

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Icebreaker)	
Windpower Inc., for a Certification to)	
Construct a Wind-Powered Electric)	Case No. 16-1871-EL-BGN
Generation Facility in Cuyahoga County,)	
Ohio)	

**CUYAHOGA COUNTY RESIDENTS' REPLY MEMORANDUM
IN SUPPORT OF PETITION TO INTERVENE**

I. Introduction

Icebreaker Windpower, Inc.'s ("Icebreaker") opposition (the "Memo Contra") to the Petition To Intervene (the "Residents' Petition") of Cuyahoga County Residents Vicci Weeks, Caryn Good Seward, and Steven Seward (the "Cuyahoga County Residents") needs to be exposed for what it is – a transparent attempt to quash any voice of opposition to its Application in this proceeding. Icebreaker seeks to make the adjudicatory hearing in this case a "whitewash" in favor of its Application. But Icebreaker's self-interested desire to escape informed opposition is antithetical to the cornerstone principle of American jurisprudence that an independent tribunal can best make an informed decision when interested parties on both sides of a dispute present their positions for adjudication. *See Greenlaw v. United States*, 554 U.S. 237 at 243 (2008) ("In our adversary system, in both civil and criminal cases, . . . we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign courts the role of neutral arbiter of matters the parties present."); *Laurent v. Laurent*, Third Dist. App. No. 92-LW-4677 (3rd), 1992 WL 293061 (October 16, 1992) at *3 (" . . . The adversarial system works best when there are two adversaries. Trial courts and courts of appeal alike benefit from the informed argument of counsel.").

Were the OPSB to deny the Cuyahoga County Residents' intervention in this proceeding, the adjudicatory hearing in this case will consist of a nothing more than a one-sided parade of testimony in favor of Icebreaker's Application, a sham that would mock the fundamental principle requiring an open hearing on the evidence of parties both for and against Icebreaker's project (the "Project") to ensure that the OPSB can arrive at the truth concerning the critical issues in dispute and make decisions that serve the best interests of the citizens of Ohio. Moreover, OPSB staff rightfully has acknowledged that Icebreaker's proposed Project is "precedent-setting" – if constructed, it would be the first wind turbine project permitted in any of the Great Lakes. The decisions made by the OPSB in this proceeding are likely to be far-reaching, affecting future wind turbine construction in all of the Great Lakes. Thus, it is especially alarming that Icebreaker is attempting to manipulate this precedent-setting proceeding to prevent an open, informed debate of the important issues here, as the OPSB's resolution of these issues will have ramifications across the country.

How do we know that Icebreaker is attempting to quash any opposition in this proceeding? We know by the fact that Icebreaker has opposed only the petition to intervene of the sole parties who oppose the Project, the Cuyahoga County Residents. Icebreaker does not oppose the remaining four (4) petitions to intervene, all filed by parties who support construction of Icebreaker's Project.¹ the Sierra Club, the Ohio Environmental Council (the "Environmental Council"), the Indiana/Kentucky/Ohio Regional Council of Carpenters (the "Carpenters"), and The Business Network For Offshore Wind, Inc. (the "Offshore Wind Business Network").

¹ Icebreaker has publicly announced the support of the Sierra Club and the Environmental Council for its Project – making Icebreaker's assertion that the Sierra Club and the Environmental Council "will adequately represent [the Cuyahoga County Residents'] interests" in preventing wildlife degradation patently absurd. Memo Contra at 10. Similarly, the Carpenters support the Project, stating in their petition that "the nature and extent of the [Carpenters'] interest is basically synonymous with the pending application." *Id* at 5. Likewise, the Offshore Wind Business Network admits in its petition that it "has been an advocate, directly advancing and building an offshore wind industry in the United States." *Id* at 3.

The Cuyahoga County Residents' Petition differs sharply from the petitions of these other, supporting, intervenors. The Cuyahoga County Residents' Petition sets forth in detail the pervasive defects and scientific short-comings in Icebreaker's required pre-construction and post-construction studies concerning the adverse environmental effects that its Project will have on birds and bats. *See* R.C. 4906.10(A)(2) & (3). None of the other intervenors even mentioned these critical Application defects that directly affect the Cuyahoga County Residents, who enjoy observing the abundant birds while they recreate at the Lake.² Similarly, on July 23, 2017, the OPSB found that Icebreaker's supplemented Application "has been found to comply with Chapters 4906-01, *et seq.* of the Ohio Administrative Code (OAC)." Yet after the Cuyahoga County Residents filed their Petition to Intervene on October 16, 2017, detailing the pervasive defects in Icebreaker's bird and bat studies, the OPSB staff filed (on October 23, 2017) a Motion to Suspend the Procedural Schedule in this case, clearly reacting to the numerous defects in Icebreaker's bird and bat studies that were detailed in the Resident's Petition. Motion to Suspend at 1-2 ("Staff believes it is necessary that Applicant provide it with additional supplemental information on the viability and design of the pre- and post-construction radar monitoring that Applicant intends to utilize at the project for determining project impacts. . . . The information is necessary to measure the effect of off-shore turbines on birds and bats. . . ."). But for the Resident's Petition, the pervasive and substantial defects in Icebreaker's Application would not have been placed on the record in this case.

Icebreaker attempts to divert attention from its effort to squelch all opposition by protesting that it has a "strong commitment to public outreach and involvement," citing "over 400 meetings" at which it has spoken, and asserting that its outreach "has resulted in over 500

² Indeed, Keith Dimoff, the Environmental Council's executive director, was quoted in the March 19, 2014 Cleveland Plain Dealer erroneously asserting that "LEEDCo has completed comprehensive studies, which demonstrate that Icebreaker will deliver cleaner air *while avoiding harm to wildlife*." (Emphasis added).

comments being filed with the Ohio Power Siting Board.” Memo Contra at 1-2. But those activities constitute little more than public relations efforts by Icebreaker to attempt to build support for the Project and tamp-down objections. However, it appears that Icebreaker’s public relations efforts have been largely unsuccessful. A 2014 Plain Dealer survey revealed that 57.87% of respondents opposed Icebreaker’s Project, while 39.89% supported the Project and 2.24% had no opinion.

Finally, there is good reason that, to date, there has been no construction of wind turbines in any of the Great Lakes. The State of Ohio’s ownership of its portion of the land under Lake Erie is subject to the “Public Trust Doctrine.” *Illinois Railroad Company v. Illinois*, 146 U.S. 387 (1892). The State of Ohio holds title to its portion of Lake Erie in trust for the benefit of the people of the State, not for the benefit of private-party Icebreaker. The State of Ohio’s title in Lake Erie:

. . . is a title different in character from that which the state holds in lands intended for sale. ***It is a title held in trust for the people of the state***, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing on them, ***freed from the obstruction or interference of private parties***. . . . The trust devolving upon the state ***for the public***, and which can only be discharged by the management and control of the property ***in which the public has an interest***, cannot be relinquished by a transfer of the property. . . . (Emphasis added).

146 U.S. at 452-453. *See also State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 345-346 (1948), quoting *Illinois R. Co., supra*. The State of Ohio holds title in Lake Erie in trust for the benefit of the Cuyahoga County Residents, not for the benefit of Norwegian corporation Fred Olsen Renewables, not for the benefit of intervenor Sierra Club, not for the benefit of intervenor Environmental Council, and not for the benefit of Maryland-based intervenor Offshore Wind Business Network.

As set forth below, the Cuyahoga County Residents have real and substantial interests to protect in this proceeding. Their opposition interests are not represented by any other party to this proceeding. They are entitled to intervene.

II. Argument and Law

A. The Cuyahoga County Residents Possess Real And Substantial Interests To Be Protected In This Proceeding

Intervention “is generally liberally construed *in favor of intervention*.” *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995), quoted in *Ohio Consumers Counsel v. P.U.C.O.*, 111 Ohio St.3d 384, 387 (2006) (emphasis added). The Cuyahoga County Residents’ Petition establishes that they possess the requisite “real and substantial” interests to be protected in this proceeding. Icebreaker’s Memo Contra does nothing to diminish the Cuyahoga County Residents’ real and substantial interests entitling them to intervention.

1. The Cuyahoga County Residents Have Real and Substantial Interests In Protecting Lake Erie Birds

The Cuyahoga County Residents devote a substantial portion of their Residents’ Petition setting forth, in extensive detail, their real and substantial interests in protecting Lake Erie birds – and to exposing the utter failure of Icebreaker’s Application to meet applicable statutory requirements to (1) explain the adverse environmental impacts its Project will have on those species, and (2) demonstrate that its Project represents the minimum adverse environmental impact on those species. Residents’ Petition at 4-9, 13-14.

Icebreaker cannot plausibly argue that the Cuyahoga County Residents’ interest in protecting Lake Erie birds is not a legally-cognizable interest to be protected in this proceeding, as R.C. 4906.10(A)(2) and (3) require the OPSB to protect that interest. Indeed, Icebreaker acknowledges that the interest of the Sierra Club and the Environmental Council in protecting

Lake Erie birds is a “real and substantial” interest, justifying the intervention of those Project-supporting parties:

“ . . . [I]nsofar as [the Cuyahoga County Residents] claim an interest in the degradation of the environment and its wildlife, both the Sierra Club and the Ohio Environmental Council will adequately represent such interests . . .

Similarly, OEC states in its intervention that its principal purpose is to “protect the natural resources and environment of the citizens of the State of Ohio.” (Emphasis in original).

Memo Contra at 10-11.

However, given its admission that the protection of Lake Erie birds is a “real and substantial” interest justifying intervention in this case, Icebreaker is left with the conundrum of attempting to explain why that protectable interest justifies intervention for Project-supporters the Sierra Club and Environmental Council, but does not justify intervention for Project-opposers Cuyahoga County Residents. Icebreaker can provide no principled distinction. Instead, Icebreaker simply is left to arbitrarily and subjectively declare, without any legal or factual authority, that “. . . it is *evident* that [the Cuyahoga County Residents’] environmental interests are *indirect* and *tangential* to their Petition and should not be viewed as particularized environmental ‘interests.’” Memo Contra at 8. (Emphasis added).

But by what legal or factual standard is it “evident” that the Cuyahoga County Residents’ interest in protecting Lake Erie birds is “indirect” or “tangential,” while the Sierra Club’s and the Environmental Council’s interest in protecting those same birds is, by Icebreaker’s admission, “real and substantial”? In fact, the “real and substantial” interest here is possessed by the Cuyahoga County Residents, not by these organizations. The Cuyahoga County Residents are actual residents of Cuyahoga County, who actually recreate at Lake Erie, and actually enjoy observing the Lake Erie birds they are attempting to protect. In stark contrast, any interest the

Sierra Club or Environmental Council organizations may possess would, of necessity, be merely derivative from the actual interests of their members – and neither organization has identified a single member who, like the Cuyahoga County Residents, is a Cuyahoga County resident, actually recreates at Lake Erie, and actually enjoys observing Lake Erie birds.

The Cuyahoga County Residents possess a direct, real, and substantial interest in protecting Lake Erie birds – not simply the derivative interest that Icebreaker admits justifies intervention by the Sierra Club, the Environmental Council, the Carpenters, or the Offshore Wind Business Network.³

2. Increased Cost of Electricity To The Cuyahoga County Residents

The Cuyahoga County Residents have a real and substantial interest in the adverse effects that construction of the Project will have on the cost of the electricity they purchase. Icebreaker cannot argue that the cost of the Cuyahoga County Residents' electricity is not a cognizable interest to be protected, as R.C. 4906.10(A)(4) requires the OPSB to find and determine that Icebreaker's Project "will serve the interests of electric system economy and reliability."

Icebreaker attempts to denigrate the Cuyahoga County Residents' real and substantial economic interest as purchasers of electricity from utilities that will buy expensive Project-generated electricity by flippantly reducing the Cuyahoga County Residents' position to the following: the Cuyahoga Residents assert the right to intervene because "we occasionally consume electricity." Memo Contra at 3. Perhaps Icebreaker resorts to such sarcasm because

³ Icebreaker also argues that the Cuyahoga County Residents should not be permitted to intervene because their "... properties are not adjacent to the Project and by our calculations sit 9 to 17 miles away from the nearest wind turbine." Memo Contra at 6 (emphasis in original). But no Cuyahoga County resident's home is situated at the Project site, 8-10 miles out in Lake Erie. By Icebreaker's logic, no Cuyahoga County resident, or any other Ohio resident, would have a cognizable interest in protecting Lake Erie wildlife – in direct contravention of the Public Trust Doctrine holding Lake Erie in trust for the benefit of these very residents. Acceptance of Icebreaker's argument would produce a particularly ironic outcome in this proceeding, where a specially-created entity for Norwegian corporation Fred Olsen Renewables is seeking permission from the State of Ohio to be the first developer to construct wind turbines in the Great Lakes, enabling benefits from the Project ultimately to inure to Norwegian interests.

the real facts preclude any honest dispute on this point. Icebreaker touts in its Application (p. 2) that it has entered into a power purchase agreement with Cleveland Public Power (“CPP”) for CPP to purchase above-market-price electricity that the Project will produce. The increase in the cost of CPP electricity that will result from its purchase of expensive Project-generated electricity will be directly borne by Cuyahoga County Residents Caryn and Steven Seward, as they purchase electricity daily (not “occasionally”) from CPP. Their direct interest in the adverse effect that CPP’s purchase of expensive Project electricity will have on the cost of electricity they purchase from CPP entitles them to intervene in this case. *See Ohio Consumers’ Counsel*, 111 Ohio St.3d at 387 (PUCO abused its discretion in denying intervention to the Ohio Consumers’ Counsel; the OCC should have been permitted to intervene because its motions “presented the view that the accounting changes sought by the two electric companies **would adversely affect the companies’ residential customers** and **would violate Ohio law.**”) (emphasis added).

The *In re. Application of Co. S. Power Co.* case cited by Icebreaker (Memo Contra at 8) has no application here. That case involved a question regarding the physical need for the construction of a transmission line, not, as here, whether the generation and sale of costly electricity will directly affect the price paid by the intervenors for their daily supply of electricity.

3. The Cuyahoga County Residents’ Additional Interests

The Cuyahoga County Residents’ Petition identifies numerous other real and substantial interests they seek to protect from the adverse effects of the Project: damages to fresh water species’ habitats (R.C. 4906.10(A)(2) and (3)), the irregularly intermittency of electricity generation from the Project (R.C. 4906.10(A) – electric system economy and reliability),

subsidies to an out-of-state producer (R.C. 4906.10(A)(6) – public interest, convenience, and necessity), and damage to infrastructure (R.C. 4906.10(A)(6)). These additional interests are not substantively addressed in Icebreaker’s Memo Contra. The Cuyahoga County Residents’ right to protect these real and substantial interests is addressed in detail in Residents’ Petition. That analysis will not be repeated here.

B. The Cuyahoga County Residents’ Interests Are Not Already Adequately Represented

The Cuyahoga County Residents are the only parties opposing Icebreaker’s Application to construct a project that OPSB staff has acknowledged is “precedent-setting,” “the first proposed off-shore wind facility in Lake Erie,” and the first that would be built in any of the Great Lakes. Motion to Suspend at 2. The Cuyahoga County Residents are the only parties to set forth on the record in this case the pervasive defects in Icebreaker’s statutorily-required bird and bat studies. It was only after the Cuyahoga County Residents established these defects on the record that OPSB staff acknowledged these defects in Icebreaker’s Application and filed its Motion to Suspend the scheduled November 17, 2017 adjudicatory hearing. No other party put these critical Application defects before the OPSB. No other party can adequately represent the interests of the Cuyahoga County Residents in this proceeding.

Again, Icebreaker asserts that the Cuyahoga County Residents’ real and substantial interests in protecting Lake Erie birds can be protected by Project-supporting intervenors the Sierra Club and the Environmental Council. Memo Contra at 10. That canard has been debunked, as set forth above. The Cuyahoga County Residents are entitled to intervene to effectively represent their own real and substantial interests here.

C. The Cuyahoga County Residents Will Contribute To A Just And Expeditious Resolution of Issues

The Cuyahoga County Residents will contribute to a just and expeditious resolution of the issues in this case. They will abide by all deadlines set by the OPSB. Without the participation of the Cuyahoga County Residents, there cannot be a just resolution of the significant issues in this “precedent-setting” case, as no party to this proceeding will zealously work to protect Cuyahoga County residents from the adverse effects of this Project – as has been established by the record in this case to date.

Icebreaker cannot identify how the Cuyahoga County Residents’ participation in this case will interfere with its just and expeditious resolution. Rather, Icebreaker must resort to complaining that if the Cuyahoga County Residents are permitted to intervene in this proceeding, “then every one of the millions of taxpaying Ohioans could intervene in this proceeding.” Memo Contra at 11. That is nonsense. The Cuyahoga County Residents are residents of Cuyahoga County. They regularly use Lake Erie and enjoy the Lake’s birds. The Swards purchase their electricity from CPP. And the Cuyahoga County Residents are the only residents of Cuyahoga County to stand-up and protect their interests in this proceeding before the intervention cut-off date (October 16). There are no other residents of Cuyahoga County, much less “millions of taxpaying Ohioans,” who can or will intervene in this case at this point.

D. The Cuyahoga County Residents Will Neither Unduly Delay This Proceeding Nor Prejudice Parties

As noted in Residents’ Petition, the Cuyahoga County Residents will not take any action in this proceeding to delay a just resolution of the significant issues that must be openly and fairly resolved in this precedent-setting case. The Cuyahoga County Residents will be

professional in litigating the significant issues in dispute, and will not take any action to prejudice the parties.

Icebreaker protests that it will be prejudiced by the Cuyahoga County Residents' involvement in this case because they will make it a "political" dispute. Memo Contra, p. 12. Nothing could be further from the truth. The Cuyahoga County Residents have no political connections or political arguments to bring to bear in this case. They will address only those issues before the OPSB in this proceeding. However, that approach contrasts with the political support and influence for the Project that Icebreaker continually has sought and publicly promoted. Nonetheless, the Cuyahoga County Residents merely seek to protect their interests in this proceeding – interests that will be materially affected by the OPSB's resolution of the important, and far-reaching, issues raised by Icebreaker's proposed precedent-setting Project.

For the foregoing reasons, and as set forth in Residents' Petition, the Cuyahoga County Residents should be permitted to intervene in this case to protect their real and substantial interests.

Respectfully submitted,

/s/ John F. Stock

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below via electronic mail this 8th day of November, 2017.

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11/8/2017 11:31:00 AM

in

Case No(s). 16-1871-EL-BGN

Summary: Reply Cuyahoga County Residents Reply Memorandum in Support of Petition to Intervene electronically filed by John F Stock on behalf of Weeks, Vicci and Seward, Caryn Good and Seward, Steven