

**BEFORE
THE OHIO POWER SITING BOARD**

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

**MEMORANDUM CONTRA
ICEBREAKER WINDPOWER, INC.'S
MOTION TO REESTABLISH THE PROCEDURAL SCHEDULE
AND FOR WAIVER OF O.A.C. RULE 4906-3-09(A)(2)
SUBMITTED ON BEHALF OF THE STAFF OF
THE OHIO POWER SITING BOARD**

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February 8, 2018

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This memorandum contra by the Staff of the Ohio Power Siting Board (Staff) is provided in response to Icebreaker Windpower Inc.'s (Icebreaker) motion to reestablish the procedural schedule and for waiver of O.A.C. Rule 4906-3-09(A)(2). Staff opposes Icebreaker's motion for waiver of O.A.C. Rule 4906-3-09(A)(2) but does not oppose its motion to reestablish the procedural schedule with the exception of Icebreaker's proposed procedural schedule. Accordingly, Staff requests that Icebreaker's request for waiver be denied and its motion to reestablish the procedural schedule granted consistent with Staff's request to modify Icebreaker's proposed procedural schedule as set forth in Staff's memorandum contra below.

Respectfully submitted,

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/s/ John H. Jones

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MEMORANDUM IN SUPPORT

On February 1, 2017, as supplemented on March 13, 2017, Applicant filed an application for a certificate to construct its proposed project, which it described as a six turbine demonstration wind-powered electric generation facility to be located in Lake Erie about 8-10 miles off the coast of Cleveland, Ohio. On April 3, 2017, the Chairman of the Ohio Power Siting Board (Board or OPSB) notified Applicant by letter that additional information was needed in order for the application to be considered in compliance with O.A.C. Chapters 4906-01, *et seq.* Subsequently, Applicant supplemented its application on July 20, 2017 and July 24, 2017, along with a response to the Chairman's April 3, 2017 letter. By letter filed on July 31, 2017, the Board notified Applicant that its application was sufficiently complete to permit Staff to commence its review and investigation of the application. Applicant completed its service and publication requirements and was then notified that August 14, 2017 was the effective date of its application. Staff began its investigation. On August 15, 2017, the Administrative Law Judge (ALJ) issued a procedural schedule for this case including an October 23, 2017 date for filing the Staff Report of Investigation, a local public hearing on November 8, 2017, and an adjudicatory hearing on November 17, 2017.

Subsequently, Staff determined that it needed additional supplemental information. On October 23, 2017, Staff filed a motion to suspend the procedural schedule to obtain this additional supplemental information, which was granted by the

ALJ on the same date. In that Entry, the ALJ stated that a new procedural schedule and the supplemented application's effective date shall be set by subsequent Entry, to be issued after Icebreaker files its supplemental information.

On January 24, 2018, Icebreaker filed the "Diehl Report" in response to the additional supplemental information Staff had requested. Icebreaker represents that the report was provided to Icebreaker, the Ohio Department of Natural Resources (ODNR) and the U.S. Fish and Wildlife Service (USFWS) in December 2017. The "Diehl Report" evaluated radar data collection options proposed by three vendors.¹ Although Dr. Diehl stated all the vendors' proposals had shortcomings, he liked VendorA's approach the most among the vendor options he evaluated.² Dr. Diehl also suggested numerous modifications to improve VendorA's approach. Staff acknowledges that Icebreaker has supplemented the record with this additional information.³

Icebreaker's request to waiver O.A.C. Rule 4906-3-09(A)(2), regarding newspaper publications and a second written notice being served on property owners to update them on case and project information, should be denied. While this notice is not mandated by statute, it is required by rule and serves an important purpose – notice issued 7-21 days before the public hearing is provided so any concerned or affected citizen or resident in the vicinity of the project area can attend and comment or give testimony at the public

¹ *In re Icebreaker* (Evaluation of Icebreaker Wind Project Vendor Proposals for Radar-Based Monitoring of Flying Animals, Dr. Robert H. Diehl at 1) (Dec. 2017).

² *Id.*

³ Staff takes no position at this time as to whether this information sufficiently resolves all of Staff's previous issues or any other issues in the case.

hearing. Icebreaker's arguments, raising unnecessary costs and delay, fail to establish good cause to waive this rule. If these general unsupported reasons were accepted, every applicant would succeed with this request and the purpose behind the rule would be defeated.

And Icebreaker's commitment, in lieu of complying with O.A.C. Rule 4906-3-09(A)(2), to serve notice of the new procedural schedule as provided in R.C. 4906.06(C) and O.A.C. Rule 4906-3-09(A)(1), is misplaced. These sections address notices being served within 15 days of an earlier stage of the proceedings - application completeness. Accordingly, these sections have no application to newspaper publications and serving notice regarding a new procedural schedule that provides a public hearing date.

Icebreaker is mistaken about the timing and association of the two notices under O.A.C. Rule 4906-3-09 with different case events or stages of the proceedings. One is associated with the completed application while the other is associated with the public hearing. For the foregoing reasons, Icebreaker's request for waiver should be denied.

On a related matter, Icebreaker has proposed a new procedural schedule on page six of its motion. The proposed schedule is ambitious and would place the case on a fast procedural track going forward. One reason, among many, Staff opposes Icebreaker's proposed schedule is because it limits Staff's time for issuing a Staff Report to less than 30 days. This case is the first of its kind in the nation and before the Board, raises new and complex issues, and requires more coordination than usual between different state and federal agencies. Faced with these new and difficult challenges, the last thing Staff

would recommend is placing this case on an accelerated procedural schedule. Staff proposes a more realistic schedule that is fair to all parties and particularly Staff, as follows:

- Effective date of Application: Date that Entry is issued setting new procedural schedule.
- Staff Report Due: 15 days prior to the date set for the Public Hearing.
- List of Issues: TBD by ALJ.
- Second Public Hearing: TBD by ALJ.
- Testimony due: TBD by ALJ.
- Evidentiary Hearing: TBD by ALJ.

Staff asserts that its proposed schedule is consistent with the required statutory time frames and schedules issued by the Board in other OPSB cases. Staff requests the maximum time be allowed for this procedural schedule under the law because it is a precedent-setting case that demands more time of Staff to complete its investigation and Staff Report.

WHEREFORE, for the reasons stated above, Staff requests the Board or its ALJ deny Icebreaker's request for waiver and grant its motion to reestablish the procedural schedule but modify its proposed procedural schedule consistent with Staff's recommendations above.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that the foregoing Memorandum Contra Icebreaker Windpower Inc.'s Motion to Reestablish the Procedural Schedule and for Waiver of O.A.C. Rule 4906-3-09(A)(2) Submitted on behalf of the Staff of the Ohio Power Siting Board was served upon the following parties of record via electronic mail this 8th day of February 2018.

/s/ John H. Jones

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Summary: Memorandum Contra Icebreaker Windpower, Inc.'s Motion to Reestablish the Procedural Schedule and for Waiver of O.A.C. Rule 4906-3-09(A)(2) submitted by Assistant Attorney General John Jones on behalf of the Staff of the Ohio Power Siting Board. electronically filed by Kimberly L Keeton on behalf of Ohio Power Siting Board