

ORIGINAL

IN THE SUPREME COURT OF OHIO

*In the Matter of the Application of* : Case No. 2014-1210  
*Buckeye Wind, LLC to Amend its* :  
*Certificate Issued in Case No. 08-666-* : Appeal from the  
*EL-BGN* : Ohio Power Siting Board,  
: Case No. 13-360-EL-BGA

MERIT BRIEF  
OF INTERVENING APPELLEE BUCKEYE WIND LLC

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<sup>1</sup> Intervening Appellee Buckeye Wind LLC is not submitting an Appendix but notes that orders from which this appeal arises are included in Appellants' Appendix (filed Oct. 14, 2014) and relevant statutes and rules are included in the Appendix of Appellee The Public Utilities Commission of Ohio (filed Nov. 12, 2014). Intervening Appellee is filing separately a Supplement in which all relevant documents may be found.

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## INTRODUCTION

Before the Court is Appellants' untimely, unsupported and untenable claim that three amendments to an approved wind farm certificate were improperly granted without a hearing. This appeal should be dismissed because Appellants have forfeited their right to appeal, because Appellants do not present this Court with any evidence or even relevant record citations, and because the Ohio Power Siting Board's relevant orders were reasonably and lawfully supported by the evidence.

Appellants forfeited their claim that the hearing improperly excluded three requested amendments. Appellants made no such claim before or at the hearing. Indeed, they repeatedly chose not to challenge the hearing scope or evidence until months after the hearing concluded – when it was too late to correct any alleged error. Therefore, they have forfeited the right to this appeal.

This appeal also lacks any required, relevant support. Although Appellants attack the Ohio Power Siting Board's factual findings here, Appellants offer no evidence whatsoever and do not once cite any part of the record in support of their arguments. For this reason, too, their appeal fails.

Finally, the reality is that the record fully supports the Board's factual determination that the three amendments did not require a hearing. The record is replete with ample evidence that the three amendments were an indisputable improvement in the project that reduced its scope and impact and that will not result in a material environmental impact or a substantial change in all or a portion of the facility. Upon the record, the Board's factual findings and orders should be affirmed.

Therefore, because Appellants have forfeited their right to appeal, because Appellants do not present this Court with any relevant evidence or record citations, and because the challenged orders were reasonably and lawfully supported by some evidence, this appeal should be dismissed and the Board's orders should be affirmed.

### **STATEMENT OF FACTS AND SUMMARY OF THE PROCEEDINGS**

#### **A. The 2010 Buckeye I Certificate Was Issued And Affirmed After Full And Fair Hearing.**

Buckeye Wind LLC's ("Buckeye Wind's") application to construct the Buckeye Wind Farm ("Buckeye I") in Champaign County was approved in the Ohio Power Siting Board's ("Board") March 22, 2010 Opinion, Order and Certificate ("Certificate"). (*In re Application of Buckeye Wind LLC*, OPSB No. 08-666-EL-BGN, Mar. 22, 2010 Opinion, Order, and Certificate at 82-101 [BW Supp. 86-105].)<sup>2</sup> That approval followed a hearing in which three dozen witnesses offered testimony over more than two weeks. (*Id.* at 3-4 [BW Supp. 7-8].)

On appeal, this Court recognized the thoroughness of the Board's review process and affirmed the Board's approval of the Buckeye I Wind Farm project over the objections of the same Appellants here. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449 ¶ 31, 2012-Ohio-878.

#### **B. Buckeye Wind's 2013 Amendment Application Sought To Improve The Buckeye I Wind Farm's Design.**

After the Buckeye I Certificate was issued, Buckeye Wind acquired leases from another developer on land near and within the Buckeye I project area. (Testimony of Michael Speerschneider ("Co. Ex. 1") at 3, ¶ A.6 [BW Supp. 186]; *In re Application of*

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<sup>2</sup> Citations to "BW Supp." are to the *Supplement to Merit Brief of Intervening Appellee Buckeye Wind LLC* being filed contemporaneous with this brief.

*Buckeye Wind LLC to Amend its Certificate*, OPSB No. 13-360-EL-BGA (“*In re Buckeye I Amendment*”), Mar. 19, 2013 Application to Amend (“Co. Ex. 2”) at 2 [BW Supp. 107].)

Also, in May 2012, Buckeye Wind’s affiliate Champaign Wind LLC applied for a certificate for the Buckeye II Wind Farm to be located in the same general area as the Buckeye I Wind Farm. *In re Application of Champaign Wind LLC*, OPSB No. 12-160-EL-BGN (3/28/13). Those two developments created opportunities for Buckeye Wind to improve and reduce the impacts of the Buckeye I wind farm on the environment and the community. (Co. Ex. 2 at 2 [BW Supp. 107], Co. Ex. 1 at 3-4 ¶ A.6 [BW Supp. 186-87].)

On March 19, 2013, Buckeye filed an Application to Amend the Buckeye I Certificate (“Application”). (*In re Application of Buckeye Wind Amendment*, Application (“Co. Ex. 2”) at 2-3 & 54 [BW Supp. 107-08 & 159]; *In re Application of Buckeye Wind Amendment*, Feb. 18, 2014 Order on Certificate Amendment (“Certificate Amendment”) at 2 [BW Supp. 220].) The requested amendments did not change the number or location of any turbines. (Certificate Amendment at 5 [BW Supp. 223]; Co. Ex. 2 at 2 [BW Supp. 107].) Rather, by six amendments, Buckeye sought to improve and reduce the scope and impact of the Buckeye I project: to construct one new access road, to relocate the substation on the same parcel as already approved and to the same location as the Buckeye II substation, to relocate three construction staging areas to the same location as the Buckeye II staging areas, to relocate four existing access roads, and to reduce and bury many of the collection lines for the project. (Certificate Amendment at 2, 4 & 5 [BW Supp. 220 & 222-23]; *In re Application of Buckeye Wind Amendment*, Dec. 23, 2013 Direct Testimony of Michael Speerschneider (“Co. Ex. 1”) at 2-5 [BW Supp. 185-88]; *In re Application of Buckeye Wind Amendment*, Nov. 1, 2013

Staff Investigation Report and Recommendation ("Staff Ex. 1") at 1-2 [BW Supp.162-63].)

Buckeye sought waivers of certain application requirements that were not applicable to these modest amendments. (Renewed Mot. For Waiver, filed 3/19/13, ICN Rec. No. 3.) Although Appellants sought some information not relevant here<sup>3</sup>, they generally did not oppose the request for waivers. (Memo Contra at 1, filed 3/29/13, ICN Rec. No. 47) In relevant part, the Board Staff did not object to the requested waivers.<sup>4</sup> (Memorandum Letter at 2, 7/2/13, ICN Rec. No.57)

As required, the Staff also investigated the Application. When that investigation was complete, the Staff issued its Investigation Report and Recommendation ("Staff Report") on November 1, 2013. (Staff Ex. 1 [BW Supp. 162-68].) The Staff Report observed that the amended staging areas, substation and most of the amended collection line routes would be in the same location as those already found reasonable in the Buckeye II case. (Staff Ex. 1 at 6 [BW Supp. 167].) The Staff also analyzed the access road adjustments and the few miles of collection line adjustments that did not share the same location as Buckeye II's collection lines, finding little or no impact from the proposed changes. (*Id.*) The Staff Report recommended that the Application be approved. (Staff Ex. 1 at 7 [BW Supp. 168].)

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<sup>3</sup> Appellants wanted the Application to address plans for additional turbines, noise levels, insurance, public information and potential impacts on public services, facilities, roads and bridges. (Memo Contra at 2-3, ¶¶ 1 & 2(i)-(iii), ICN Rec. No. 47.)

<sup>4</sup> The Staff did recommend that Buckeye be required to state any future plans to add turbines to the project. (Staff Ex. 1 at 1 [BW Supp. 162].) This non-issue was mooted when Buckeye thereafter confirmed that "it had no plans to propose additional wind turbines for the certificated Buckeye I or Buckeye II projects." (*Id.*)

**C. The Board Found That Three Amendments Need No Hearing.**

On November 21, 2014, the Board, by its Administrative Law Judge, granted Buckeye Wind's Motion for Waivers, subject to the conditions stated in the Staff Report. (*In re Application of Buckeye Wind Amendment*, Nov. 21, 2013 Entry ("Prehearing Entry") [BW Supp. 169-83].) At the same time, the Board set the schedule and scope for a hearing. (*Id.* at 3 ¶ 6 [BW Supp. 171].) Considering that proposed amendments require a hearing only if they will result in a material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility, R.C. 4906.07(B), the Board found that the amendments to the staging areas, four access roads and collection line routes did not require a hearing. (Prehearing Entry at 1-3, ¶¶ 3-5 [BW Supp. 169-71].) A hearing was scheduled for January 6, 2014 on three additional amendments that are not within this appeal. (*Id.* at 3 ¶¶ 5-6 [BW Supp. 171].)

Thereafter, Buckeye Wind withdrew one of the proposed amendments scheduled for hearing – a proposal to relocate the Western construction staging area for the project.

**D. Appellants Did Not Contest The Scope Of The Scheduled Hearing.**

When the Board scheduled a hearing that did not include the three amendments at issue here, Appellants did not object, apply for rehearing or take an interlocutory appeal.

As the scheduled hearing date drew closer, Buckeye pre-filed the written direct testimony of Mr. Michael Speerschneider. (Co. Ex. 1 [BW Supp. 184-91].) Among other things, that testimony explained that the amendments would "result in significantly less impact on the environment and the local community" by sharing "the same

locations as the collection line system, staging areas and substation for the Buckeye II Wind Farm...." (Co. Ex. 1 at 3-4, ¶ A.6 [BW Supp. 186-87].)

Appellants did not move to bar, strike or even limit that testimony before the hearing. Nor did Appellants file or try to file any testimony of their own on any of the amendments. (*In re Application of Buckeye Wind Amendment*, Jan. 6, 2014 Hr'g Tr. ("TR") at 23:14-18 [BW Supp. 214].)

**E. Appellants Agreed To Or Acquiesced In The Scope Of The Hearing And Evidence.**

On January 6, 2014, Buckeye Wind's Application was called for hearing. (TR at 6 [BW Supp. 196].) At the hearing, Appellants had numerous chances to object to the proceedings or evidence being introduced but did not once object or complain.

First, before taking evidence, the ALJ asked all parties "is there anything anyone wants to raise prior to us going forward?" (TR at 7:4-6 [BW Supp. 198].) Appellants declined, telling the ALJ they had "[n]othing, Your Honor." (*Id.* at 11:19-20 [BW Supp. 202] (emphasis added).)<sup>5</sup>

Second, Appellants declined to examine Buckeye Wind's witness or evidence. Buckeye introduced the testimony of Mr. Speerschneider who testified as follows:

**The proposed amendment as a whole, will result in significantly less impact on the environment and the local community, primarily as a**

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<sup>5</sup> Non-appealing intervenors made a formal objection to the scope of the hearing regarding collection lines but explained that they were "not as much concerned about the locations of the lines as about whether the installation of those lines is going to cut through the roads in the community." (*Id.* at 8:23-9:24 [BW Supp. 199-200] (seeking decision that collection lines would be installed using directional drilling).) In response, Buckeye argued that the collection line amendments did not involve a substantial change in the location of part of the facility. (*Id.* at 10:22-11:15 [BW Supp. 201].) Non-intervenors' motion to expand the scope of the hearing to address collection line drilling was denied. (*Id.* at 11:21-22 [BW Supp. 202].) Non-intervenors have not appealed the Board's Order.

**result of eliminating overhead collection lines in favor of underground lines.** For example, the proposed amendment converts approximately 40 miles of overhead collection lines to underground collection lines, eliminating poles and above-ground wires. Just as important, the total collection line distance has been reduced from approximately 65 miles to 42 miles. **These changes are significant design improvements, which Buckeye Wind was able to accomplish by obtaining additional property rights.**

Another benefit of the proposed design is that the **majority of the collection line system, all staging areas and the substation for the Buckeye I Wind Farm (Case No. 08-666-EL-BGN) will now share the same locations as the collection line system, staging areas and substation for the Buckeye II Wind Farm (Case No. 12-160-EL-BGN).** This design change **avoids redundant impacts that would result if the Buckeye I Wind Farm and Buckeye II Wind Farm were constructed and operated as proposed under the current certificates.** Instead, under the new design as proposed in the amendment, both projects can utilize the same substation and staging areas as well as the same locations for the majority of the collection line systems.

(TR at 12:25-14:11 [BW Supp. 203-05] & Co. Ex. 1 at 3-4 ¶ A.6 [BW Supp. 186-87]

(emphasis added).) When asked to cross-examine Mr. Speerschneider, **Appellants declined, saying they had "no questions...."** (*Id.* 14:17-18 [BW Supp. 205]

(emphasis added).)

Third, Appellants allowed Buckeye Wind's evidence into the record. After a direct examination, Buckeye moved Mr. Speerschneider's direct testimony (Ex. 1) and Buckeye Wind's Application (Ex. 2) into the record. (TR at 12:4-16 & 15:4-6 [BW Supp. 203 & 206].) **Appellants did not object.** (*Id.* 15:7-9 [BW Supp. 206].)

Fourth, Appellants permitted the Staff to introduce the Staff Report into the record. In the hearing, the Staff Report was adopted, sponsored and introduced in the record. (TR at 16:16-23 & 23:3-5 [BW Supp. 207 & 214].) Once again, **Appellants declined to object.** (*Id.* 23:6-7 [BW Supp. 214].)

Finally, before adjourning the hearing, the ALJ gave Appellants one final chance to speak about "anything further" but they said nothing. (TR at 23:14-18 [BW Supp. 214].)

**F. The Board Issued an Order Amending The Certificate.**

On a record with ample evidence supporting the Application and showing Appellants' agreement with, or at least acquiescence in, the proceedings and the record, the Board issued an Order on Certificate Amendment on February 18, 2014. (Certificate Amendment [BW Supp. 219-31].) In the Order, after explaining and examining the history of the proceedings, issues raised, and relevant record, the Board found that the ALJ had reasonably and lawfully determined that a hearing was not required on the Amendments to the collection lines, the staging areas and the four existing access roads. (Certificate Amendment at 8-10 & 11 ¶¶ 7 [BW Supp. 226-28 & 229].) The Board found and held that Buckeye Wind's Application should be approved and that Buckeye Wind's Certificate be amended. (Certificate Amendment at 10 & 12 ¶¶ 13-14 [BW Supp. 228 & 230].)

**G. Appellants' Untimely Objection To The Scope Of The Hearing.**

On March 20, 2014, Appellants filed an Application for Rehearing ("RehApp") with the Board, alleging that the Certificate Amendment was unlawful or unreasonable. (RehApp at 2 [BW Supp. 232-40].) Tellingly, the RehApp did not challenge or question the Board's finding that Certificate should be amended to allow a new access road and to move the substation. (*In re Application of Buckeye Wind Amendment*, May 19, 2014 Entry on Rehearing ("Rehearing Entry") at ¶¶ 9, 12, 14, 16 & 18 [BW Supp. 243-47].) Instead, Appellants made the unsupported suggestion that the amendments of the collection lines, the two staging areas and the existing access roads should have been

subject to hearing because they might somehow result in some environmental impact or a unspecified substantial change in the location of a portion of the facility. (RehApp at 4-6 [BW Supp. 235-37].) Appellants also claimed that they had been denied their due process right to be heard as to those three Amendments. (*Id.* at 6-7 [BW Supp. 237-38].)

The Board denied the RehApp by Entry of May 19, 2014 (“Rehearing Entry”). (Rehearing Entry [BW Supp. 241-49].) Although the Appellants alleged errors only vaguely, the Board thoroughly parsed and rejected the unsupported arguments in the RehApp. (*Id.*, ¶¶ 12-19 [BW Supp. 243-48].) The Board repeatedly found that Appellants had never objected to the scope of the hearing and had never offered any evidence supporting their claims that the three amendments might require a hearing. (See, e.g., *id.* ¶¶ 13, 15, 17 & 19 [BW Supp. 244-48].) In any event, the Board also identified and explained how the record fully supported the ALJ's rulings and the Board's Order. (*Id.*)

#### **H. Appellants' Appeal To This Court.**

The Appellants filed their Notice of Appeal on July 16, 2014. (*In re Application of Buckeye Wind Amendment*, July 16, 2014 Notice of Appeal [BW Supp. 250-54].) In the Notice of Appeal, Appellants allege two errors by the Board. (*Id.* at 2 [BW Supp. 251].) First, Appellants argue that the Board's approval of the three amendments without holding a hearing was unreasonable and unlawful, claiming that 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. (*Id.* at 2, ¶ A [BW Supp. 251].) Second, Appellants argue that approving the three amendments without

holding a hearing denied Appellants "the only opportunity to be heard." (*Id.* at 2, ¶ B [BW Supp. 251].)

The record was transmitted to this Court on August 15, 2014.

After taking an extension of time, Appellants filed their Merit Brief in this Court on October 14, 2014. Appellants' Merit Brief does not include citations to the record. Also, Appellants' Merit Brief includes an undesignated Appendix which is missing Appellants' Notice of Appeal, Appellants' Application for Rehearing and copies of relevant rules, statutes and constitutional provisions. See S.Ct.Prac.R.16(B)(5)(a) & (e)-(g).

Appellants did not file a Supplement.

## ARGUMENT

### A. **The Appeal Should Be Dismissed Because Appellants Forfeited Their Right To Appeal.**

On November 21, 2013, the Board scheduled a hearing on three amendments that are not in issue. At the same time, the Board found that "R.C. 4906.07(B) does not require a hearing" regarding the three amendments at issue in this appeal. (Prehearing Entry at ¶¶ 5-6, 11/21/13.) For five months thereafter, Appellants acquiesced in the course of the proceedings, often even agreeing that there was "nothing" on which they wanted to be heard. For example, when asked by the ALJ if they wanted to cross-examine Buckeye Wind witness Michael Speerschneider, Appellants affirmatively declined, saying they had "no questions...." (TR. 14:17-18 [BW Supp. 205].) Appellants still did not complain about the scope of the hearing until March 20, 2014 – **well over two months after the hearing.** (RehApp. at 2 [BW Supp. 233].)

By waiting five months to challenge the Board's decision to limit the scope of the hearing, Appellants forfeited their "objection because [they] deprived the [Board] of an

opportunity to cure any error when it reasonably could have." *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St. 3d 524, 527-28 ¶ 18 (2010) (holding that the appellant forfeited its right to object to public notice by failing to object to the notice until months after it was first proposed, approved and published). Appellants' failure to assert any objections to the hearing or evidence until long after the ALJ's Entry scheduling the hearing and after the hearing itself is exactly the action that this Court has previously held rises to a forfeiture of an objection. *See id.* *See also, e.g., In Re Application of Columbus S. Power Co.*, 2014-Ohio-462, ¶ 41 (Ohio Feb. 13, 2014) (holding that objection to prehearing error was forfeited when first raised on application for rehearing); *Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred").

Appellants' appeal should be denied and the Board's Orders should be affirmed.

**B. Appellants' Arguments Are Not Supported By Any Evidence Or Even Citation To The Record.**

Although Appellants repeatedly claim that the three amendments are "substantial changes to the facility" and may result in "a material increase in the environmental impact," they have not marshaled any evidence in support of these claims. (*See, e.g.,* Appellants' Merit Br. at 6 & 7.) Nor have Appellants cited a single part of the record to support their allegations of error below. (*Id.*)

These failures are dispositive of, and fatal to, Appellants' arguments. *See, e.g., In re Fuel Adjustment Clauses for Columbus S. Power Co.*, 2014-Ohio-3764, ¶ 36 (Ohio Sept. 3, 2014) ("Ohio Power has again failed to marshal any evidence in its first merit

brief to support its appellate arguments. Ohio Power's failure to offer relevant citations to the record to support its appellate arguments is a fatal flaw."); *Smith v. Ohio Edison Co.*, 137 Ohio St. 3d 7 ¶ 39 (2013) ("This is a factual argument, but Smith has failed to marshal any evidence to support it. The pertinent section of Smith's brief contains no citations to the record. This alone is grounds to reject Smith's claim."); *In re Duke Energy Ohio, Inc.*, 131 Ohio St. 3d 487, 490 (2012) ("Duke's failure to support essential factual assertions with citations to the record is fatal to its argument.")

Appellants' substantial disregard of the Court's rules is not limited to their failure to offer any record citations or evidence. Appellants' Appendix is missing required documents relevant to this Court's jurisdiction – including Appellants' Application for Rehearing, their Notice of Appeal, and the text of any constitutional provisions, statutes or rules "on which the appellant relies" or that are "otherwise involved in the case." S.Ct.Prac.R. 16.02(B)(5)(a) & (e)-(g). The Court's rules are intended to ensure "the correct dispatch of the court's business" and, while the Court "exercises a certain liberality in enforcing a strict attention to its rules," it has also held that "a substantial disregard of the whole body of these rules cannot be tolerated." *Drake v. Bucher*, 5 Ohio St. 2d 37, 39-40 (1966). For these reasons, this appeal should be dismissed.

**C. Appellants Cannot Object To The Sufficiency Of The Board's Order.**

On appeal and in support of their first proposition of law, Appellants make the first-time, and untimely, claim that the Board's Order was not sufficiently specific in its basis and reasoning. (Appellants' Brief at 6-7.) This claim fails because it was not stated in Appellants' RehApp or in their Notice of Appeal. Therefore, Appellants may not challenge the sufficiency of the Board's Order.

This Court has repeatedly held applications for rehearing must set forth specific grounds for rehearing as a jurisdictional prerequisite to appellate review. See *Office Of Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St. 3d 244, 247 (1994); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 12 Ohio St.3d 280, 290 (1984). Nothing in Appellants' RehApp claimed that the Board's Order lacked sufficient specificity.

Moreover, Appellants' Notice of Appeal does not include an error regarding specificity of the Board's orders. (Notice of Appeal at 2 [BW Supp. 251].) This failure is a jurisdictional bar to appealing that issue. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St. 3d at 528 ¶¶ 20-21 (holding that appellant waived its right to object to subject matter jurisdiction by failing to specifically "state a claim of lack of subject matter jurisdiction in the notice of appeal"); R.C. 4903.13 (requiring a party challenging a Board order to set forth the errors complained of in the notice of appeal to this Court). Accordingly, Appellants may not now complain about the sufficiency of the Board's Orders.

**D. Appellants Bear A Difficult Burden On Appeal.**

Appellants bear a very difficult burden of persuasion on this appeal. *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 462 (2006). Specifically, this Court cannot reverse, vacate or modify an order of the Board unless the order is found to be unlawful or unreasonable based on the record. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, ¶ 26, citing *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, ¶ 17 (2010).

"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.*, 49 Ohio St.2d 231, 238 (1977) (citations omitted). Thus, this Court requires only that the Board's orders contain "some factual basis and reasoning based thereon to reach its conclusion." *Payphone Ass'n*, 109 Ohio St.3d at 461 ¶ 32 (internal quotation and citation omitted).

And when, as here, the governing statute does not provide a formula for the Board's application, the Court will defer to the Board's expertise in interpreting and implementing the statute. See *Payphone Ass'n*, 109 Ohio St.3d at 459 ¶ 25 (affording deference to "the agency with the expertise and statutory mandate to implement the statute" and "broad discretion" when "a statute does not prescribe a particular formula"); *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18 (2000) (requiring deference "to statutory interpretations by an agency" with "substantial expertise and ... enforcement responsibility").

**E. Response to Appellants' First Proposition Of Law: The Board's Orders Are Supported By The Record And Should Be Affirmed.**

Not every application to amend a certificate requires a hearing. A hearing will be required only "if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application." R.C. 4906.07(B). See also O.A.C. 4906-5-10(B)(1) (requiring a hearing only if "the board, its executive director, or the administrative law judge determines that the proposed change in the certified facility would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility").

Here, the Board's decision not to hold a hearing on the changes to the collection line system, some of the access roads and the de minimis shifts in the construction staging areas was lawful and reasonable.

1. The Board's decision not to hold a hearing on the collection line amendment was lawful and reasonable.<sup>6</sup>

The collection line amendment did not require a hearing because it will not involve a substantial change in location or significant environmental impact.

- a. *Reducing collection lines, and burying them, will not have material increase in environmental impact.*

Appellants' only argument – that the relocated collection lines will impact road use – is both legally and factually flawed. As a matter of law, Appellants' very vague "road use" objection bears no obvious relation to the environmental impact of the facility. See, e.g., Certificate at § V.C [BW Supp. 18-29] (regarding "environmental impacts) and § V.E [BW Supp. 32-38] (regarding air, water, solid waste and aviation); O.A.C. 4906-17-07(B)-(D) (defining environmental impact in relation to air, water and solid waste); O.A.C. 4906-17-08(B) (defining ecological impact without discussion of road use or repair).

Appellants "road use" argument also fails factually because Appellants offer no supporting citation to the record and also because it is flatly contradicted by the record – including the Application, the Staff Report and the hearing testimony. It is undisputed

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<sup>6</sup> Both the Staff Report and the Board's Orders cite relevant factual findings from the hearing *In re Buckeye II*. This is proper, and Appellants do not contend otherwise. See, e.g., *Canton v. Pub. Util. Comm.*, 63 Ohio St.2d 76 (1980) (holding that the commission's reference to a prior commission case was not improper); *County Commrs. Assn. v. Pub. Util. Comm.*, 63 Ohio St.2d 243 (1980) (concluding that it was not a denial of due process of law for the commission to take administrative notice of an investigative case in the appellants' complaint case).

that the collection line amendments significantly reduce impacts on public roads and rights of way and that the collection lines will be buried using drilling techniques such that "any direct impacts to the road at the crossing locations would be avoided." (Staff Ex. 1 at 5 [BW Supp. 166]; Co. Ex. 1 at 3-4 § A.6 [BW Supp. 186-87]; Certificate Amendment at 9 [BW Supp. 227].)

The record fully supports the Board's determination and is clear that the collection line amendment will reduce, not increase, the environmental impact of the facility. The number of miles of collection line will be significantly reduced and the collection line route will be adjusted "largely to avoid sensitive resources" and will use "installation techniques that would minimize impacts to the resources." (Staff Ex. 1 at 6 [BW Supp. 167]; Certificate Amendment at 5-6 & 9 [BW Supp. 223-24 7 227].)

- b. *Reducing and burying collection lines almost entirely on private property is not a substantial change in the location of all or part of the facility.*

The amendment does not involve a "substantial change" in the location of collection lines. In this case, because the term "substantial change" is not defined in R.C. 4906.07(B), the Board had discretion to interpret its meaning consistent with its experience and in the context of a wind-farm project. See *Payphone Ass'n*, 109 Ohio St. 3d at 459 ¶ 25; *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d at 17-18.

Because the Board rightly found that the collection line amendments were an improvement in and reduction of the Buckeye I project, it reasonably found that the collection line amendments were not a substantial change within the meaning of R.C. 4906.07(B). The word substantial has been interpreted by various Ohio courts to connote a materially – and typically adverse – event. See, e.g., *Mandelbaum v.*

*Mandelbaum*, 121 Ohio St. 3d 433, ¶ 32 (2009) (favorably citing case law defining substantial as "drastic," "material" and "significant").

As the Board found, the collection line amendment both reduces and improves the collection line system in four respects. First, the amendment reduces the total length of collection lines from approximately 65 miles to approximately 41 miles – resulting in far less total impact. (Staff Ex. at 4-6 [BW Supp. 165-67]; Co. Ex. 1 at 3-4 ¶ A.6 [BW Supp. \_\_\_186-87]; Certificate Amendment at 7 [BW Supp. 225].) Second, the amendment routes the collection lines over participating private property, thereby eliminating a sizable, previously approved impact on public right-of-ways. (*Id.*) Third, the amendment will reduce the impact of approximately 40 miles of previously planned overhead collection lines by burying all of the collection lines underground. (*Id.*) Finally, the collection lines will be buried to minimize or reduce any impact to the surrounding area or public roads (*Id.*) using the same methods the Board previously approved for the Buckeye Wind II project. These facts were admitted in the record without objection or challenge and are beyond dispute.

Supporting the Board's decision is the fact that the turbine locations remain unchanged by the approved amendments. (Certificate Amendment at 8 [BW Supp. 226].) Collection lines continue to route from the turbines to the project's substation and as noted previously, in many instances share locations with the collection lines for the approved Buckeye II Wind Farm. (*Id.* at 5 [BW Supp. at 223].) Considering this fact, coupled with the record evidence that the collection line amendment indisputably results in reduced and improved impacts, the Board reasonably and lawfully determined that the changes were not "substantial" and did not require a hearing.

Insofar as Appellants speculate that collection line burial is somehow too loosely prescribed or may somehow implicate safety concerns, the Board properly determined that any such concerns are adequately addressed by the standards and requirements of state and federal agencies with jurisdiction over the safety and engineering of electrical systems. (Rehearing Entry at ¶¶ 16-17 [BW Supp. 246-47]; Staff Ex. 1 at 5-6 [BW Supp. 166-67].) Appellants offer nothing to contradict the Board's finding regarding Appellants' speculation that placing collection lines underground raises safety concerns.

The Board also properly rejected Appellant's suggestion that new road use maintenance agreements (RUMAs) be required and negotiated. (Rehearing Entry at ¶¶ 14-15 [BW Supp. 244-46]; Staff Ex. 1 at 5-6 [BW Supp. 166-67].) The record amply supports the Board's finding that the Certificate adequately addresses road use and repair issues in Condition 23 (requiring coordination with the Champaign County Engineer and others if facility construction or operation affects the public roads), Condition 24 (requiring repair of bridges and roads), and Condition 56 (requiring a bond for repair of any damage). (Rehearing Entry ¶¶ 15 [BW Supp. 245-46]; Certificate at 88 & 93 [BW Supp. 92 & 97].) Appellants do not dispute this finding and provide no reasoning why they did not raise this issue when this Court heard and rejected Appellants' appeal of the initial issuance of the Buckeye Wind I project certificate.

2. *The Board's decision not to hold a hearing on the access road adjustments was lawful and reasonable.*

There is no merit to Appellants' argument that the Board was required to hold a hearing on the access road adjustments. The Board did hold a hearing on one amendment to add a new access road – an amendment that the Appellants did not challenge before the hearing, at the hearing, on rehearing, or on this appeal. Instead,

Appellants half-heartedly challenge four access road amendments that, based on the record, represent an unqualified improvement of the project.

As a result of the access road amendments, four existing access roads will be shifted slightly on the same parcels of participating private landowners and will not require any tree clearing. (Certificate Amendment at 6 [BW Supp. 224] (*citing* Co. Ex. 2 at 6 [BW Supp. 111]; Staff Ex. 1 at 3-4 [BW Supp. 164-65]).) Specifically:

- An access road to Turbine 40 will shift in order to move farther from a wetland and to follow a collection line;
- An access road to Turbine 36 will shift at the landowner's request and would also follow a collection line;
- An access road to Turbine 54 will shift to avoid a stream crossing; and,
- An access road to Turbine 21 will shift to be closer to a staging area and so that it no longer crosses directly in front of a residence.

(Certificate Amendment at 6 [BW Supp. 224] (*citing* Co. Ex. 2 at 6 [BW Supp. 111]; Staff Ex. 1 at 3-4 [BW Supp. 164-65]).)

- a. Adjusting the four access roads will not have a material increase in environmental impact.*

The access road amendments reduce the risk of environmental impact – moving one access road away from a wetland and moving another to *avoid* a stream crossing. (Certificate Amendment at 6 [BW Supp. 224] (*citing* Co. Ex. 2 at 6 [BW Supp. 111]; Staff Ex. 1 at 3-4 [BW Supp. 164-65]).) Appellants never did dispute this and cannot do so now.

There is no merit to Appellants' claim that "relocation of two of four identified access roads which end at a right of way are significant changes and would have a material increase in the environmental impact of the facility as they will entail concerns with road use...." (Appellants' Brief at 7.) Appellants do not even identify the access

roads about which they are complaining nor do they describe the "concerns with road use" on which their entire argument hinges.

The reality is, as the Board expressly found, there are Certificate conditions that cover any legitimate concerns that Appellants may have on the minor changes made to the project's access roads. (Rehearing Entry, ¶ 15 [BW Supp. 245-46] (discussing Conditions 56 (requiring a bond for repair of any damage), 23 (requiring coordination with public officials if facility construction or operation will affect public roads), and 24 (requiring repair of roads and bridges).)

*b. Adjusting the four access roads is not a substantial change in the location of all or part of the facility.*

Assuming that access roads are treated as "part of the facility,"<sup>7</sup> the access road amendments do not involve a "substantial change" in location of all or part of the facility. As the Board found, "the modifications to four previously approved access roads will all be located in farm fields" and reduce the impact of the access roads by aligning them with collection lines and avoiding both a stream crossing and a residence. (Certificate Amendment at 9 [BW Supp. 227] (*citing* Co. Ex. 2 at 6 [BW Supp. 111] & Staff Ex. 1 at 3-4 [BW Supp. 164-65].) These factual determinations by the Board are amply supported and explained in the record. (*Id.*) Moreover, the turbines served by the access roads remain in place and all of the access roads shifts remain in the same general location as the turbines. (*Id.*) As to any claim about the access roads connecting to county or township roads, Condition 23 of the Certificate requires

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<sup>7</sup> The Board's rules define a wind-farm "facility" as "all the turbines, collection lines, any associated substations, and all other associated equipment." See O.A.C. 4906-17-01(B)(2).

Buckeye Wind to obtain the necessary permits for use of the right-of-way from the local authorities. (Certificate at 88 [BW Supp. 92]; Rehearing Entry ¶ 15 [BW Supp. 245].)

Appellants muster no evidence that the access road modifications are anything but an improvement to the Buckeye I project. The Board did not act unlawfully or unreasonably in not holding a hearing on the four access road adjustments.

3. The Board's decision not to hold a hearing on staging area adjustments on the same parcels was lawful and reasonable.

The Board appropriately rejected Appellants' argument that the Board was required to hold a hearing on the staging area adjustments. In relevant part, the amendments relocate two staging areas – known as the Eastern and Southern staging areas – at the request of the private landowners. (Certificate Amendment at 5-6 & 9 [BW Supp. 223-24 & 227] (*citing* Co. Ex. 2 at 7 [BW Supp. 112]; Staff Ex. 1 at 2 [BW Supp. 163].) The relocated Eastern and Southern staging areas will remain on the same parcels as previously approved and will be the same size and in the same place as the staging areas already approved for the Buckeye II Wind Farm. (*Id.*)

a. *The staging area adjustments will not have a material increase in environmental impact*

There is no merit to Appellants' claim that the "adjustments to the construction staging areas" may give rise to ambiguous "traffic and road maintenance concerns" and wholly unspecified "environmental impact." (Appellants' Br. at 7.) The amendments reduce by more than seven acres the amount of land to be used as staging areas, using instead areas that were approved as reasonable after extensive hearing in the Buckeye II case. (Staff Ex. 1 at 2 [BW Supp. 163].) The Board's approval of these areas for use in the Buckeye II project alone refutes Appellants' claim of unspecified "environmental

impacts." (See *id.*; Certificate Amendment at 9 & 11-12 ¶¶ 7, 12 & 14 [BW Supp. 227 & 229-30].)

As to concerns with road use, Appellants make the purely speculative assertion that the amended staging areas will have double the traffic at the same time. (Appellants' Br. at 7.) But there is no basis for this assertion and, to the extent that there are traffic or road use concerns, the Board correctly found that those are addressed by conditions to the Certificate. (Rehearing Entry ¶ 15 [BW Supp. 245-46] (discussing Conditions 23 (requiring coordination with public officials), 24 (requiring repair) and 56 (requiring a bond).)

Also, if the Buckeye I and Buckeye II projects are built at the same time, the Buckeye II project RUMA will address any relevant roads serving the shared construction staging areas. (*In re Application of Champaign Wind LLC for a Certificate*, OPSB No. 12-160-EL-BGN, May 28, 2013 Opinion, Order and Certificate at 84-85 ¶ 31 (Board Appx. 193-94, filed 11/12/14.)) This fact should address any concerns by Appellants about a higher volume of traffic to the construction staging areas.

*b. The staging area adjustments are not a substantial change in the location of all or part of the facility.*

The staging areas are for the construction of the facility and are not used to generate electricity. Even if considered part of the facility, the staging area adjustments do not involve a "substantial change" in location of all or part of the facility. The two amended staging areas remain on the same parcels as originally approved and reduce the impact of the Buckeye I Wind Farm by sharing the same location and size as the staging areas for the adjacent and approved Buckeye II Wind Farm – avoiding redundant impacts and consolidating four staging areas into two staging areas on the

same privately-owned parcels. (See Co. Ex. 2 at 18 [BW Supp. 123]; Staff Ex. 1 at 2-3 [BW Supp. 163-64]; Certificate Amendment at 9 [BW Supp. 227].)

Appellants did not dispute that fact at hearing and do not dispute that fact before this Court. Both the Staff Report and Application were admitted in the record without any objection or relevant cross-examination by Appellants. (TR at 15:7-9 & 23:3-7 [BW Supp. 206 & 214].) And, at the hearing, Appellants did not question or object to the testimony of Michael Speerschneider which discussed the staging area relocations or the Application which was admitted into evidence with no objection by Appellants. (TR at 15:7-9 [BW Supp. 206].) That evidence affirmed that the changes to the staging areas would help avoid redundant impacts by sharing staging areas with the adjacent Buckeye II Wind Farm. (Co. Ex. 1 at 3-4, ¶ A.6 [BW Supp. 186-87].)

Regardless whether the staging areas are part of the “facility,” the record fully supports the Board’s finding that the staging area amendments reduced and improved the Buckeye I project and did not involve a substantial change in the location of a part of the facility. (Certificate Amendment at 9 [BW Supp. 227]; Staff Ex. 1 at 2 [BW Supp. 163]; Co. Ex. 1 at 3-4 § A.6 [BW Supp. 186-87].) There is no merit to Appellants' claim that a hearing should have been held on the changes to the construction staging areas and the Board's determination that a hearing was not necessary should be affirmed.

**E. Response to Appellants' Second Proposition Of Law: Appellants' Can Neither Claim Nor Show A Denial of Due Process.**

Appellants did not preserve their allegation that due process was denied. “Due process” is not even mentioned in the Notice of Appeal. Because the Notice of Appeal did not specifically allege any such error, the Court cannot address the merits of Appellant's due process argument. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127

Ohio St. 3d at 529 ¶23 (holding that Court could not review a due process claim that was not set forth in the notice of appeal); *id.* ¶ 20-21 (holding that appellant waived its right to object to subject matter jurisdiction by failing to specifically "state a claim of lack of subject matter jurisdiction in the notice of appeal"); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, ¶ 40 (2007).

Even if the Court were to consider Appellants' due process argument, it should be rejected. Appellants had no statutory right to a hearing on the three Amendments and, therefore, there cannot be a due process violation. See *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, ¶ 38 (2007) ("Moreover, we have repeatedly held that there is no constitutional right to notice and hearing in utility-related matters if no statutory right to a hearing exists.").

Appellants due process argument also fails in the face of the record. Despite numerous opportunities before and during the hearing to assert their right to be heard, Appellants declined to question Buckeye Wind's witness and did not object to the admission of that testimony into evidence. (TR 14:15-17 & 15:7-9 [BW Supp. 205-06].)

When a party repeatedly foregoes the opportunity to assert its alleged rights, as Appellants did here, that party cannot later claim that was denied due process. See *Parma*, 86 Ohio St.3d at 149 (rejecting due process claim to notice and hearing when appellant failed "to raise an objection until the filing of an application for rehearing"); *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 269 (1988) (holding that a party's failure to object to proposed change in rates did not support allegation that a party was "denied its right to be heard"). Appellants' Second Proposition of Law, even if heard by this Court, is without merit.

## CONCLUSION

Because Appellants have forfeited their right to appeal, because Appellants do not present this Court with any relevant evidence or record citations, and because the Board's Orders were reasonably and lawfully supported by the record evidence, Buckeye Wind LLC respectfully requests that this Court affirm the Board's February 18, 2014 Order amending the Certificate and the Board's May 19, 2014 Order denying rehearing.

Respectfully submitted on behalf of,

BUCKEYE WIND LLC



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## CERTIFICATE OF SERVICE

I certify that the foregoing Merit Brief Of Intervening Appellee Buckeye Wind LLC was served via email and U.S. first class mail, postage prepaid, upon the following persons this 13th day of November, 2014:

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