

**BEFORE  
THE OHIO POWER SITING BOARD**

**In the Matter of the Application of  
Buckeye Wind, LLC, for a Certificate  
to Install Numerous Electricity  
Generating Wind Turbines in  
Champaign County to be Collected at  
an Electrical Substation in  
Union Township,  
Champaign County, Ohio** ) ) ) ) ) ) ) ) ) )  
Case No. **08-0666-EL-BGN**

**In the Matter of the Application  
of Buckeye Wind LLC to Amend its  
Certificate Issued in  
Case No. 08-666-EL-BGN** ) ) ) ) ) ) ) ) ) )  
Case No. **13-360-EL-BGA**

**MOTION FOR EXTENSION OF CERTIFICATE**

Buckeye Wind LLC (“Buckeye Wind”), for good cause shown, respectfully requests that the Ohio Power Siting Board (the “Board”) extend its Certificate of Environmental Compatibility and Public Need (the “Certificate”) for the Buckeye I Wind Project from March 22, 2015 to May 28, 2018. Buckeye Wind has good cause for seeking this extension for many reasons including a two-year delay caused by intervenor appeals to the Supreme Court of Ohio and ongoing litigation related to the Incidental Take Permit that is necessary for Buckeye Wind to construct this project. Even the Buckeye II Wind Project is subject to ongoing litigation, with another appeal by the same intervenors pending before the Supreme Court of Ohio. This litigation coupled with Buckeye Wind’s progress in continuing to develop this project warrant an extension of its Certificate. The sought extension aligns the Buckeye I Wind Project with the Buckeye II Wind Project, projects that will share the same construction laydown yards, the same substation and multiple collection line locations. Buckeye Wind therefore, for good cause

shown, respectfully requests that the Board extend its Certificate from March 22, 2015 to May 28, 2018. The reasons supporting this motion are set forth in the accompanying Memorandum.

Respectfully submitted,

s/ Michael J. Settineri

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## MEMORANDUM IN SUPPORT OF MOTION TO EXTEND

### **I. INTRODUCTION**

Through this motion, Buckeye Wind LLC (“Buckeye Wind”) seeks to extend its Certificate of Environmental Compatibility and Public Need granted by the Ohio Power Siting Board (the “Board”) in Case No. 08-0666-EL-BGN (the “Certificate”) from March 22, 2015 to May 28, 2015. The Certificate authorized Buckeye Wind to construct a wind-powered electric generation facility consisting in part of 54 wind turbines, access roads, an electric substation, and an electric collection system (the “Buckeye I Wind Project”) with construction to commence no later than March 22, 2015.

Buckeye Wind’s request for extension is supported by good cause. The primary delay to this project has been ongoing litigation that has hindered Buckeye Wind’s ability to commence construction of the Buckeye I Wind Project. Intervenors appealed the Certificate to the Supreme Court of Ohio and the Court did not issue a decision until March 6, 2012. Likewise, Union Neighbors United (“UNU”) is now challenging the U.S. Fish & Wildlife Service (“USFWS”) issuance of the incidental take permit (“ITP”) for the Buckeye I Wind Project in the District of Columbia Circuit. UNU is also challenging the certificate issued for the Buckeye II Wind Project, a project that would share components with the Buckeye I Wind Project. This litigation, outside the control of Buckeye Wind, has hampered Buckeye Wind’s ability to move forward with construction of the project.

Although litigation has delayed progress, Buckeye Wind continues its efforts to develop the project. Buckeye Wind obtained the first ITP for a wind farm in Ohio on or about July 17-18, 2013 from the USFWS. Buckeye Wind has improved the project design by amending the project to relocate collection lines from above-ground to underground, and to locations that will be shared by the Buckeye II Wind Project, certificated in Case No. 12-0160-EL-BGN. Buckeye

Wind has also continued to pursue its interconnect to the PJM regional transmission grid. All of these steps show a commitment by Buckeye Wind to develop the project and support the extension. Considering the delays caused by litigation, good cause exists to extend Buckeye Wind's Certificate to the same date that exists for the Buckeye Wind II Project certificate, May 28, 2018.

## **II. BACKGROUND**

On March 22, 2010, the Board approved the application for the Buckeye I Wind Project and granted the Certificate. The Board imposed several conditions in the Certificate, including a condition that Buckeye Wind implement a habitat conservation plan ("HCP") and obtain an ITP related to the potential presence of Indiana bats. The Board's conditions also required Buckeye Wind to implement "... all avoidance, minimization, and mitigation measures to protect the Indiana bat that [were] identified in [the] HCP and ITP..."<sup>1</sup> The Board also ordered that the "... certificate shall become invalid if Buckeye has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate." *In re: Buckeye Wind LLC*, Opinion, Order and Certificate dated March 22, 2010 at page 92.

Intervenors filed applications for rehearing with the Board on or around April 20, 2010. The Board denied the intervenors' applications for rehearing on July 15, 2010. The intervenors then appealed the Certificate to the Supreme Court of Ohio on or around September 13, 2010. Almost a year and a half later, on March 6, 2012, the Court affirmed the Board's decision in full. This litigation imposed a two-year delay on the project considering that the Board issued the Certificate in March 2010.

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<sup>1</sup> See Conclusions and Conditions numbers 16 and 17 as contained on page 87 of the Certificate.

While the Supreme Court appeal was pending, Buckeye Wind proceeded to develop a HCP and sought an ITP under the Endangered Species Act<sup>2</sup> from the USFWS. On or about July 17-18, 2013 the USFWS approved the HCP and issued the ITP. UNU, however, intervened and appealed the issuance of the ITP to the U.S. Court of Appeals – D.C. Circuit, Case No. 1:13cv1435 (the “ITP Appeal”). The ITP Appeal has hindered Buckeye Wind’s ability to finalize plans for the Buckeye I Wind Project and commence construction.

Following the Board’s issuance of the Certificate, Champaign Wind LLC (“Champaign Wind”), another subsidiary of EverPower Wind Holdings, Inc., submitted an application to the Board on May 15, 2012, Case No. 12-0160-EL-BGN, for a 56 wind turbine project (the “Buckeye II Wind Project”), which is located proximate to the Buckeye I Wind Project. The Board issued an Opinion, Order and Certificate in regards to the Buckeye II Wind Project on May 28, 2013; however, intervenors appealed the Board’s decision to approve the Buckeye II Wind Project to the Supreme Court of Ohio, Case No. 13-1874. That appeal is currently ongoing and the Court has yet to render a decision or set oral arguments. Pursuant to the Buckeye II Wind Project’s certificate, Champaign Wind must commence construction of the Buckeye II Wind Project prior to May 28, 2018.

On March 19, 2013, the Buckeye Wind submitted an application to amend its Certificate for the Buckeye I Wind Project, in Case No. 13-360-EL-BGA (the “Amendment”). In its Amendment, Buckeye Wind proposed to change the Buckeye I Wind Project’s collection line design, the location and size of two construction staging areas, the location of four of the access roads, the addition of a new access road, and the relocation of the electric substation.

The Amendment presented significant design improvements. For example, Forty (40) miles of above-ground collection lines would be converted to underground collection lines,

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<sup>2</sup> See 16 U.S.C. § 1531 *et seq.*

thereby eliminating poles and above-ground wires, and reducing the total collection line distance from approximately sixty-five (65) miles to forty-two (42) miles. Further, the Amendment sought to abandon Buckeye I Wind Project's initially proposed electric substation location and instead utilize the same electric substation location used by the Buckeye II Wind Project. The modifications proposed in the Amendment were a significant design improvement.

On February 18, 2014, the Board issued an Order on Certificate Amendment approving the Amendment subject to the conditions set forth in the Certificate. Certain intervenors filed an application for rehearing on March 20, 2014 disputing the issuance of the Amendment. On May 19, 2014, the Board denied intervenors' application for rehearing; however, Buckeye Wind expects the intervenors to file an appeal disputing the Amendment with the Supreme Court of Ohio.

### **III. GOOD CAUSE EXISTS FOR GRANTING THE EXTENSION**

Buckeye Wind's extension request is consistent with other certificate extension requests, which the Board has routinely granted for good cause shown. *See e.g. In re; FDS Coke Plant, LLC*, Case No. 07-703-EL-BGN, Entry dated Sept. 30, 2013 (approving extension for reasons outside control of applicant) *and see In re: American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN, Entry dated Dec. 17, 2012 (approving extension to allow for alternate design consideration). As discussed below, ongoing litigation delays coupled with Buckeye Wind's continued course of development of this project support its request for extension to May 28, 2018. Buckeye Wind proposes that date because construction must commence on the Buckeye II Wind Project by May 28, 2018 and because the Buckeye I Wind Project, as amended, will be able to utilize the electric substation, laydown yards and many of the underground transmission lines that are part of the Buckeye II Wind Project.

***The ITP Appeal has caused delay that is beyond Buckeye Wind's control***

The Board imposed several conditions in the Certificate that Buckeye Wind must follow prior to and during the construction of the Buckeye I Wind Project. Conditions 16 and 17 of the Certificate require Buckeye Wind to develop an HCP, obtain the associated ITP, and thereafter implement all avoidance, minimization, and mitigation measures identified therein to protect the endangered Indiana bat. While Buckeye Wind pursued and received approval of the HCP and the issuance of an ITP, UNU is now appealing that permit issuance to the U.S. Court of Appeals – D.C. Circuit. As a practical matter, Buckeye Wind cannot commence construction until the ITP Appeal is resolved, which is unlikely to occur prior to March 22, 2015. Any change to or reversal of the ITP could result in significant changes to the HCP and an amendment to the ITP. Even if the ITP Appeal is resolved prior to March 22, 2015, which is unlikely, Buckeye Wind would not have enough time to obtain the necessary financing and to complete the necessary planning that accompanies substantial engineering projects on the magnitude of the Buckeye I Wind Project. Buckeye Wind's pursuit of the HCP approval and ITP demonstrate a continued course of development and support the extension. The ITP Appeal, however, is a matter outside the control of Buckeye Wind and further supports an entry extending Buckeye Wind's Certificate

***Other litigation initiated by intervenors has caused delay that is beyond Buckeye Wind's control***

In addition to the ITP Appeal, intervenors have litigated the Buckeye I Wind Project before the Board and before the Supreme Court of Ohio. After the Board issued the Certificate on March, 22, 2010, intervenors appealed the Buckeye I Wind Project Certificate to the Supreme Court of Ohio on or around September 13, 2010. That litigation was not resolved until March 6, 2012, imposing a two-year delay on the project.

Intervenors are also opposing the Buckeye II Wind Project before the Supreme Court of Ohio. As discussed above, the Buckeye I Wind Project was amended to allow it to share the same locations for components of the Buckeye II Wind Project. If constructed at the same time, both projects can utilize the same electric substation and construction laydown yards. Intervenors, however, are now appealing the Board's decision to approve the Buckeye II Wind Project to the Supreme Court of Ohio, an appeal which has a direct impact on Buckeye Wind's ability to construct both projects simultaneously. Extending the Buckeye I Wind Project Certificate to match the Buckeye II Wind Project certificate will allow both projects to be built simultaneously once all legal challenges to both projects have been resolved.

***The Intervenors' challenge to the Buckeye I Wind Project amendment added further delay to Buckeye Wind's ability to commence construction of the Buckeye I Wind Project, and the Amendment may still be appealed to the Supreme Court***

Buckeye Wind improved the Buckeye I Wind Project's design through the Amendment. As detailed above, the design modifications approved by the Board decrease surface impact by utilizing a single electric substation for both projects and improve the project design by shifting above-ground collection lines to under-ground collection lines to be located primarily on privately leased lands. Buckeye Wind filed its application for the Amendment on March 19, 2013. Intervenors challenged the application and the Board did not approve the Amendment until almost one year later, on February 18, 2014. It is now July 2014, and Buckeye Wind expects the intervenors to appeal the Board's decision to grant the Amendment to the Supreme Court of Ohio, resulting in another appeal with no date certain for resolution. If the Amendment is appealed to the Ohio Supreme Court, Buckeye Wind will be left with even less time to commence construction and it is likely that such appeal will not be resolved prior to March 22, 2015, the current date by which construction must commence with regard to the Buckeye I Wind Project. Like the ITP Appeal and litigation on the initial Certificate, the delay to obtain the



Amendment was caused by litigation outside of Buckeye Wind's control, and further supports an extension of the Certificate to May 28, 2018.

***Buckeye Wind has continued to show a commitment to developing and constructing the Buckeye I Wind Project***

Buckeye Wind's actions in continuing to work on the Buckeye I Wind Project also support an extension of the Certificate. Buckeye Wind spent over two years working closely with the USFWS and Ohio Department of Natural Resources to obtain the first ITP for a wind farm project in Ohio. Regardless that the ITP is now under appeal, Buckeye Wind spent considerable time and resources obtaining the ITP, a necessary permit required before Buckeye Wind can start any construction on the Buckeye I Wind Project.

Buckeye Wind has also continued to spend time and resources on its PJM interconnect application. Buckeye Wind has committed considerable expense to develop the PJM interconnect, and has executed a PJM Facility Study Agreement. PJM recently completed its facility study for the interconnect and Buckeye Wind is currently reviewing the results of that study.

#### **IV. CONCLUSION**

Although Buckeye Wind continues to work diligently to develop the Buckeye I Wind Project, the delays incurred as a result of litigation have delayed Buckeye Wind's ability to construct the project. Further, unresolved litigation continues to hamper Buckeye Wind's efforts to commence construction of the Buckeye I Wind Project. While Buckeye Wind must commence construction of the Buckeye I Wind Project by March 22, 2015, it is uncertain whether the ITP Appeal and the Buckeye II Wind Project court appeal will be resolved by that date. As well, an appeal of the Buckeye I Wind Project Amendment will simply add further delay to the project. Even if the appeals are resolved prior to March 22, 2015, Buckeye Wind

will be left with insufficient time to finalize financing, develop final engineering plans, complete engineering, obtain procurement and construction contracts, and review plans with Staff, all required before construction can commence. Therefore, good cause exists to extend the Buckeye I Wind Project's Certificate, especially considering that the Buckeye II Wind Project is proposed in the same general area as the Buckeye I Wind Project with a certificate expiration date of May 28, 2018.

Respectfully submitted,

s/ Michael J. Settineri

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served upon the following parties of record via U.S. Mail and via electronic mail on this 14th day of July, 2014.

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Summary: Motion to Extend Certificate electronically filed by Mr. Michael J. Settineri on behalf of Buckeye Wind LLC