in their words, "be applied carefully," that case permits no doubt as to whether the strict-scrutiny test is still in vogue: "A discriminatory law is 'virtually *per se* invalid' . . . and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 338.

The environmental benefits of a state law that discriminates against interstate commerce will not rescue the law from its unconstitutionality. *West Lynn Creamery,* 512 U.S. at 204, fn. 20. *See also Alliance for Clean Coal v. Miller*, 44 F.3d 591, 593-96 (7th Cir. 1995) (rejecting

discriminatory state law despite its air quality benefits). Similarly, a state law may not burden interstate commerce to promote in-state jobs or in-state industry. *West Lynn Creamery*, 512 U.S. at 205. "Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *Id.* While these amici claim (at 15) that R.C. 4928.64(B)(3) somehow "helps strengthen Ohio's electricity grid," they do not show that interstate discrimination is the only way to accomplish that function.

Contrary to OPSB's suggestion (at 10), the State is not exempt from Commerce Clause scrutiny as a market participant. R.C. 4928.64 does not authorize the State to buy or sell electricity in the renewable energy market or otherwise. *PPL*, 2013 WL at *48. Rather, the law renders the State a market regulator subject to Commerce Clause restrictions. *Id.*

Thus, R.C. 4928.64(B)(3) is unconstitutional. As discussed below, OPSB used the in-state mandate as its sole basis for public need, so UNU has been prejudiced by this error.

C. The Board's Reliance on R.C. 4928.64(B)(3) Was Not Harmless Error.

Appellees and amici assert that the constitutionality of the in-state renewable energy mandate is immaterial, because OPSB based its finding of public need on other factors. However, OPSB's decision relies on no other benefits.

Section F of the Certificate sets forth OPSB's public need determination. (Certif. at 35-73 (Appx. 46-84)) Section F consists of topical subsections restating the parties' positions on various issues. At the end of each subsection, OPSB set forth its own findings on that topic. OPSB's only finding of public need is that BW II may help utilities meet the in-state mandate of R.C. 4928.64. (Certif. at 35 (Appx. 46)) The remaining subsections of Section F discussed OPSB's reasoning why project impacts such as aesthetics, transportation, health, and safety

were not contrary to public need. These findings do not show that the facility "serves the public interest, convenience and necessity" under R.C. 4906.10(A)(6). (Emphasis added.)

In its conclusion to Section F, OPSB added a cursory statement that "the renewable energy generation by the proposed facility will benefit the environment and consumers." (*Id.* at 72 (Appx. 83)) The Certificate cites no reasoning or record support for either claim, and thus is an abuse of discretion under *IEU*. 2008-Ohio-990, at ¶30.

OPSB's reference to "renewable energy benchmarks" in Section F's conclusion does not address whether BW II will help utilities meet non-discriminatory mandates in R.C. 4928.64. OPSB's only finding about renewable energy mandates in the body of Section F related to the in-state mandate, so the conclusion's reference relates back to that finding. The Entry on Rehearing confirms this fact by focusing only on the in-state mandate. (Appx. 134-135) Even if the conclusion refers to non-discriminatory mandates, the Certificate cites no record evidence that more energy is needed to meet these mandates. Indeed, the confusion over the meaning of this vague reference illustrates why *IEU* requires OPSB to cite record support for its findings.

OPSB did state 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." (*Id.*) However, OPSB cited no record evidence that anyone needs this electricity, contrary to *IEU*. In fact, in January 2013, PUCO determined that a proposed solar generation facility did not serve the public interest, because additional renewable energy was not needed to aid utilities in meeting their benchmarks under R.C. 4928.64(B). *In re Long-Term Forecast Report of Ohio Power Company*, No. 10-501-EL-FOR, 2013 WL 175238 (Jan. 9, 2013).

In conclusion, OPSB's finding of public need rested entirely on its finding that BW II would assist utilities in meeting the unlawful in-state benchmarks of R.C. 4928.64(B)(3). This was not harmless error, since OPSB cited no evidence in the record for any other benefit.

II. Blade Safety Setbacks Shorter Than 1640 And 1000 Feet From Neighbors' Properties And Public Roads, Respectively, Are Contrary To The Weight Of Evidence. [Related To Proposition of Law No. 5]

Having excluded most reports of blade strikes on occupied buildings and near misses of citizens, OPSB argues that the record lacks evidence of a public threat. OPSB's setbacks fall well short of the blades' travel distance. Instead, it justifies its short setbacks on its supposition that, so far, no member of the public has been killed or injured, and its hope that the safety equipment proven ineffective at Timber Road II will prevent accidents at BW II. The Court should not condone OPSB's exposure of citizens, homes, and motorists to this risk.

OPSB argues (at 42-43) that Mr. Palmer based his setback on only two instances in which blade parts traveled 1640 feet. Actually, he also testified about two other instances (including Timber Road II) in which blade parts went almost 1640 feet. (OPSB Supp. 126) He also based his setback opinion on other instances of 1640-foot throws that the ALJs prevented him from discussing. (OPSB Supp. 128) Nevertheless, no one disputes that blade parts will fly 1640 feet. Mr. Conway's research confirmed this fact. (Conway, Tr. 2526:16-19 (Supp. 247))

Milo Schaffner saw blade pieces from EDP's Timber Road II turbine that had gone almost 1640 feet into a road ditch and yard. OPSB argues (at 43-44) that the "official" report's estimate that the "larger" pieces traveled 764 feet is more credible. EDP prepared this "official" report. (Supp. 429) EDP reported travel distances only for blade pieces of at least 3 kilograms (6.6 pounds), which have the force of a 40 pound concrete block dropped from an 8-story window. (Supp. 436, 406) OPSB speculates, without evidence, that children may have taken turbine pieces to the yard or that the pieces may have blown there from their original landing spots during the four to five days before Mr. Schaffner visited. However, OPSB's quashing of UNU's EDP subpoena and thwarting the cross-examination of Mr. Conway have prevented UNU from testing those theories or learning whether EDP had previously cleared the road and

yard of larger blade parts. Moreover, the accuracy of Mr. Schaffner's distance calculations is revealed by the fact that OPSB considered a 1640-foot setback for BW II in light of the Timber Road II incident before deciding erroneously that the travel distance for Vestas V100 blades could be ignored if this model was removed from the BW II application. (Supp. 254-255)

The warnings in turbine manufacturers' safety manuals also are based on a 1640-foot travel distance. While manufacturers may not have written the manuals for siting, the manuals' strongly worded warnings to stay at least 1640 feet away when turbines are damaged by wind, fire, and blade defects reveal that blade throws at that distance are expected. These emergency situations are the exact scenarios that setbacks are meant to address.

Champaign Wind witnesses Poore and Speerschneider testified that blade shear is "unusual" and that there is a "very low rate" of blade failure, but they offered no statistics on failure rates to support these vague statements. (Supp. 292, 325) OPSB argues (at 43) that Mr. Palmer referred to blade throws of 1640 feet as unusual, but he actually stated that throws "over 1,640 feet" were unusual (emphasis added). (Tr. 1473:25-1474:4 (OPSB Supp. 126-127)) Champaign Wind also claims (at 26) that Mr. Palmer sought to apply "the zero risk approach for the nuclear industry to the wind industry," citing OPSB's decisions. However, neither OPSB's decisions nor Mr. Palmer made such a remark. Importantly, Appellees do not deny Mr. Conway's admission that blade failures occur at a rate of once in every 2400 turbines every year. (Supp. 236) Nor do they dispute Mr. Palmer's testimony that current blade detachment rates are 125 times greater than the accident rate allowed by government agencies for the conventional power industry. *See* pages 31-32 of UNU's opening brief.

OPSB argues (at 35-36) that the average BW II setback from homes is 1,521 feet. However, while some of the project's longer setbacks raise the average, 33 of its 52 turbines are too close. (UNU Exh. 22R (Supp. 458-460)

Although OPSB argues (at 36-37) that the Court addressed blade shear in Buckeye Wind I ("BW I"), the BW II Certificate must be based on the BW II record. Unlike BW I, the BW II record contains evidence about the widespread incidents of blade defects and throws that have been revealed since BW I. The Timber Road II project hurled its blades after the BW I decision. The BW II record shows that turbines throw their blades at least 1640 feet.

Recognizing the lack of record support for its blade setbacks, Champaign Wind discusses at length (at 30) the Certificate's precautions against ice throw. OPSB contends (at 37-38) that its setbacks satisfy manufacturers' recommendations, citing GE guidance on ice throw setbacks. But ice throw is a straw man. No one has appealed the ice throw setbacks. And while Appellees represent that BW II's setbacks exceed manufacturers' recommendations, Mr. Conway admitted that the only such guidance is a GE paper that deals with ice throw and some other hazards, but does not analyze travel distances for blade fragments. (Tr. 2497:10-14, 2504:19-23, 2524-2525)

OPSB argues (at 38) that it need not provide any blade throw setbacks for what Mr. Conway characterized as "lightly traveled roads." Mr. Conway assumed that only interstate, arterial, and U.S. routes are "heavily traveled," so OPSB applied setbacks only to them. (OPSB Supp. 135-137) But protecting only motorists on highly traveled roads is illogical. By analogy, no one would argue that safety standards for auto manufacturers should apply any differently to vehicles owned by persons who drive less often than average. Nor does the record justify OPSB's decision to expose motorists on local roads to more risk of injury from blade throw.

OPSB argues (at 38-40) that BW II's turbines will meet factory standards and have safety features. These are the same measures proved ineffective at Timber Road II; even the pertinent wording of their applications is nearly identical. (Supp. 11a-11b, §5; Supp. 453-454, §5) Only setbacks of 1640 and 1000 feet will protect neighbors' properties and motorists.

III. OPSB's Noise Limit Of 44 dBA And Its Failure To Protect Neighbors' Land Are Contrary To The Weight Of Evidence. [Related to Proposition of Law No. 6]

Champaign Wind argues (at 6) that the Court in BW I resolved the noise issues for BW II. If so, the 40 dBA noise limit found necessary in BW I necessitates reversal of OPSB's 44 dBA limit for the combined noise emissions of BW I and II turbines in the same community. This relaxed limit will cause (1) annoyance and sleep deprivation; and (2) adverse health effects. Any such harm justifies more reasonable limits of 38 dBA, or at the highest, 40 dBA. OPSB argues that UNU seeks an "impact free" project, but 38-40 decibels of turbine noise is far from impact free. Nevertheless, OPSB's 44 dBA limit exposes over 200 nonparticipating homes to over 40 dBA (based on a count of the black dots within the red and green areas of the application, Plot 5). (Applic. Exh. O, Plot 5 (Supp. 16a)) This noise is a substantial threat.

A. OPSB's 44 dBA Noise Limit For Neighboring Homes Will Cause Harmful Annoyance And Sleep Deprivation.

OPSB's 44 dBA limit is contrary to everyone's testimony, especially that of Company expert David Hessler. Appellees are noticeably silent about Mr. Hessler's siting guide for wind turbines in Minnesota. They do not dispute that this guide's instructions call for a 40 dBA limit. Nor do they dispute that acousticians warn against noise increases over five dBA above the L90 background level, which calls for a 38 dBA limit here. Appellees also do not contest the findings of the World Health Organization ("WHO") that noise from 30 to 40 decibels leads to awakenings, body movements, arousals, and sleep disturbance.

Unable to dispute its own expert's views, Champaign Wind attacks (at 23) Eja Pedersen's study on turbine noise that Company witness Mundt used in his own testimony. That study concluded that "at sound category 37.5 to 40 dBA, 20% of the 40 respondents living within this exposure were very annoyed and above 40 dBA, 36% of the 25 respondents." (Mundt, Tr. 2942:19 - 2943:4, 2946:20 - 2947:2) This study supports UNU's position.

Nevertheless, OPSB opined that only 2% of the persons exposed to turbine noise of 40 to 45 dBA are bothered. (Cert. at 63 (Appx. 74)) OPSB based this conclusion on Mr. Hessler's interviews of a small number of neighbors of five wind projects in other states. (Co. Exh. 1, Application Exh. O, p. 29); Entry on Rehearing at 41 (Appx. 155)) However, Mr. Hessler cautioned that he "never set out with a design to obtain a representative number of responses to questions about whether they were bothered by turbine noise," because "[t]hat's an entirely different project and it is difficult to do." (Tr. 842:15-20 (Supp. 130)) He did not send questionnaires to find noise victims, because his work was "never intended to be an exhaustive study." (*Id.* at 841:22-842:3 (Supp. 129-30)) Mr. Hessler's cautions about his results were well taken, since his Minnesota siting guide warns that "relatively high" annoyance rates of 20 to 25% occur among persons exposed to turbine noise of 40 to 45 dBA. (Tr. 850 (Supp. 138))

OPSB argues (at 28) that it cannot use a 40 dBA limit in every case because it has to adapt to "new issues." But no one has identified any "new issues" justifying a higher limit for BW II than BW I. In fact, the community's background sounds have not increased since the sound survey in BW I. (James, Tr. 1180:2 - 1181:4 (Supp. 179-80))

Appellees also contend that few noise complaints have occurred at the two operating Ohio wind projects with similar limits. This point is not credible, since OPSB prevented UNU from subpoenaing the evidence necessary to test this premise.[3]

Nor is the complaint resolution process in Certificate Condition 48 a cure-all. Its last sentence provides that OPSB will act only on turbine noise above the limit. (UNU Appx. 100) This does nothing to address the noise problems resulting from the lenient limit itself.

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[3] Again displaying a double standard, OPSB struck the testimony of township trustee Milo Schaffner that he has received noise complaints from 14 families about one of these wind projects. (Tr. 1290-1291; UNU Exh. 21, A4)

B. OPSB's 44 dBA Noise Limit For Neighboring Homes Will Harm Health.

Dr. Punch's testimony that noise above 40 dBA causes health damage was not based on his own paper -- it was based on WHO's study. (UNU Exh. 23, A.24 (Supp. 476)) WHO found that "[a]dverse health effects are observed among the exposed population" from 40 to 55 dBA. (Punch, Tr. 1742:10-16 (Supp. 225)) While Appellees argue that 44 dBA is at the lower end of the harmful 40 to 55 dBA range, they cannot deny that health damage starts at 40 dBA.

WHO advises that a 55 dB interim target can be temporarily considered for "exceptional local situations," but warns that this level will not protect public health. (Punch, Tr. 1816:17-23, 1817:19 -1818:22 (Supp. 229-31)) Therefore, the undisputed evidence calls for a limit of 40 dBA to protect neighbors from adverse health effects.

Thus, it is not surprising that OPSB set a 40 dBA limit for BW I. OPSB alleges (at 22) that UNU's "extreme" limit would "virtually guarantee that no turbines would be constructed," but OPSB has sited 52 BW I turbines based on this standard. BW II should be sited consistently.

IV. OPSB Certificates Must Protect The Neighbors' Use Of Their Entire Property From Noise, Not Just Their Homes. [Related To Proposition of Law No. 7]

Champaign Wind contends (at 24) that no noise limit applies at the property lines.[4] OPSB's two-page diatribe (at 31-33) alleges that such limits would exclude turbines from the county and destroy its green energy agenda, but cites no record support for this rhetoric.

OPSB accuses (at 33) UNU of seeking property line limits only to protect its property development opportunities, arguing that OPSB can override UNU's property rights in order to promote green energy. However, excluding neighbors' yards, patios, gardens, barns, corrals,

[4] OPSB's brief states (at 33) that Condition 46 sets acceptable "outside" sound levels, but this condition refers to the 44 dBA limit applicable to the "exterior" of "sensitive receptors," i.e., the outside walls of occupied buildings.

and other land from noise limits deprives the neighbors of the enjoyment of their current activities. OPSB's policy sequesters neighbors inside their homes, where they must retreat in an attempt to escape turbine noise (where, unfortunately, its 44 dBA limit will not protect them).

Moreover, the neighbors have a legitimate basis for protecting their options to use their land for future beneficial purposes. The State has no authority to deprive them of their property rights for the sake of promoting EverPower's private development. The Court has made this principle abundantly clear. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶¶ 34, 43, 77-78 (noting that the rights to "acquire, use, enjoy, and dispose of property" are "integral aspects of our theory of democracy and notions of liberty"). The Court stated:

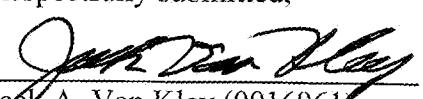
> After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like.

Id. at ¶ 77. OPSB's transfer of neighbors' property rights to EverPower offends this principle.

CONCLUSION

While OPSB portrays itself as the General Assembly's champion for promoting wind energy, the legislature has directed OPSB to approve only projects that meet protective statutory siting criteria rather than riding roughshod over the health, comfort, and property rights of more than 200 families in its obsession over wind energy. R.C. 4906.10(A). The Court should hold OPSB to its duty to protect the public.

Respectfully submitted,



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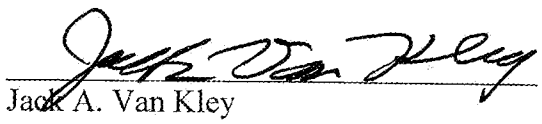

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