ORIGINAL

IN THE SUPREME COURT OF OHIO

Champaign County and Goshen, Union and Urbana Townships,	)	Case No. 2014-1210
Appellants,	)	
v.	)	**On Appeal from the Ohio Power Siting Board, Case No. 13-360-EL-BGA** *In the Matter of the Application of Buckeye Wind, LLC, to Amend its Certificate Issued in Case No. 08-666-EL-BGN*
Ohio Power Siting Board,	)	
Appellee.	)	

REPLY BRIEF OF APPELLANTS CHAMPAIGN COUNTY AND GOSHEN, UNION AND URBANA TOWNSHIPS

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I. REPLY ARGUMENT

A. FIRST PROPOSITION OF LAW:

The Ohio Power Siting Board's approval of Applicant's amendments in its Order of February 18, 2014 and its Order of May 19, 2014, without holding a required hearing was unreasonable and unlawful, as such amendments would result in a material increase in the environmental impact of the facility or a substantial change in the location of all or a portion of such facility.

1. Material Increase/Substantial Change

Both Intervening Appellee Buckeye Wind, LLC (Intervening Appellee) and Appellee Ohio Power Siting Board (Appellee OPSB) argue that the three amendments not heard would not be a "material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility" for a wind project as set forth in R.C. §4906.07(B). *Appellee OPSB's Brief pp. 15 and 16, and Intervening Appellee Brief, pp. 15-17, 19.* Specifically, they both argue that the use of the same staging area would significantly decrease the environmental impact. *Appellee OPSB's Brief pp. 15 and 16, and Intervening Appellee Brief, pp. 15-17, 19.* However, in arguing so, both appellees essentially contend that the amendment has a significant impact upon the Buckeye I wind project, but as positive impacts. *Appellee OPSB's Brief pp. 15 and 16, and Intervening Appellee Brief, pp. 15-17, 19.* Appellees, however, failed to consider the negative impacts as cited by Appellants Champaign County and Goshen, Union and Urbana Townships (Appellants). For example, Appellee OPSB states that the amendment regarding the staging area, along with other amendments create

> "important, practical synergies. The majority of the collection line system, all staging areas and the substation for the Buckeye I Wind Project will now share the same locations as . . . the Buckeye II Wind Project. These changes avoid redundant impacts that would result if the two projects were constructed and operated under the current certificates. Because these changes allow both projects to use the same substation and staging areas as

> well as the same location for the majority of the collection line systems, environmental and other impacts will be significantly reduced not increased."

Appellee OPSB's Brief pp. 15-16.

Appellee OPSB indicates that the "environmental benefits of these changes is **self-evident**" Appellee OPSB's Brief p. 16 (emphasis supplied). Unfortunately, there was no consideration of the impacts upon Champaign County due to traffic and road maintenance concerns. *See Entry of November 21, 2013, pp. 2-3.* As previously stated in their Merit Brief, Appellants contend that in utilizing the same staging areas for not one but two projects, essentially doubling the estimated turbines and construction traffic from 50+ turbines to 100+ turbines, there certainly are significant impacts which were not foreseeable in the approval of the original certificate (Buckeye I Wind Project) or in the Buckeye II Wind Project and, therefore, could not be addressed at that time. It is certainly reasonable, or perhaps self-evident, that there may be a material increase in the environmental impact on Champaign County as well as the facility if the construction staging area is used for both Buckeye I and Buckeye II at the same time, thereby aggregating the impacts considered in Buckeye I and Buckeye II. The aggregation of the two projects using the same staging areas is certainly a substantial change in the facility. The impacts of the aggregation should be explored through hearing and additional conditions imposed if necessary to protect the public.

The ALJ, in the entry of November 21, 2013, found "that none of the six proposed changes in the amendment application would result in a material increase in any environmental impact of the facility" and "that the following three proposed changes in the amendment application do not require a hearing under R.C. 4906.07(B), because

they do not result in a substantial change in the location of all or a portion of the facility: adjustments to the construction staging areas; modifications to four previously approved access roads; and the movement of the electric collection line system underground." *See Entry of November 21, 2013, pp. 2-3.* However, the ALJ gives no factual reasons for such conclusions. Further, Appellee OPSB bases its denial mainly upon the perceived failure of Appellants to file an interlocutory appeal, which is not mandatory but discretionary. *See Entry on Rehearing of May 19, 2014, p. 4.*

Although Applicant proposed relocating and moving some of the lines, not all were moved out of the public rights-of-way as Appellee OPSB incorrectly asserts, but are proposed to be buried. See Company Exhibit 2 (Supplement of Appellee OPSB). Interestingly, Intervening Appellee does not make the argument asserted by Appellee OPSB. As there are some lines within the rights-of-way proposed to be buried, the amendment is certainly relevant to Appellants and conditions should be set forth by Appellee OPSB or Appellants and the public may be harmed. There are no requirements for burying the electrical collection lines in the rights-of-way set forth by Appellee OPSB including, but not limited to: the depth of such lines, the media in which the lines will be encased, emergency procedures, *etc.* Certainly, a Road Use Maintenance Agreement ("RUMA") would be the proper document to address these concerns.

Unlike in the Buckeye II Wind Project and other projects subsequent to the Buckeye I Wind Project, there is no condition for the negotiation of a RUMA to the original Certificate. Certainly the manner in which access roads will abut the existing public rights-of-way is not addressed in the Certificate conditions and would materially increase the impact of the facility on Champaign County. Due to the lack of now

commonplace conditions such as the requirement of a RUMA, which is more expansive than the conditions set forth in Buckeye I, the amendments to Buckeye I not heard herein would materially increase the environmental impacts of the facility on Champaign County.

As stated previously, there is very little guidance as to what would be considered a "material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility" for a wind project. *R.C. §4906.07(B) and* See *In re Application of Buckeye Wind, LLC, (2012) 131 Ohio St.3d 449, 457.* The amendments not heard are clearly very substantial changes to the facility and will impact Champaign County which were not foreseeable at the hearings on the original certificate application held in November 2009. Therefore, the ALJ's finding that three of the amendments did not require a hearing, and the approval of finding by Appellee OPSB, was manifestly against the weight of the evidence. Further, the Order of the ALJ of November 21, 2013 and Appellee OPSB's Orders do not show in sufficient detail the facts in the record upon which the order is based and the reasoning followed.

2. Issues Ripe for Review

Appellee OPSB contends that the traffic and right of way concerns raised by Appellant regarding use of the same staging areas either were, or could have been resolved in the Buckeye Wind I case and, therefore, are *res judicata*. Appellee OPSB's Brief p. 26. Appellants are unable to understand how the County and Townships could have argued that the use of the same staging areas in two wind projects could have been raised in the first project when the second project had not been filed nor was even known

to Appellants at that time. Appellee OPSB also argues that, had the building of two projects using the same staging areas been a concern to the Appellant, "it should have been raised during the Buckeye Wind II case" Appellee OPSB's Brief p. 19. However, at the time of the Buckeye II wind case, there was no indication that the staging areas would be the same for both projects, as that is one of the amendments herein. Therefore, it is certainly an issue ripe for review and not *res judicata.*

B. SECOND PROPOSITION OF LAW:

The Ohio Power Siting Board's approval of the amendments in its Order of February 18, 2014 and its Order of May 19, 2014, without hearing was unreasonable and unlawful, as it denied Appellants County and Townships the only opportunity to be heard.

1. Scope of Hearing

The scope of the hearing held on January 6, 2014 was for hearing on three amendments, the remaining three amendments had previously been found not to be issues for hearing by the Administrative Law Judge. See Entry of November 21, 2013, pp. 2-3. Intervening Appellee incorrectly states that Appellant did not contest the scope of the hearing by applying for rehearing. Intervening Appellee's Brief, p. 5. Application for Rehearing was filed by Appellant on March 20, 2014. See Application for Rehearing by Appellants Champaign County and Goshen, Union and Urbana Townships filed March 20, 2014 and Entry on Rehearing denying the application filed by Appellants of May 19, 2014.

Further, interlocutory appeal of the ALJ's procedural ruling, pursuant to OAC 4906-7-15, is certainly a discretionary appeal. *See OAC 4906-7-15*. The rule sets forth

that if the party adversely affected by a ruling elects not to take an interlocutory appeal on a ruling under OAC 4906-7-14, the party may still raise the propriety of the ruling as an issue for the OPSB's consideration in its initial brief or any other appropriate filing, such as an application for rehearing. *See OAC 4906-7-15(F).*

In their Application for Rehearing before the OPSB and their Merit Brief herein, Appellants indicate that they have pertinent information regarding the amendments not heard by Appellee OPSB. Certainly, due to these amendments, the Champaign County Sheriff and the Champaign County Engineer would have testimony regarding traffic safety and right-of-way concerns not present in the Project originally and opinions as to conditions to minimize the negative impacts on the public. Further, there are other township, county and city officials who would have relevant testimony regarding the significant positive and negative effects of the amendments not heard herein. Unfortunately, with the OPSB approving the amendments without hearing by its Order of February 18, 2014 and May 19, 2014, the Boards have been denied any opportunity to present evidence on such amendments and, therefore, have been denied due process.

A due process requirement recognized by this Court is the opportunity to confront and cross-examine witnesses, even before an administrative tribunal. *See Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn. (1994), 68 Ohio St.3d 175, 624 N.E.2d 1043.* Unfortunately, by the failure of Appellee OPSB to even hear the three amendments, due process has been denied. As such, there is an appearance that, without the benefit of hearing, Appellee OPSB has "rubber stamped" amendments requested by Intervening Appellee which impact Champaign County.

2. Right to Appeal

Intervening Appellee argues that the Appellants forfeited the right to appeal as Appellants did not complain about the scope of the hearing until March 20, 2014. *Intervening Appellee's Brief, pp. 10-11.* The scope of the hearing was set by the ALJ in the Entry of November 21, 2013, not Appellee OPSB. Appellee OPSB did not review the matter and decide until March 2014 and could have remanded for hearing the three amendments not heard at that time. Contrary to Intervening Appellee's assertion, Appellee OPSB had the opportunity to cure any error when it reasonably could have. *Intervening Appellee's Brief, pp. 10-11.* The cases cited by Intervening Appellee should be distinguished from the circumstances at hand as the cases cited did deprive the administrative tribunal of an opportunity to cure the error, such as objection to notice requirements for a hearing had, *etc. See Ohio Consumers' Counsel v. Pub. Util. Comm., 127 Ohio St. 3d 524, 527-28 (2010), Parma v. Pub. Util. Comm., 86 Ohio St.3d 144, 148 (1999).* Here, the scope of the hearing held did not include the three amendments not heard and further hearing could be easily held on these amendments. Certainly, the hearing on those additional amendments, whether it was done at the same time as the hearing held on January 6, 2014 or sometime thereafter, would have entailed additional time for testimony and presentation of exhibits and Appellants would have had the opportunity to be heard on those amendments.

II. CONCLUSION

Accordingly, Appellants County and Townships continue to pray that Appellee OPSB's Orders of February 18, 2014 and May 19, 2014 are unlawful and unreasonable

and, therefore, be reversed. This Honorable Court should remand the Orders to the Ohio Power Siting Board for further hearing to rectify the errors as identified herein.

Respectfully submitted,

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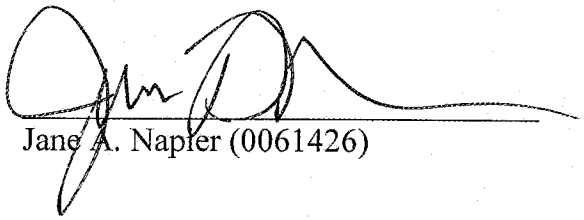

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