

BEFORE THE OHIO POWER SITING BOARD

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

- - -

PROCEEDINGS

before Mr. Nick Walstra and Ms. Megan Addison,
Administrative Law Judges, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 10:17 a.m. on Monday,
September 24, 2018.

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VOLUME I

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Monday Morning Session,
September 24, 2018.

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ALJ ADDISON: Let's go ahead and go on
the record.

Good morning. The Ohio Power Siting
Board has assigned for public hearing at this time
and place Case No. 16-1871-EL-BGN, being In the
Matter of the Application of Icebreaker Windpower
Incorporated for a Certificate to Construct a
Wind-Powered Electric Generation Facility in Cuyahoga
County, Ohio.

My name is Megan Addison, and with me is
Nick Walstra; and we are the Administrative Law
Judges assigned by the Ohio Power Siting Board to
preside over this hearing.

At this time we will begin by taking
appearances starting with the Applicant.

MR. SECREST: Thank you, your Honor. On
behalf of Applicant Icebreaker Windpower Inc.,
Jonathan Secrest, Christine Pirik, Terrence
O'Donnell, William Vorys, and Sara Jodka.

ALJ ADDISON: Thank you.

MR. SECREST: Thank you, your Honor.

MR. BERKOWITZ: Paul Berkowitz from Paul

1 T. Berkowitz & Associates, representing the
2 Indiana/Kentucky/Ohio Regional Council of Carpenters,
3 Intervenors.

4 ALJ ADDISON: Thank you.

5 MR. STOCK: John Stock and Rob Haffke,
6 Benesch, representing -- excuse me -- intervenors,
7 Robert Maloney and W. Susan Dempsey.

8 ALJ ADDISON: Thank you, very much.

9 MR. JONES: Good morning, your Honor. On
10 behalf of the Ohio Power Siting Board Staff, Ohio
11 Attorney General Mike DeWine, Assistant Attorneys
12 General Tom Lindgren, Cameron Simmons, Ina Avalon,
13 John Jones, 30 East Broad Street, Columbus, Ohio.

14 ALJ ADDISON: Thank you very much.

15 MS. LEPPLA: Good morning. Miranda
16 Leppla, Chris Tavenor, and Trent Dougherty for the
17 Ohio Environmental Council and the Sierra Club.

18 ALJ ADDISON: Thank you.

19 MR. SETTINERI: Good morning, your
20 Honors. On behalf of the Business Network for
21 Offshore Wind, Inc. Mike Settineri and Gretchen L.
22 Petrucci, Vorys, Sater, Seymour and Pease, 52 East
23 Gay Street, Columbus, Ohio, 43215.

24 ALJ ADDISON: Thank you very much.

25 I believe that's everyone. Thank you

1 all. We have several administrative matters to
2 discuss before we start taking witnesses this
3 morning.

4 Mr. Secrest, will you be arguing on
5 behalf of the Applicant as to the merits of the
6 motion to quash that was filed on September 20, 2018,
7 and the motion in limine filed on September 21, 2018,
8 as well as the motion for protective order covering
9 that particular motion?

10 MR. STOCK: Yes, your Honor. Thank you.

11 ALJ ADDISON: Thank you. I would like to
12 begin with the motion to quash, if we could.

13 MR. SECREST: Very well, thank you.

14 ALJ ADDISON: Thank you.

15 MR. SECREST: Before we went on the
16 record, we filed a motion to quash the subpoena
17 served to Ms. Nagusky predominantly related to two
18 categories of documents, the first category being
19 documents, communications, e-mails, et cetera,
20 related to negotiations that took place with regard
21 to the Stipulation. It is my understanding based on
22 off-the-record conversations that intervenors'
23 counsel is withdrawing that portion of the subpoena;
24 is that accurate?

25 MR. STOCK: That is correct. Just so

1 we're clear on the record, the schedule attached to
2 the subpoena, the first item requested relates to a
3 March 12, 2018, letter from the Fish & Wildlife
4 Service to ODNR, and we'll discuss that in a minute.

5 The second requested item relates to
6 documents surrounding and including copies of a
7 proposed Stipulation, and we do withdraw our subpoena
8 with respect to any materials relating to the
9 Stipulation.

10 MR. SECREST: Thank you, appreciate it.

11 ALJ ADDISON: Thank you.

12 MR. SECREST: With regard, your Honor, to
13 the remaining category of documents, the issue is the
14 request is overly broad and unduly burdensome. It
15 requests any and all documents related to drafts of
16 the March 12, 2018, Fish & Wildlife Service. Given
17 the breadth of that, it can encompass any number of
18 documents that aren't directly related to that.
19 Further, the negotiations o March 1, 2018, letter is
20 not relevant. What is relevant is the final product
21 that was issued by the Fish & Wildlife Service.

22 ALJ ADDISON: Thank you very much,
23 Mr. Secrest.

24 Mr. Stock.

25 MR. STOCK: I'm nonplussed. I don't

1 understand the argument. If I may approach the
2 Bench.

3 ALJ ADDISON: You may.

4 MR. STOCK: Exhibit A is the letter at
5 issue. This letter is prominent in the testimony
6 that's been filed on behalf of Icebreaker to argue to
7 the effect that --

8 ALJ ADDISON: Mr. Stock, I am just going
9 to interrupt. You aren't marking this as an exhibit
10 right now, are we?

11 MR. STOCK: We are not.

12 ALJ ADDISON: Maybe, perhaps, you could
13 just describe generally what the letter is that you
14 just handed to the Bench.

15 MR. STOCK: It's the March 12, 2018,
16 letter from the Fish & Wildlife Service to Gary
17 Obermiller at the Ohio Department of Natural
18 Resources. It is signed by Lori Nordstrom on behalf
19 of Fish & Wildlife Service with a CC to Dan Everson.
20 I don't have the references at the tips of my
21 fingers, but it is repeatedly referenced in the
22 direct testimony of Icebreakers's witnesses. They
23 apparently consider it to be a material document.

24 The essence of testimony relating to this
25 is twofold. One, that this letter indicates that

1 Fish & Wildlife Service has concluded that this
2 project represents little danger, if you will, risk
3 to birds and bats. Second, they assert that this
4 letter indicates the Fish & Wildlife Service's
5 acceptance of the radar testing that is to be done at
6 the site from a floating platform, vessel-based
7 radar, VBRR.

8 Attached to this letter is an e-mail
9 exchange I just -- the first is an e-mail dated
10 March 14th of 2018 from Erin Hazelton to Beth
11 Nagusky. And Ms. Nagusky's title at LeedCo is
12 director of sustainable development, and the
13 documents produced by Icebreaker are replete with
14 e-mails back and forth between Ms. Nagusky and people
15 at Fish & Wildlife and ODNR. Ms. Hazelton's letter
16 says -- the subject is "Letter," and it reads:

17 "Hi Beth. I did get a copy of the letter
18 (just yesterday). Thanks for checking in. We are
19 meeting internally to discuss later today so I'll get
20 Gary -- I'll let Gary know you called. I have spoken
21 with John Jones and are available if he wants to
22 call.

23 "Thanks again, Erin."

24 And then she responds with an e-mail
25 dated March 14 back to Erin Hazelton. "Thanks for

1 letting me know, and I just left you another
2 voicemail."

3 I have been requesting since January of
4 this year to get copies of all communications between
5 LeedCo and Icebreaker and Fish & Wildlife Service and
6 ODNR relating to this project, clearly within the
7 scope of acceptable discovery. I've been
8 stonewalled.

9 The request was first made on January 17
10 of this year. On February 16 I got some letters. I
11 got some e-mails, but they only went through the
12 beginning of the month. So by -- beginning of
13 February of this year. So by a letter dated May 2nd
14 of 2018, that I sent to Ms. Pirik, I said, Supplement
15 your responses. I want everything from all the
16 communications from February 1st of 2018, to date.

17 She wrote me back on June 11 saying, We
18 anticipate producing by the end of next week,
19 June 22. Came and went, didn't get it. I sent a
20 second set of e-mail or -- excuse me, requests for
21 production was documents for the Bratenahl
22 intervenors on June 18 of this year. I sent another
23 letter on June 26, Where's the supplementation of
24 responses, my letter to Ms. Pirik.

25 On August 27 I sent an e-mail to

1 Ms. Pirik. Where is my supplementation? If they are
2 going to wave this letter around saying that this
3 represents Fish & Wildlife Service's sign-off on this
4 project, I'm entitled to all communications among
5 Icebreaker, LeedCo, Fish & Wildlife Service, and ODNR
6 regarding how this letter was solicited, whether or
7 not drafts of it were exchanged, whether or not the
8 language of it was changed. I'm entitled to know the
9 context and genesis of this letter.

10 And I can't figure out any way that
11 that's not relevant if they are going to flag this
12 letter around and say this is a sign-off. That's our
13 position.

14 ALJ ADDISON: Thank you, Mr. Stock.

15 MR. STOCK: And I need to have that
16 information before I cross-examine them in their
17 waving this thing around, and I believe it starts
18 with, maybe, Mr. Gordon representing -- or
19 referencing it.

20 ALJ ADDISON: Thank you, Mr. Stock.

21 MR. STOCK: There is a lot of
22 cross-examination to do, a lot of witnesses, and I am
23 sitting here on the first day of hearing, and I still
24 don't have this stuff. That's why the subpoena went
25 out.

1 ALJ ADDISON: Thank you.

2 Mr. Secrest, response?

3 MR. SECREST: Thank you, your Honor.

4 Well, first, if you note from the document that
5 Mr. Stock handed you, there are Bates stamp numbers
6 at the bottom. That is because these documents were,
7 in fact, produced by us, so we do take offense and
8 umbrage to the characterization of being stonewalled.
9 We produced hundreds of communications back and forth
10 to intervenors' counsel, which included documents
11 related to this letter.

12 Our motion to quash is with regard to how
13 the subpoena was phrased in that it seeks any and all
14 documents related to this letter. Frankly, we think
15 we have produced them all. But with regard to, for
16 example, A-1, which Mr. Stock handed you, there is
17 discussion -- there is a reference to August 2016 and
18 October 2016. We don't know the limit of what he is
19 seeking. Anything related to this letter can
20 encompass a whole host of documents.

21 And, frankly, your Honor, I wasn't aware
22 we were here on a motion to compel but a motion to
23 quash, so with regard to the litany of issues
24 Mr. Stock has brought to your attention regarding our
25 supposed noncompliance with discovery requests,

1 first, we were compliant. Second, that's not what we
2 are arguing right now, your Honor.

3 Our issue is with the breadth of the
4 motion to quash in that it seeks any and all
5 documents related to the May 12, 2018, letter, and,
6 frankly, with regard to A-1, which was presented to
7 you, this is a document after the letter. It's not
8 evidence of negotiations of the terms of the letter.

9 Thank you, your Honor.

10 ALJ ADDISON: Thank you very much.

11 MR. STOCK: He's precisely correct, I got
12 an e-mail two days after. I want what came before,
13 and I want to make it clear I'm not trying to be
14 burdensome, but if there were any communications
15 relating to the issuance of this letter, discussions
16 of the letter, discussions of the content, that's
17 what I want. I think it's pretty clear.

18 ALJ ADDISON: Thank you very much.

19 MR. STOCK: That's all I want. I want to
20 know how this came to -- they don't kind of issue
21 these just as public press releases. I want to know
22 how it came to be issued.

23 ALJ ADDISON: Thank you, Mr. Stock.

24 Okay. It's our preference to reserve our
25 ruling on these particular arguments until we hear

1 the arguments relating to Icebreaker's motion in
2 limine filed on September 21, 2018, and we will
3 provide our decision as to the motion to quash, the
4 motion in limine, and the motion for protective
5 order, also filed on September 21, 2018, at the same
6 time.

7 Mr. Secrest.

8 MR. SECREST: Thank you. Again, as your
9 Honors noted, we filed a motion in limine requesting
10 to limit the participation of the intervenors to
11 relevant issues, specifically with regard to
12 Dr. Brown's testimony. His expert report makes it
13 clear that he is to testify on issues such as
14 Icebreaker's cost and rate structure, the, quote,
15 need for the project, the project's contributions to
16 PJM interconnection and regional interconnection
17 system, as well as similar and related topics related
18 to tax credits and subsidies, things of that nature.

19 The Board is empowered to prevent
20 cumulative and irrelevant evidence, and it is our
21 position that testimony and that evidence is, in
22 fact, irrelevant with regard to the factors set forth
23 in 4906.10, those eight factors, including the basis
24 of the need for the facility, if the facility is an
25 electric transmission line or gas pipeline.

1 Dr. Brown, however, proposes to testify
2 as to the, quote, need for the facility. That is not
3 relevant. Dr. Brown intends to testify related to
4 the project's competitiveness on the wholesale
5 market, topics such as the PPA entered into by
6 Icebreaker, Cleveland Public Power. Even the OPSB
7 Staff's own witness, Mr. Cross, has indicated that is
8 not relevant to these proceedings.

9 We certainly concur that it is not
10 relevant, especially with regard to the two
11 intervenors. Mr. Maloney and Ms. Dempsey last
12 indicated from our motion neither one of them are
13 customers of CPP. They are both FirstEnergy
14 customers. So issues with regard to rate, tax
15 liability, those are not their issues, your Honor,
16 and those are not properly before the OPSB.

17 Thank you, your Honor.

18 ALJ ADDISON: Thank you.

19 Mr. Secrest, are you prepared to go
20 through the testimony of Dr. Brown to identify those
21 particular portions of the testimony that are subject
22 to your motion?

23 MR. SECREST: We are, your Honor. And I
24 believe we have with regard to the attachments to our
25 actual motion included a chart which identifies the

1 portion of Dr. Brown's testimony that we do not
2 believe is relevant or should be introduced in these
3 proceedings.

4 ALJ ADDISON: Thank you very much.

5 MR. SECREST: Thank you.

6 ALJ ADDISION: Mr. Stock.

7 MR. STOCK: Mr. Haffke.

8 ALJ ADDISON: I apologize.

9 MR HAFFKE: No problem. Thank you, your
10 Honor. First, I would like to go on the record to
11 reserve our right to file written response to the
12 motion. This motion was filed on Friday afternoon.
13 Icebreaker has had Dr. Brown's expert report since
14 July 14. They were able to depose Dr. Brown on it,
15 and Dr. Brown is not set to testify for several days,
16 to be determined.

17 With that said, every aspect of
18 Dr. Brown's written testimony and his expert report
19 are directly relevant to the proceedings before
20 this -- before this Board. Their motion is to
21 exclude the testimony as irrelevant, but all aspects
22 of the testimony are directly relevant to the
23 statutory test that is being applied here.

24 Specifically, it is relevant to Ohio
25 Revised Code 4906.10(A)(4), which requires the Board

1 to determine that the facility is consistent with
2 regional plans for expansion of the electric power
3 grid, of the electric system serving the state and
4 interconnected utilities and the facility will serve
5 the interests of the electric system, economy, and
6 reliability.

7 Dr. Brown's testimony discusses the
8 electric system economy and reliability issues
9 directly by talking about the market, market
10 distortions, the effects of the economics on this
11 project on its viability.

12 I would also note that the Staff Report
13 has -- includes a section opining about the need to
14 reach the determination that the facilities will
15 serve the interests of the electric system economy
16 and reliability, and every portion of Dr. Brown's
17 testimony goes to that.

18 A second portion of the statutory test
19 that Dr. Brown's testimony is relevant to is
20 4906.10(A)(6), which requires the determination that
21 the facility will serve the public interest,
22 convenience, and necessity. Icebreaker goes in their
23 motion to make the point into there is -- this is not
24 currently at issue. It is the -- it is A-1 of that
25 test regarding need, but this goes to public

1 necessity, convenience, and interests, which is
2 statutorily mandated, and the opinions expressed in
3 here go to whether this power -- excuse me -- this
4 facility will serve the public necessity.

5 With regard to the portions of sort of
6 the second portion of the motion in limine, which
7 essentially seeks to make the point these issues were
8 not raised by the breadth of the resident local
9 intervenors, Mr. Maloney and Ms. Dempsey, that's
10 incorrect. Both of their submitted written
11 testimonies specifically say they have read and
12 support the testimony of Dr. Brown.

13 Also in their petition to intervene, they
14 specifically raised their concerns about whether the
15 project will serve the impact on the interests of
16 electric system, economy and reliability, and public
17 necessity. So these issues have been at the
18 forefront throughout intervenors' petition to
19 intervene, which was then, obviously, granted.

20 ALJ ADDISON: Thank you very much.

21 Response?

22 MR. SECREST: Very briefly, your Honor.
23 Thank you. As Mr. Haffke plainly indicated, they are
24 tying reliability and public need into the, quote,
25 effect of the economics on the viability of the

1 project. That is not properly before the Board.

2 That is not a factor for 4906.10.

3 These are not publicly regulated
4 entities. The economics of the project, the
5 reliability of the project, and the ties to
6 economics, the competitiveness of the project as it
7 ties to economics, and usurping PJM's authority to
8 determine reliability is exactly what Dr. Brown's
9 testimony proposes to do.

10 Thank you, your Honor.

11 ALJ ADDISON: Thank you very much. Just
12 a quick clarification, there were no objections to
13 the motion to the protective order filed to cover
14 portions of Dr. Brown's deposition in the motion in
15 limine; is that correct?

16 MR HAFFKE: That is correct. I don't
17 believe we objected to the protective treatment of
18 the testimony.

19 ALJ ADDISON: Thank you. I think at this
20 moment we are going to take just a brief break to go
21 upstairs and review the filings a little more
22 thoroughly. We will be down -- let's break for maybe
23 15 minutes. We'll reconvene around 11:00.

24 Thank you all.

25 (Recess taken.)

1 ALJ ADDISON: Let's go back on the
2 record. Thank you. Before the brief break we
3 accepted arguments regarding the September 20 motion
4 to quash filed by Icebreaker and the motion in limine
5 motion for protective order filed also by Icebreaker
6 on September 21.

7 In terms of the motion to quash,
8 Mr. Secrest, Icebreaker is not proposing any sort of
9 limiting language for the subpoena; is that correct?

10 MR. SECREST: That's correct, your Honor.

11 ALJ ADDISON: Thank you.

12 Okay. At this time we will be denying
13 the motion to quash. We feel that communications
14 regarding this specific letter dated March 12, 2018,
15 which is referenced in several witnesses' prefiled
16 testimony are reasonably calculated to lead to the
17 discovery of admissible evidence, and we do not feel,
18 limited to this particular letter, the way that the
19 subpoena was phrased is unduly burdensome.

20 Mr. Secrest, when do you believe you will
21 be able to provide any documentation that has not
22 otherwise been provided to date?

23 MR. SECREST: Your Honor, to date the
24 correspondence between my client and any agency has
25 been provided. The remaining documents that have not

1 been provided that would be responsive to the
2 subpoena would be internal communications. The main
3 concern with those is reviewing them for
4 attorney-client privilege because counsel was copied
5 on a number of those. I anticipate by close of
6 business tomorrow, though, we could produce those.

7 ALJ ADDISON: Wonderful. Thank you.
8 And, of course, any -- any communication subject to
9 attorney-client privilege, please be sure to mark
10 that accordingly, and if there are any additional
11 issues provided to you in discovery, we can address
12 those at that time.

13 MR. STOCK: That will be fine. I just
14 want to make it clear there will be an identification
15 of all materials, and if there is a claim of
16 privilege with respect to certain of them, we need to
17 know what exhibits, and if you claim the privilege,
18 tell us you are claiming the privilege with respect
19 to identified communications.

20 ALJ ADDISON: Certainly. I think that's
21 what Mr. Secrest is agreeing to, so.

22 MR. STOCK: Thank you.

23 MR. SECREST: Thank you.

24 ALJ ADDISON: Thank you very much
25 Additionally, we will be granting the motion for

1 protective order filed on September 21, 2018, with
2 regards to the deposition of Dr. Brown and the motion
3 in limine.

4 And I just wanted to have this on the
5 record for clarification, Mr. Secrest, the portions
6 of Dr. Brown's testimony, specifically pages 11
7 through 14 of the attached report to this testimony,
8 the motion for protective order also applies to that
9 portion of his testimony, correct?

10 MR. STOCK: That's correct, your Honor.
11 Thank you.

12 ALJ ADDISON: Thank you very much.

13 And I just wanted to note there was no
14 objection to that motion.

15 In turning now to the motion in limine
16 itself, we will be denying that motion at this time.
17 The Board is certainly prepared to provide any
18 testimony presented by Dr. Brown the appropriate
19 weight it deserves, and we feel any additional
20 objections or issues with the relevancy of that
21 testimony can be addressed during his
22 cross-examination.

23 Okay. Is there anything else before we
24 begin taking witnesses this morning?

25 Mr. Jones.

1 MR. JONES: Yes, your Honor. I have two
2 matters.

3 ALJ ADDISON: Certainly.

4 MR. JONES: Number one, I don't believe
5 all the parties have responded to the bench as to the
6 time estimation of cross-examination, and we would
7 like to know those parties' time estimations for
8 cross, is one matter.

9 ALJ ADDISON: Thank you. What's the
10 second?

11 MR. JONES: And the second is Staff has a
12 motion to strike Mr. Karpinski's testimony, parts of
13 it. We would like to present that motion before he
14 takes the stand.

15 ALJ ADDISON: Thank you very much. Let's
16 go off the record for just a moment.

17 (Discussion off the record.)

18 ALJ ADDISON: Let's go ahead and go back
19 on the record. We took a brief -- there was a brief
20 discussion off the record in terms of Mr. Jones' two
21 inquiries. Any cross estimates that have not
22 otherwise been provided, the parties will be
23 providing those after today, if not before.

24 And we will address the motion to strike
25 raised by staff to Mr. Karpinski's testimony when he

1 takes the stand.

2 Ms. Pirik also raised the fact there are
3 some additional outstanding motions for protective
4 order that the ALJs have yet to rule upon, the first
5 being the motion for protective order filed on
6 February 1, 2017, as amended on June 22, 2018, and
7 the second being filed on June 11, 2018.

8 I would just like the record to show that
9 the Bratenahl residents filed a response to the June
10 11 protective order on June 25, 2018, to which
11 Icebreaker filed an additional response on July 22.

12 We would also note that Icebreaker filed
13 an affidavit for the confidential portions of the
14 February 1 motion for protective order as amended on
15 June 22 and the June 11 motion for protective order.

16 Upon review, we do find these motions do
17 seek to protect trade secret information as they
18 pertain to highly competitive financial information,
19 and we will be granting the motions for protective
20 order at this time.

21 ALJ WALSTRA: Icebreaker, would you like
22 to call your first witness?

23 MR. STOCK: Yes, thank you, your Honor.
24 Icebreaker would like to call David Karpinski.

25 (Witness sworn.)

1 ALJ WALSTRA: Thank you. Go ahead.

2 MR. SECREST: Thank you, your Honor.

3 Mr. Karpinski will be testifying in support of
4 premarked Exhibits 1 through 24, as well as the
5 confidential portions of 1 and 14, which will be
6 marked 1A and 14A and have been provided to the court
7 reporter already.

8 May I approach the witness, your Honor?

9 ALJ WALSTRA: You may.

10 MR. SECREST: Thank you. May I approach
11 the Bench, your Honor?

12 ALJ WALSTRA: You may.

13 MR. SECREST: What I have handed you has
14 been marked as Applicant Exhibit 35, which is a proof
15 of publication, which was filed in the docket last
16 week but was not contained within the exhibits to the
17 application.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 - - -

20 DAVID KARPINSKI

21 being first duly sworn, as prescribed by law, was
22 examined and testified as follows:

23 DIRECT EXAMINATION

24 By Mr. Secrest:

25 Q. Mr. Karpinski, would you spell your last

1 name?

2 A. K-A-R-P-I-N-S-K-I.

3 Q. Do you have your prefiled written
4 testimony in front of you?

5 A. Yes, I do.

6 Q. Does that testimony require any
7 amendments or revisions?

8 A. No, it doesn't.

9 Q. Okay. Thank you. And, Mr. Karpinski,
10 are you also sponsoring the Joint Stipulation and
11 Recommendation?

12 A. Yes, I am.

13 MR. SECREST: We tender Mr. Karpinski for
14 cross-examination.

15 ALJ ADDISON: Before we proceed,
16 Mr. Secrest, would you mind just moving your mic just
17 a little closer. Thank you, so much.

18 MR. SECREST: Is that better, your Honor?

19 ALJ ADDISON: Yes, thank you.

20 ALJ WALSTRA: What is the -- is it Joint
21 Exhibit 1, is that the Stipulation?

22 MR. SECREST: Yes.

23 ALJ WALSTRA: Okay.

24 MR. SECREST: Yes, your Honor.

25 (EXHIBIT MARKED FOR IDENTIFICATION.)

1 ALJ WALSTRA: Before we get to cross,
2 Mr. Jones.

3 MR. JONES: Thank you, your Honor. Your
4 Honors, on behalf of Staff, I have a motion to strike
5 certain parts of Mr. Karpinski's testimony, and I
6 would like to walk through those parts that I'm
7 highlighting here. And I begin on page 10 --

8 MR. SECREST: I am sorry to interrupt.
9 Would you mind speaking up just a bit?

10 MR. JONES: Yes. I am going to begin on
11 page 10 of Mr. Karpinski's testimony, line 12 -- no,
12 excuse me, line 14 beginning with "However, there are
13 three conditions that, in my opinion, make the
14 project un-financeable and, therefore, are fatal
15 conditions."

16 Your Honors, this is, first of all, it's
17 beyond the scope of his testimony as provided on page
18 7 of his testimony where on line 12 he says that he's
19 summarizing "the differences between the conditions
20 in the Stipulation and those in the Staff Report of
21 Investigation that was filed on July 3, 2018 ('Staff
22 Report')."

23 There is no mention that this is part of
24 this -- the purpose of his testimony giving opinion
25 on the Staff Report. Second of all, on page 4 of his

1 testimony, line 18, the Applicant would be the one
2 securing financing from lenders and equity investors
3 here, and Mr. Karpinski is the vice president of
4 operations for LeedCo.

5 LeedCo and Icebreaker Wind Park are two
6 distinct entities, as provided in the testimony here
7 of Mr. Karpinski. So on this -- him giving an
8 opinion here as to being unfinanceable, he doesn't
9 have any degrees in financing, economics. You know,
10 he's not qualified to give this opinion as an expert
11 on the Staff Report addressing the criteria of
12 4906.10(A). There's no foundation for this
13 testimony. It's hearsay. He makes assumptions and
14 conclusions. It's not relevant.

15 And I would argue that this testimony --
16 and let me proceed because it continues over on page
17 11, line 19, at the end of the line there starts with
18 "that make the project un-financeable" in relation to
19 condition 19 he's addressing, as to strike that
20 language there, too, beginning with "that make the
21 project un-financible." That's the language I am
22 asking to strike there.

23 Again, that language is repeated as to
24 condition 22(c) beginning at line 23. At the end of
25 the line, starting with "that make the project

1 un-financible," I would ask to strike that language
2 there. This language is repeated again on page 12 of
3 his testimony addressing condition 24, starting with
4 the word "that" at line 3 at the end, "that make the
5 project un-financeable." Again, I would ask to
6 strike the language there.

7 It continues on on page 12, line 20, in
8 the question itself, "What is the impact of this
9 provision on the ability to secure financing for the
10 project?" I would ask to strike that line there as
11 well as the line in line 22 at the end where it says
12 "and, in my opinion, makes financing the project
13 virtually impossible." I ask to strike that line
14 there.

15 Continuing on page 13 at line 5, the last
16 sentence there, "This 40% reduction in revenue would
17 render it impossible to pay the three key obligations
18 I just listed above." On the same page, line 15,
19 last line, "We simply will not be able to secure the
20 financing to build the project and the certificate
21 itself loses all value," I ask to strike that last
22 sentence.

23 Continuing down the page beginning at
24 line 22, last sentence, "Lenders and investors will
25 view the trigger for this condition (a future

1 regulatory approval) as uncertain and they will view
2 the consequences for failing to achieve the
3 approval(a 40% hit to revenues) as fatal. I ask to
4 strike that line there.

5 Go to page 15, as to the sentence
6 beginning at page -- line 3, "As a result, the
7 obstacle to obtain financing I addressed earlier is
8 eliminated, enabling the project to be built," I ask
9 to strike that line there.

10 ALJ WALSTRA: Mr. Jones, why don't we
11 take -- I assume these are all going to be along the
12 same line.

13 MR. JONES: These are all connected, but
14 there are other pieces here that are not connected to
15 financing. There are other pieces that are hearsay
16 and no foundation. It's not relevant -- not related
17 to financing. I am hitting on all the financing
18 ones, but I can stop there for now or I can continue
19 to complete the record.

20 ALJ WALSTRA: If you want to move past
21 the financing ones, and then we can go back to them
22 if need be.

23 MR. JONES: Okay. Let's see here, page
24 16, beginning at line 27, and continuing on through
25 the rest of that answer on page 17, line 3, at

1 "8 percent," this there is no foundation for this
2 testimony. It's data that's not provided as part of
3 his testimony. There is nothing that said that he
4 did this analysis, he is familiar with the analysis,
5 so there's no foundation for it.

6 He's not the expert in this area. He's
7 the big-picture guy. He is not the guy on birds and
8 bats or radar. It's clearly hearsay and no
9 foundation. There's no data provided to back it up,
10 nothing that relates to him being involved in the
11 analysis with that data, so I would ask to strike it
12 on those grounds.

13 Let's see, I can get back into the
14 lenders and financiers on 18. Let's see, you want me
15 to just go over that? I'll pass that.

16 ALJ WALSTRA: Thank you.

17 MR. JONES: Down at the bottom on page 18
18 beginning at line 28, it says, "According to bird and
19 bat experts I have talked to it is not necessary to
20 have produced viable data for 80% of the survey time
21 in order to properly address those questions."
22 That's clearly hearsay. He's talking about
23 information he got from yet someone else, and he's
24 repeating that information for its truth and
25 voracity.

1 Let's see, okay. We get back into the
2 investor again on 19, again, financing on page 20.
3 Let's see here, again on 21, investors again, 22,
4 investors. Page 23, beginning at line 3, beginning
5 with "During the discussions that led to the Board's
6 adoption of this language, Staff had proposed the
7 language '...result in significant adverse impact to
8 wildlife, then mitigation measures may be prescribed
9 to the Applicant.' But the Board rejected this
10 language period. Instead, the Board adopted language
11 proposed by the Mid-Atlantic Renewable Energy
12 Coalition that is now contained in rule
13 4906-4-09(D)(6) OAC." I would ask to strike all of
14 that except for the citation itself. It sets it up
15 for what the citation is. But all of that other
16 information is not relevant as to what was behind the
17 rule being passed and whose position Mid-Atlantic, or
18 Staff's position, that was relevant to passing of
19 that rule, so it is hearsay. There is no foundation.
20 There is no relevance. I would ask to strike that
21 language.

22 Again, on page 26 more financing stuff,
23 down at line 18, again it's referencing at line 18
24 that the words "proposed by MAREC." I would ask to
25 strike those three words there. Again, it's not

1 relevant to anything and no foundation for that.

2 MS. LEPPLA: John, is that the last page?

3 MR. JONES: Yeah, page 26, line 18, the
4 word "proposed by MAREC," and that's it.

5 ALJ WALSTRA: Thank you.

6 MR. JONES: Thank you.

7 ALJ WALSTRA: Go ahead.

8 MR. SECREST: Thank you, your Honor.

9 I'll start with the financing information. If you
10 note on page 5, starting at line 9, there are various
11 bullet points that are in reference to page 4, the
12 question, "What are your duties at LeedCo?" And
13 Mr. Karpinski indicates managing LeedCo's finances,
14 budget, and accounting process; developing the
15 financing plan for the project, develop; and managing
16 the project's schedule; identifying and engaging with
17 prospective off-takers; negotiate power purchase
18 agreements; and engage in investor relations and
19 administration.

20 On that same page in response to question
21 6, which is lines 20 through 26, he specifically
22 states that LeedCo is performing project development
23 tasks on behalf of Icebreaker. And he again states
24 what some of those tasks are, which include pursuing
25 project financing, pursuing power purchase

1 agreements, managing the project's schedule, plans,
2 and budget.

3 If you look at page 6, your Honor, also
4 in response to question 8, lines 5 through 12,
5 Mr. Karpinski again identifies duties and tasks he
6 has performed on behalf of this project. He
7 performed analysis and prepared financial reports,
8 statements, budgets for the application.

9 Mr. Karpinski has been intimately involved in the
10 financing, intimately involved in discussions with
11 the investors, with the project schedule, with the
12 budgeting. He is testifying as to his knowledge
13 based upon the performance of his duties and the
14 knowledge he has gained over the past seven years
15 working on this project in efforts to obtain
16 financing.

17 With regard to -- I am not sure how to
18 phrase or characterize the other concern, but it was
19 on page 23, line 3 -- or I am sorry, it was page 16,
20 line 27, was the next one I noted. And they are
21 moving to strike Mr. Karpinski's testimony that he
22 has a concern with regard to the 80 percent standard.

23 I'm not quite sure why Mr. Karpinski
24 cannot have a concern relating to that standard,
25 despite the fact he is not a bird or bat expert. He

1 can still have a concern with regard to that, and
2 that's what he is testifying to with relation to the
3 duties he has just identified and the tasks he
4 identified that he has performed for the project.

5 I'll just make that a he's going to raise
6 today. That's a legitimate concern. He is
7 testifying to his own personal knowledge.

8 ALJ WALSTRA: In question 36, that was
9 your issue, right?

10 MR. JONES: Question 36, your Honor?

11 ALJ WALSTRA: In terms of that data that
12 was supplied?

13 MR. JONES: On the 8 percent and the
14 6-foot waves, and he is not an expert.

15 ALJ WALSTRA: Was that information
16 provided?

17 MR. JONES: There is no data provided.

18 ALJ WALSTRA: Is that accurate?

19 MR. SECREST: It is addressed in
20 Mr. Karpinski's testimony, your Honor, not the wave
21 height data, but the average wave height and number
22 of days of wave height of the high seas.

23 ALJ WALSTRA: Beyond what's just in this
24 answer?

25 MR. SECREST: No, your Honor.

1 ALJ WALSTRA: Okay.

2 MR. JONES: There is no description he
3 did this type of analysis anywhere else in his
4 testimony.

5 MR. SETTINERI: Your Honor, if I may on
6 this specific issue, I believe Mr. Karpinski is an
7 experienced engineer and his testimony indicates he
8 has wave height data, which I think as an engineer,
9 he certainly could be able to calculate averages from
10 the data itself. I believe he has almost over 30
11 years of engineering managerial experience, so as to
12 that specific point, he certainly has experience, and
13 his testimony could be weighed accordingly, and these
14 kind of questions are questions that should be
15 brought on cross.

16 MR. JONES: Your Honor, this is not
17 addressed in anyone else's testimony. Mr. Karpinski
18 is the only witness that brings up this 8 percent and
19 the data related to that 8 percent.

20 ALJ WALSTRA: Is this information
21 publicly available?

22 MR. SECREST: He would testify what he
23 did regarding the information, what he did to obtain
24 that information, what he viewed on cross-examination
25 if asked.

1 ALJ WALSTRA: You can go forward.

2 MR. SECREST: Thank you, your Honor.

3 ALJ WALSTRA: Continue your argument.

4 MR. SECREST: I noted a concern page 23,
5 line 3, starting on line 3, "During the discussions
6 that led to the Board's adoption of this language,"
7 and I believe the remaining portion of that testimony
8 Staff seeks to strike, except for the citation.

9 Is that accurate, Mr. Jones?

10 MR. JONES: That's correct.

11 MR. SECREST: Here Mr. Karpinski is
12 quoting a prior proceeding before the Board, the
13 relevance issue or the concern with regard to
14 relevance is no concern at all. It is
15 precedential -- it is relevant from a precedential
16 standpoint as to what the Board has done previously
17 with regard to Stipulation and proposed language.

18 And page 26, line 18, that is the same
19 concern there raised by Staff and the same response
20 for the precedential value.

21 MR. JONES: Your Honor, can I be heard
22 about those comments? He's saying that's
23 precedential value. These were positions of
24 different stakeholders who had input, you know, for
25 purposes of developing the rule. There is no

1 precedential value there. It is what the rule is,
2 the rule itself. The past rule is the precedential
3 value. It's not the positions taken by different
4 parties in trying to have, you know, the rule -- in
5 developing the rule.

6 MR. SETTINERI: Your Honor, if I may
7 briefly, in terms of precedential, but regarding the
8 Board's opinions adopting rules and the positions
9 that they adopt, I think are certainly relevant.

10 MS. LEPPLA: If I may, your Honor, as we
11 also submitted comments throughout that process and
12 can confirm that is all accurate.

13 ALJ WALSTRA: Thank you. I am going to
14 deny the motions to strike regarding the financials.
15 I think he testified that is part of his job
16 responsibilities. I think it is something that can
17 certainly be explored on cross-examination.

18 And with regard to the rules portion we
19 just discussed, a lot of that is in the public
20 record, and the Board can give that amount of
21 relevancy it deems necessary.

22 Regarding the other arguments regarding
23 the hearsay arguments, the Board does have some
24 discretion to consider the evidence that comes in,
25 and I think that can be explored on

1 cross-examination.

2 MR. JONES: Thank you, your Honor.

3 MR. SECREST: Thank you, your Honor.

4 ALJ WALSTRA: Anything further before we
5 go around the room?

6 Mr. Berkowitz.

7 MR. BERKOWITZ: No questions.

8 ALJ WALSTRA: Mr. Stock?

9 MR. STOCK: I have questions. I spoke to
10 Ms. Pirik. In the exhibits that I have for my
11 cross-examination include an unredacted copy of the
12 power purchase agreement dated May 6 between Fred
13 Olsen and Renewables U.S.A. and the City of
14 Cleveland. Clearly I am going to provide copies for
15 the bench and the witness. I will take direction
16 otherwise as to how we handle that.

17 ALJ WALSTRA: Do you have a redacted
18 version?

19 MR. STOCK: I do not.

20 ALJ WALSTRA: Is that part of the record?

21 MR. SECREST: We do have a redacted
22 version, your Honor.

23 ALJ WALSTRA: Yeah. Let's go off the
24 record for a second.

25 (Discussion off the record.)

1 ALJ WALSTRA: We'll go back on the
2 record.

3 - - -

4 CROSS-EXAMINATION

5 By Mr. Stock:

6 Q. Good morning, Mr. Karpinski.

7 A. Good morning.

8 Q. We've met before. You know I'm John
9 Stock, and I represent the intervenors, Robert
10 Maloney and W. Susan Dempsey. If you would take a
11 look at the binder of exhibits I've given you.

12 A. Yes.

13 Q. Behind tab A, which we will be marking as
14 Exhibit 1, is a depiction, a diagrammatic depiction,
15 of the project area on the first page that was taken
16 from the application. Do you generally recognize
17 that depiction as an accurate depiction of the
18 general geography of it?

19 A. Yes.

20 Q. I just want us all to know what we are
21 talking about. And then if you flip to the second
22 page of that, this is a depiction of a rotor from --
23 excuse me, a turbine from two viewpoints, what I will
24 call face on and then profile, also taken from the
25 application, I believe Exhibit P in the application.

1 Does that look familiar to you?

2 A. Yes, it does.

3 Q. And as depicted here, the turbine, the
4 wind turbine, the lowest point of the blade would be
5 20 meters or 65.62 feet above the surface of Lake
6 Erie; is that correct?

7 A. That's right.

8 Q. And the maximum height, total maximum
9 height, of the rotor would be 146 meters, which is a
10 little over 479 feet; is that correct?

11 A. That's correct.

12 Q. Okay. The project, if you go back to the
13 first page here, is approximately -- the nearest
14 turbine, would that be ICE-1?

15 A. Yes.

16 Q. Nearest to shore?

17 A. Yes. That's what the diagram indicates,
18 right.

19 Q. Is that approximately 8 miles offshore?

20 A. Yes.

21 Q. And the line of turbine stretches out
22 approximately how far? Two miles?

23 A. About 2 miles from the first line.

24 Q. Eight to ten miles; is that correct?

25 A. That's right.

1 Q. And it runs generally from turbine 1 to
2 turbine 6 in a northwesterly, slightly northwesterly,
3 direction?

4 A. Yes.

5 Q. Okay. Now, do you have your written
6 testimony there before you?

7 A. Yes, I do.

8 Q. Okay. If you would turn to question
9 number 57 on page 27. Do you see that?

10 A. Yes, I do.

11 Q. The question reads, Does the Application,
12 as agreed to through the Stipulation, enable the
13 Board to determine the nature of the probable
14 environmental impact of the facility? And you answer
15 yes; is that correct?

16 A. Yes.

17 Q. Okay. With some explanation that
18 follows. And I want to direct your attention to page
19 11 of your testimony, the bullet point for condition
20 19. "As explained in greater detail below and by
21 Rhett Good (Applicant Exhibit 31), the revision in
22 the Stipulation is crucial for eliminating the
23 concerns that make the project un-financeable, while
24 maintaining minimum adverse environmental impact."

25 So you testify with respect to question

1 57 regarding the nature of the probable environmental
2 impact, correct?

3 A. Yes.

4 Q. And then in this language you testify
5 regarding the condition in the Stipulation as
6 maintaining minimum adverse environmental impact; is
7 that also correct?

8 A. Yes.

9 Q. Okay. Exhibit tab 2 -- tab B, Exhibit 2
10 is your resume. Would you please confirm for the
11 record that this is -- is this your most recent
12 resume?

13 A. Yes. It appears that it is, yes.

14 Q. And it accurately depicts your
15 educational background? You have a BS in electrical
16 engineering from the Ohio State University in 1984,
17 correct?

18 A. That's right.

19 Q. You might want to add the article The
20 before that. And then you have your work experience
21 depicted here or explained here, correct?

22 A. Yes.

23 Q. Now, you have no degrees in wildlife
24 biology, do you?

25 A. No, I don't.

1 Q. You have no degrees in wildlife ecology,
2 do you?

3 A. No, I don't.

4 Q. You have no degrees in zoology, do you?

5 A. No.

6 Q. You have no degrees in environmental
7 studies, correct?

8 A. No.

9 Q. You have no degrees in statistics,
10 correct?

11 A. No.

12 Q. Okay. You have never been employed
13 professionally as a wildlife biologist, correct?

14 A. No; never purported to be, but I have
15 been involved with a lot of our consultants and a lot
16 of experience in this project for the past 10 years.

17 Q. Well, my question is, you have never
18 really been employed as a wildlife biologist?

19 A. No, that's true.

20 Q. You have never been employed by anyone as
21 a wildlife ecologist?

22 A. No, I haven't.

23 Q. Never been employed as a zoologist?

24 A. No.

25 Q. Never been employed as an environmental

1 scientist by anyone, correct?

2 A. That's correct.

3 Q. Never been employed as a statistician by
4 anyone, correct?

5 A. That's correct.

6 Q. You've never authored and published any
7 articles in the field of wildlife, biology, correct?

8 A. That's correct.

9 Q. Never published, authored and published,
10 any articles in the field of wildlife ecology,
11 correct?

12 A. That's correct.

13 Q. Never authored and published any articles
14 in the field of zoology, correct?

15 A. Correct.

16 Q. Never authored and published any articles
17 in the field of environmental science, correct?

18 A. Correct.

19 Q. Never authored and published any articles
20 in the field of statistics, correct?

21 A. That's correct.

22 Q. Now, you've never been employed by anyone
23 to conduct a study regarding the migration --
24 nocturnal migration of birds, correct?

25 A. Yeah, that's correct. But I've enlisted

1 experts to do that. Those experts formed my opinion.
2 You will hear the testimony from those experts to
3 follow.

4 Q. I know. They're not on the stand right
5 now.

6 A. Okay.

7 Q. I want to know what you've done.

8 A. My resume is pretty clear what I've done,
9 so okay.

10 Q. We'll find out. So you've never been
11 employed by anyone to ever conduct a study of the
12 nocturnal migration of birds, correct?

13 A. That is correct.

14 Q. You've never designed or implemented a
15 study to analyze the nocturnal migration of birds,
16 correct?

17 A. As I said, that's true, yes.

18 Q. You've never designed and implemented an
19 avian radar study of any nature, correct?

20 A. That's correct.

21 Q. All right. You've never authored and
22 published any article regarding avian radar; is that
23 correct?

24 A. That's correct.

25 Q. You've never authored or published any

1 article regarding the nocturnal migration of birds,
2 correct?

3 A. Correct.

4 Q. Okay. I want you, if you would, please,
5 take a look at tab 3, which is now Exhibit 3. Would
6 you please identify that for the record?

7 A. It's a power purchase and sale agreement
8 between Fred Olsen Renewables U.S.A. and the City of
9 Cleveland.

10 Q. And what is the purpose of this
11 agreement?

12 A. The document is an agreement of the City
13 of Cleveland to purchase power from the Icebreaker
14 Wind Project.

15 Q. Okay.

16 A. The terms under which that purchase would
17 be made.

18 Q. Okay. I believe at your deposition you
19 testified, did you not, that you were involved in the
20 negotiation of this agreement?

21 A. Yes, yes.

22 Q. Okay. So you're intimately familiar with
23 the agreement, correct?

24 A. Yes.

25 Q. Now, if you turn to Section 5.1, on page

1 16.

2 A. Yes.

3 Q. The term of the agreement is for 192
4 months, and I will confess I went to law school so I
5 didn't have to take math. But is that 16 years?

6 A. Yes, it is.

7 Q. Okay. And --

8 A. I would clarify from the date the project
9 goes live, begins producing electricity.

10 Q. And that's when the 16 years begins to
11 run?

12 A. Right.

13 Q. Thank you. Now, if you take a look at
14 page 7, Section 2.1, Purchased Output Tranches, this
15 agreement is between Fred Olsen Renewables U.S.A,
16 LLC. What's the relationship of Fred Olsen
17 Renewables, LLC to the Applicant, Icebreaker?

18 A. It -- Fred Olsen, LLC was renamed to
19 Icebreaker Windpower Inc., so it's the same entity.

20 Q. Okay. Thank you. And is there a parent
21 organization of Icebreaker?

22 A. As I said, my earlier comments, there is
23 an owner of Icebreaker. That's Fred Olsen Renewables
24 U.S.A, Inc.

25 Q. As opposed to LLC?

1 A. Right, right.

2 Q. Thank you. And pursuant to Section 2.1,
3 specifically subparagraph A-1, is the City of
4 Cleveland required to produce -- or excuse me,
5 purchase electricity that is produced by the project
6 if, in fact, it becomes operational and produces
7 electricity?

8 A. This term, they are agreeing to purchase
9 that amount of power.

10 Q. Okay. Does the City of Cleveland,
11 pursuant to this agreement, have the right to refuse
12 to accept power from the project?

13 MR. SECREST: Let me note an objection to
14 the extent it calls for a legal conclusion as well as
15 relevancy.

16 ALJ WALSTRA: Overruled.

17 A. So the -- the agreement, as I see it,
18 establishes the provisional purchase, and they are
19 agreeing to purchase 25 percent. If they want the
20 right to not purchase power, they would have not
21 entered the agreement.

22 The only thing I would point out is a
23 significant provision of this agreement as opposed to
24 other power purchase agreements you enter into, other
25 PPOs in the market require payments even if no energy

1 is produced, so this is a favorable provision that
2 says you are only going to have to buy the power if
3 it is indeed produced, pay any monies if it is indeed
4 produced.

5 Q. I don't believe I'm asking you about
6 other agreements. If you would confine your
7 responses to my questions, I would appreciate it.

8 So there is -- what you're telling me,
9 there is no provision pursuant to this agreement if
10 the project begins to produce electricity, there is
11 no provision for the City of Cleveland to refuse to
12 accept the 25 percent of the electricity that it
13 agrees to purchase pursuant to this agreement; is
14 that correct?

15 A. Termination of the agreement. The
16 agreement's purpose is to set forth the purchase of
17 power, not reasons I don't want to purchase power, so
18 in my mind that would be a termination provision or
19 some termination provisions.

20 Q. Okay. So I want to make sure I
21 understand how this works. The project is up and
22 operating, producing electricity, and electricity
23 gets transmitted by the transmission line to a
24 substation on the shore; is that correct?

25 A. That's correct.

1 Q. In laymen's terms, the City of Cleveland,
2 pursuant to this agreement, is required to purchase
3 25 percent of that output; is that correct?

4 A. That's correct.

5 Q. All right. Now, what does the second
6 tranche C mean? Subparagraph (A)(2) there, "Buy or
7 shall procure from seller an amount equal to
8 8.6 percent. That's over and above the 25 percent;
9 is that correct?

10 A. That's correct.

11 Q. All right. What happens with the 8.6.

12 A. The 8.6 percent is an amount that the
13 City of Cleveland is, in turn, going to distribute,
14 sell to Cuyahoga County. It goes through this power
15 purchase agreement, because the City of Cleveland
16 also reached an agreement to provide all the power
17 for certain Cuyahoga County facilities, and this
18 power would be a portion of the total power delivered
19 by CPP to those county facilities.

20 Q. Okay. So is CPP required to purchase
21 this additional 8.6 percent from the project?

22 A. Yes, it is.

23 Q. Okay. And it can't, pursuant to the
24 terms of this contract, decline to purchase that
25 additional 8.6 percent; is that correct?

1 A. Under -- under -- the conditions for the
2 tranches varies, so the conditions aren't identical
3 for Tranches A, B, and C.

4 Q. Okay.

5 A. So there are provisions that if under
6 certain conditions -- I would have to refresh my
7 memory on the details, what the specific provisions
8 of Tranche B were.

9 Q. Well, take a look at that, if you would.
10 You were involved in negotiating this. And tell us
11 what that means for that second tranche means. It's
12 on page 12, I think, Tranche B purchased output.
13 That refers to the 8.6 percent, correct?

14 A. Yes.

15 Q. Okay.

16 A. So there are three conditions that --

17 Q. Okay.

18 A. That everything -- all the conditions
19 that were required by the City of Cleveland for the
20 Tranche B purchase.

21 Q. All right.

22 A. In addition, CPP or the City of Cleveland
23 had to enter into a binding agreement with Cuyahoga
24 County covering this purchase.

25 Q. Have they done that?

1 A. Yes, they have.

2 Q. All right. So that condition has been
3 met, correct?

4 A. Yes.

5 Q. Have the conditions for tranche A been
6 met?

7 A. Not all of them, no.

8 Q. Okay. They are still yet to be met?

9 A. Yes. Some of them, yeah.

10 Q. Okay. All right.

11 A. And some of those would not be met until
12 closer to construction and operation.

13 Q. Okay. All right. And then what's the
14 third condition there?

15 A. The third -- the third condition is a
16 provision that says that Fred Olsen Wind or the
17 seller to Cuyahoga County enter into a agreement
18 where they represent the liability of the County to
19 honor its obligations for the purchase of power. The
20 City did not want to assume that liability or that
21 responsibility.

22 Since this was drafted, the City and
23 County, with the concurrence of Icebreaker Windpower,
24 have an agreement that provisions in the agreement
25 between the City and the County represent this --

1 this provision adequately, and this provision in the
2 future will be waived then because it's represented
3 in the agreement directly between the City and the
4 County that gives Icebreaker Wind Power certain
5 rights.

6 Q. Okay. Now, go back to page 7, Tranche
7 C -- or 3, excuse me. Well, yeah, 3, (A) (3),
8 "Subject to satisfaction of the conditions set forth
9 in Section 3.1(C) and commencing on the Commercial
10 Operation Date, Buyer shall procure from Seller and
11 Seller shall provide to Buyer Tranche C Purchased
12 Output in the amount of up to 30 percent." So that's
13 over and above the original Tranche A 25 percent?

14 A. Yes.

15 Q. And then 8 percent, which gets us to
16 33.6 percent, correct?

17 A. That's correct.

18 Q. And then you have another 30 percent,
19 which gets us up to 63.6 percent; is that correct?

20 A. That's correct.

21 Q. And pursuant to this Tranche C, is CPP
22 required to purchase this additional 30 percent of
23 the electricity if the conditions of Tranche C are
24 met?

25 A. Yes. If the conditions for Tranche C are

1 met, yes.

2 Q. Okay. Now, if you turn to page 8,
3 paragraph (C) (1).

4 A. Yes.

5 Q. "The parties acknowledge that the project
6 is an intermittent resource and that it will not
7 produce any guaranteed minimum level of Project
8 Output." Do you see that?

9 A. Yes.

10 Q. What does that mean?

11 A. That's acknowledging the fact that all
12 wind energy is considered intermittent, meaning you
13 can't generate at will. There has to be wind blowing
14 in the area for it to be generable, so you can't
15 guarantee a certain output. It recognizes and
16 acknowledges that fact.

17 Q. Okay. So if the wind is not blowing and
18 the blades aren't moving, the turbines won't be
19 producing electricity, correct?

20 A. Yes.

21 Q. And when the wind is blowing and the
22 turbines are producing electricity and the
23 electricity is being transferred through the proposed
24 transmission line, does the project, as it is
25 designed today, have the capability to store that

1 produced electricity and then transmit it out at a
2 later date to other points?

3 A. The project does not have a storage
4 provision in the scope today.

5 Q. Okay.

6 A. And I would say that's typical of all
7 wind projects that I am aware of that have been built
8 to date.

9 Q. Now, if you look on -- still on page 8,
10 paragraph (E)(1), "Curtailed Dispatch, Buyers shall
11 have no right to curtail or dispatch the Project or
12 the Project output in its capacity as Buyer under
13 this agreement for any reason." What does that mean?

14 A. That means that the buyer -- so curtail
15 dispatch and stop the provision of accepting the
16 power.

17 Q. Okay.

18 A. So they have no provision to just stop
19 sending it.

20 Q. Okay. Now, page 9, paragraph 3, the last
21 sentence, "The Parties acknowledge that the Contract
22 Price is anticipated to be above PJM market prices at
23 the time of the execution of this Agreement and at
24 all times during the term of this Agreement." What
25 does that mean?

1 MR. SECREST: Objection as to relevance.

2 A. I think it speaks for itself, all the
3 parties --

4 MR. SECREST: Hold on a second.

5 THE WITNESS: It's like the deposition.

6 ALJ WALSTRA: Overruled.

7 MR. SECREST: Thank you.

8 A. As it reads, all the parties to the
9 contract acknowledge that the price that's being paid
10 by the PPO, being by the off-taker, is above the
11 current price for the PJM wholesale market price. It
12 also acknowledges that may not be the case forever,
13 that we know what the price is today, and it's above
14 that price today when the contract was signed.

15 Q. Well, doesn't it also say it's
16 anticipated to be above PJM market prices at the time
17 of the execution of this agreement and at all times
18 during the term of this agreement?

19 A. It's anticipated, yes, but it's not
20 guaranteed.

21 Q. Okay.

22 A. Not predicting and guaranteeing what it
23 will be.

24 Q. The parties agree in writing here that
25 they anticipate -- acknowledge that it is anticipated

1 by them that at all times during that 16-year term,
2 correct --

3 A. Uh-huh.

4 Q. -- of the agreement that the contract
5 price for the electricity from the project will
6 exceed the PJM market prices. Isn't that what that
7 says?

8 A. That's what it says, yeah. They
9 willingly agree to that provision, make sure everyone
10 understood, to make sure there was no
11 misunderstanding.

12 Q. At this time I would like to go into the
13 contract price of this agreement, which is
14 confidential.

15 ALJ WALSTRA: We are going to hold off on
16 that.

17 MR. STOCK: Okay. I'll wait until I --

18 ALJ WALSTRA: Until close.

19 MR. STOCK: Finish my cross?

20 ALJ WALSTRA: Right.

21 MR. STOCK: Fair enough.

22 Q. (By Mr. Stock) Please take a look at Tab
23 D, which is now Exhibit 4.

24 A. Okay.

25 Q. Can you identify that for the record?

1 A. That's the joint Stipulation that we
2 submitted and signed on by several other parties.

3 Q. It was not signed on by the Staff of the
4 Ohio Power Siting Board; is that correct?

5 A. That's correct.

6 Q. Okay.

7 A. It wasn't signed on by the intervenors
8 either.

9 ALJ WALSTRA: Mr. Stock, since this has
10 already been marked as his exhibit, as Joint Exhibit
11 1, can we just refer -- I mean, it's fine if you use
12 this document, but we will just refer to this as the
13 same, as Joint Exhibit 1.

14 MR. STOCK: Yes. And I will tell you
15 that I have separate exhibit binders for each witness
16 so that we have the exhibits for them to see and for
17 us to move through cross-examination. And they
18 will -- they run serially. At some point, I guess at
19 the conclusion of the proceedings, we can do a cross
20 reference to give you an identification of where our
21 witness -- if our exhibits are part of joint exhibits
22 or other marked exhibits. The fundamental problem
23 being in most litigation in the court you have joint
24 exhibit lists before the proceeding. We don't have
25 them here, so.

1 ALJ WALSTRA: Okay. At least especially
2 regarding the Stipulation, which I think we will be
3 referencing that, I assume, a fair amount. We will
4 just --

5 MR. STOCK: Fair enough, yeah. We'll
6 just note that it is also our Exhibit 4 in our
7 witness binder as well.

8 ALJ WALSTRA: That's fine.

9 MR. STOCK: Thank you.

10 Q. (By Mr. Stock) You're intimately familiar
11 with this document, correct?

12 A. Yes.

13 Q. You personally were involved in
14 negotiations regarding the document?

15 A. Yes.

16 Q. All right. Please turn to page 6,
17 paragraph 19. Would you please read into the record,
18 this is the -- well, let me first ask, this is a
19 proposed -- a condition for the certificate to be
20 issued by the Power Siting Board, that pursuant to
21 this Stipulation, Icebreaker would propose B, a
22 condition of the certificate, correct.

23 A. Yes. That's what I understood the
24 Stipulation to be, yes.

25 Q. Yeah.

1 A. Yes.

2 Q. We are just going A, B, C, D all through
3 it. All right. Would you please read Exhibit 19 --
4 excuse me, paragraph 19 into the record.

5 A. "The Applicant shall submit a
6 post-construction avian and bat collision monitoring
7 and shall demonstrate that, considering the state of
8 available technology, the plan is sufficient either
9 prior to construction through lab and field testing
10 or during operation. Compliance with this condition
11 will be determined by the ODNR in consultation with
12 Staff. Because this project is the first of its kind
13 in Lake Erie, if the ODNR and Staff find that the
14 plan is not sufficient, the ODNR and Staff may
15 require turbines to be feathered up to 30 minutes
16 prior to sunset to 30 minutes after sunrise during
17 peak spring and fall migration periods when cloud
18 ceilings are low."

19 Q. Okay. I want to make sure I understand
20 your understanding of how this works. Icebreaker
21 receives -- let's assume Icebreaker receives a
22 certificate from the Ohio Power Siting Board with
23 this condition 19 in it, okay?

24 A. Okay.

25 Q. Now, let's assume Icebreaker submits a

1 post construction monitoring plan, post-construction
2 avian and bat collision monitoring plan to ODNR and
3 staff. Okay? Let's assume that having done that,
4 Icebreaker constructs the project. Turbines are out
5 there. Are those all possibilities under this?

6 A. Those are possibilities, yes.

7 Q. Okay. Now --

8 A. But I would ask, there is a step that you
9 didn't get to. After we submit the plan, what was
10 ODNR's response? Did they comment on the plan? Did
11 they approve the plan?

12 Q. Well --

13 A. That would be an important factor in this
14 scenario.

15 Q. That's a good point. If the certificate
16 has this condition in it, does ODNR need to get back
17 to Icebreaker and say, We approve the plan before
18 Icebreaker begins construction?

19 A. We are assuming that the agency will
20 respond in a timely manner, so if we submit the plan
21 before construction, well before construction, we
22 would expect the Staff would review it, ask
23 questions, and respond with their approval in a
24 timely fashion.

25 Q. Is there language in this Section 19 that

1 prohibits Icebreaker from proceeding to construction
2 before it receives word back from ODNR regarding the
3 post construction avian and bat collision monitoring
4 plan?

5 A. This provision allows for that
6 possibility. But then under -- if that's the case,
7 there are other provisions of this that kick in if
8 the plan has not yet been approved.

9 Q. And that's what I want to walk through.

10 A. That's the feathering at various periods.

11 Q. So as this provision is drafted here,
12 Icebreaker gets its certificate with this condition
13 19, it submits a post-construction monitoring plan to
14 ODNR and Staff, and before it hears back from Staff,
15 it goes out and constructs the project. There --
16 there is nothing from this paragraph 19 that
17 prohibits that, is there?

18 A. Nothing prohibits that. This is modeled
19 after -- that's modeled after the Staff condition,
20 also structured the same way.

21 Q. Okay. So I just want to make clear on
22 the record, there is nothing that prohibits
23 Icebreaker from going out and building these turbines
24 in the lake before it hears back from ODNR regarding
25 the proffered post construction avian and bat

1 collision monitoring plan; is that correct?

2 A. Yes. Also the same is true for Staff
3 condition 19 to that extent, yes.

4 Q. All right. Now, under this scenario we
5 are talking about, Icebreaker has submitted the plan
6 to ODNR. It's gone ahead and constructed. Now,
7 hypothetically, let's say staff comes back to
8 Icebreaker. The project is out there. The turbines
9 are ready to go, and Icebreaker -- or ODNR says,
10 whoa, whoa, whoa. This plan you proposed to us
11 doesn't cut it. Do not start operating. We tell you
12 do not start operating. Is there any provision in
13 this paragraph 19 that prohibits Icebreaker from
14 operating under that circumstance?

15 MR. SECREST: Objection to the extent it
16 calls for speculation.

17 A. I mean, the way I read --

18 ALJ WALSTRA: Hold on.

19 THE WITNESS: Oh, I'm sorry.

20 ALJ WALSTRA: Elaborate further.

21 MR. SECREST: Sure. He specifically in
22 the question referred to this hypothetical scenario
23 that may or may not occur, so it's clearly requesting
24 Mr. Karpinski to speculate.

25 ALJ WALSTRA: Mr. Stock.

1 MR. STOCK: I'm asking his understanding
2 of how this can work. This is the language they
3 proposed. You can't get anything that's more
4 relevant to this case.

5 ALJ WALSTRA: Overruled. It's a
6 hypothetical.

7 A. So I want to point out for purpose of
8 this discussion, it's the same -- the same thing
9 would hold true for the Staff condition drafted. So
10 neither Staff 19 nor Stipulation 19 gives the ODNR
11 the authority under this provision, maybe other
12 provisions, I am unaware, but this provision to stop
13 construction and say do not proceed.

14 Q. It does or does not?

15 A. Does not.

16 Q. Okay.

17 A. Neither the staff condition nor this
18 condition.

19 Q. So under this proposal, again,
20 hypothetically, how it could play out -- and that's
21 all I am asking, your understanding of how it could
22 play out under this language -- it's a theoretical
23 possibility Icebreaker gets a certificate from the
24 Power Siting Board with this condition 19 that's
25 proposed. You submit your monitoring plan to ODNR.

1 You build the turbines out in the lake. After having
2 built them and connected them up to the transmission
3 line, ODNR says, Wait, wait, wait, wait. No, that
4 study doesn't cut it. Do not begin operating.
5 Icebreaker couldn't operate.

6 A. Well, I would point out the scenario that
7 you are describing is not one we would pursue. We
8 would seek to get feedback from ODNR. We submit the
9 plan. We would make our case this plan is adequate,
10 and we would encourage ODNR, and we think they would
11 be interested in responding as well before we get to
12 that point. So I guess the scenario you paint, I
13 don't think it is realistic.

14 Q. I didn't ask if it's realistic. I am
15 asking you if there is language in there.

16 A. I already said there is no language.

17 Q. In 19.

18 A. I answered that question. No, there is
19 no language in 19, Staff condition 19, or Stipulation
20 19 that allows ODNR to stop construction of the
21 project.

22 Q. Okay. Now, under this scenario where
23 ODNR has set -- you've built the project. You are
24 operating it. ODNR has said, We don't think the plan
25 you submitted is adequate. We don't think it will

1 tell us whether you are killing birds and bats. Is
2 there anything whatsoever that ODNR can do at that
3 point with respect -- well, is there anything the
4 Power Siting Board can do at that point with respect
5 to your operation of the facility?

6 MR. SECREST: Objection, speculation.

7 ALJ WALSTRA: He can answer if he knows.

8 A. Yeah. Let me make sure I understand the
9 scenario. You are saying under condition 19 -- are
10 we talking about the whole Stipulation or just
11 condition 19?

12 Q. Just condition 19.

13 A. I think you have to look at the other
14 parts of the Stipulation. You can't take just this
15 one provision. There are other provisions, like 24,
16 that allow for the staff and ODNR in consultation
17 with Fish & Wildlife, if they detect certain things
18 to take actions that cause mitigation plans to be put
19 in place.

20 But if you are limiting it just to
21 condition 19, which I don't think is a valid
22 approach, because this is a -- these -- all these
23 provisions work together. Then in that case, ODNR,
24 the way we have drafted this, is that they could
25 require us to curtail during this time that's been

1 identified as the highest risk period of migratory
2 birds in spring and fall, and especially during those
3 high-risk periods, which are when cloud ceilings are
4 low, they could require us to feather, which is stop
5 operating turbines, prohibit the turbines from
6 rotating so that they would have no impact on birds
7 during that time of high risk.

8 Q. I'm sorry.

9 A. Which is when?

10 MR. STOCK: Could you read back the
11 record to me?

12 You don't need to do that.

13 Q. You are talking about a high-risk
14 situation?

15 A. Right.

16 Q. All right. I'm sorry. I am trying to
17 listen to you and follow the text here. All right.
18 Let's not limit this question to -- well, let me --
19 let's start again with -- start with paragraph 19.
20 In this hypothetical scenario you built the project,
21 transmission line to the shore, you submitted your
22 monitoring plan. ODNR said, nope, doesn't cut it,
23 and you are operating.

24 Under the Stipulation can the Power
25 Siting Board -- is there any provision in here that

1 indicates that the Power Siting Board could shut you
2 down, can stop you from operating?

3 A. Not that I see, no.

4 Q. Okay.

5 A. If there were, this would be -- that
6 would be draconian measure that would be difficult
7 for any project to withstand.

8 Q. Okay. So you're telling us that you are
9 out there operating, and you don't have a
10 post-construction bird and bat plan that's been
11 accepted by ODNR, and the Power Siting Board can't
12 shut you down; is that correct?

13 A. That's the way the Stipulation is
14 drafted. Our wildlife experts will testify later on
15 why we believe that's in the -- that meets the
16 minimum -- adverse minimum, is what we have
17 highlighted, and that's the time we are going to
18 curtail if we don't have an approved plan.

19 Q. And you can continue operating even if
20 ODNR has said your plan is not adequate.

21 MR. SECREST: Asked and answered.

22 ALJ WALSTRA: Sustained.

23 Q. Okay. Now, you did indicate with respect
24 to paragraph 19 that there was something that ODNR
25 would do if they had rejected your post-construction

1 avian and bat collision monitoring plan and you are
2 out there operating. And that was ODNR -- it reads,
3 "ODNR and Staff may require turbines be feathered up
4 to 30 minutes prior to sunset to 30 minutes after
5 sunrise during peak spring and fall migration periods
6 when cloud ceilings are low." They could require
7 that.

8 A. That's what it says, yes.

9 Q. Okay. Peak spring and fall migration
10 periods, is that defined anywhere in this
11 Stipulation?

12 A. Not from the Stipulation. Our wildlife
13 experts will testify to how that's -- what those
14 periods -- how those periods are defined.

15 Q. Okay.

16 A. And I would also say it's defined in our
17 bird and bat conservation strategy.

18 Q. Has ODNR agreed to the meaning of peak
19 spring and fall migration periods for purposes of
20 this paragraph 19?

21 A. No. I don't really know.

22 Q. Okay. And then it reads, "when cloud
23 ceilings are low." What does into mean?

24 A. That means when the -- when the fog or
25 clouds come down at a low altitude and the risk is

1 that typically the birds fly very high, like, much,
2 much higher than the turbines. However, if there are
3 clouds and it becomes low fog, the birds may fly
4 lower. So the idea here is cloud ceilings are low,
5 that represents a high-risk period to these migrating
6 birds in this season, so that would be the time to
7 curtail to minimize risk.

8 Q. How high is low?

9 A. As high as the turbines.

10 Q. So low cloud ceilings mean clouds that
11 are as low as -- down to 146 meters above the water?

12 A. Yes.

13 Q. Okay.

14 A. So if -- if the cloud ceiling is 175 feet
15 above the water, that's not a low cloud ceiling,
16 right, not the way we have defined it.

17 Q. Where is that defined?

18 A. That's in our -- again, our bird and bat
19 conservation strategy document, which is also
20 throughout the Stipulation. This is another document
21 referring to the mitigation plan, adopt a management
22 strategy. The bird and bat conservation strategy we
23 drafted and submitted to ODNR in draft form embodies
24 both of those aspects, the mitigation plan and bat
25 management.

1 Q. Have those been accepted yet?

2 A. No.

3 Q. Let's move in the Stipulation to Section
4 24. Would you please read that into the record.

5 A. "If the Staff and the ODNR, in
6 consultation with the USFWS, determine the project
7 results in significant adverse impact (i.e.
8 biologically significant impact on the population
9 level of any species or the occurrence of a large
10 mortality event as defined in the impact mitigation
11 plan) to species covered under the Avian and Bat MOU
12 and the Fisheries and Aquatic Resources MOU (other
13 than state or federally listed endangered or
14 threatened species, which are exclusively addressed
15 in Stipulation Condition 21), the Applicant will
16 determine and submit a mitigation or adaptive
17 management strategy to Staff and the ODNR to confirm
18 compliance with this condition. Following execution
19 of the strategy, if the significant adverse impact
20 persists, the Applicant will request a meeting with
21 Staff and the ODNR to jointly develop a revised
22 mitigation or adaptive management strategy. Within
23 30 days of an agreement between the Applicant, Staff
24 and the ODNR, the Applicant will submit the revised
25 mitigation and adaptive management strategy to Staff

1 and ODNR to confirm compliance with this condition."

2 Q. Okay. I want to do a similar exercise
3 for this paragraph that we did for 19 to flesh out
4 your understanding of how this provision would work.
5 So Staff and ODNR, in consultation with the U.S. Fish
6 & Wildlife Service, determined the project results
7 have significant adverse impact. Okay? Do you see
8 that?

9 A. Yes.

10 Q. All right. Now, let's go back to what we
11 were talking about before. Under paragraph 19, what
12 could hypothetically happen? Icebreaker gets issued
13 from the Power Siting Board a certificate that
14 contains condition 19 and it contains condition 24,
15 okay? Similar scenario, a post-construction avian
16 and bat collision monitoring plan icebreaker has
17 submitted to ODNR, has gone ahead and built, is
18 operating, and ODNR has said, No, no, no, no, that
19 plan is not sufficient. So you are out there
20 operating, and the plan that ODNR has is one that
21 they say is not sufficient. If, in fact, the plan
22 you submit is not sufficient to accurately determine
23 bird and bat mortality while you are out there
24 operating, how are Staff and ODNR -- ODNR in
25 consultation with the Fish & Wildlife Service able to

1 determine if the project is resulting in a
2 significant adverse impact?

3 A. As I said before --

4 MR. SECREST: Objection, speculation.

5 ALJ WALSTRA: Overruled.

6 A. As I said before in our discussion about
7 19, we are going to submit a plan to ODNR. The plan
8 has to include validation on this collision detection
9 technology and how it was validated, and we would
10 expect to get feedback, and if there are deficiencies
11 at that time, we would address them.

12 So we would -- we wouldn't pursue the
13 scenario that you describe where we have no feedback
14 from ODNR. After submitting the plan, proceeding to
15 construction, if they voice no concerns or opinions
16 but later they do. So that's the first step.

17 The other thing I point out is -- is that
18 lacking ODNR's judgment that the plan is sufficient,
19 we are still going to install the collision
20 monitoring detection system and operate and prove it
21 out. So just because ODNR didn't give approval in
22 that scenario you're describing, we wouldn't cease to
23 install and operate the collision detection system.

24 And, actually, in so doing, may actually
25 help ODNR come to the conclusion it is effective. So

1 there would be means in that case to sense these
2 collisions, mortality events, other visual sightings
3 and observations of others that are killed that may
4 not depend on the collision detection system.

5 Q. So what you're telling me, the
6 hypothetical I asked you to suppose that ODNR said,
7 No, no, no, your plan is not sufficient. What you're
8 telling me is Icebreaker may think it is sufficient
9 and will be using the system that Icebreaker thinks
10 is sufficient.

11 A. No. What I am saying -- what I said was
12 while we are waiting for them to decide, in your
13 hypothetical where they haven't rendered an opinion
14 in a timely fashion, we are going to proceed and
15 install this collision detection monitoring to
16 demonstrate that it is sufficient with the hope at
17 some point they would come to that conclusion as we
18 showed them results from the actual operation.

19 Q. You are contorting my -- you are
20 contorting my hypothetical. I didn't say they didn't
21 respond. I said they do respond and tell Icebreaker
22 it is insufficient.

23 A. It's -- I guess I am getting confused.
24 That's a question of timing. When did they respond?
25 When did we submit it? So we have to be more clear

1 on this scenario.

2 Q. Let's make it real clear. There was an
3 objection before that we had gone through this too
4 often. Make it clear how these two things --

5 A. What I would ask, in your scenario,
6 please tell me when we submitted the plan and when --
7 how long before ODNR responded. That would be
8 helpful in trying to respond to your question.

9 Q. All right. You submit the plan on day
10 one, okay?

11 A. Okay.

12 Q. Submit the plan to ODNR. On day two you
13 build the project. On day three, ODNR says the plan
14 is insufficient, don't operate, don't start
15 operating. Day four, you begin operating.

16 A. Can I stop you, though? Because day
17 three, that's not allowed for in the provision, what
18 you just said. The condition for day three for ODNR
19 to say, Don't operate, that's not a condition here,
20 so that scenario isn't in accordance with the
21 Stipulation, so I am kind of confused there.

22 Q. All right.

23 A. Okay.

24 Q. We'll clarify. On day one you submit the
25 plan. Are we on the same page based on that?

1 A. Yes.

2 Q. Okay. Day two you build.

3 A. I'm with you.

4 Q. All right. Day three ODNR says -- and
5 this is important. ODNR says, Your plan is
6 insufficient.

7 A. Okay. That's different. That's
8 different than saying don't construct.

9 Q. And it says something else. It says
10 because it's insufficient, don't start operating.

11 A. But, again, that's inconsistent with the
12 Stipulation and the Staff condition.

13 Q. I am just saying hypothetically how this
14 can work. Let's assume they do that.

15 A. But I am just really torn here.

16 MR. SECREST: Hold on a second. Let me
17 note a continuing objection, speculation, assumes
18 facts not in evidence.

19 ALJ WALSTRA: I think we are starting to
20 get speculative, but I will allow the question, and
21 you can explore on redirect.

22 Q. Right. This -- I want -- I am exploring
23 the limits and the boundaries of what they can do and
24 what regulatory authorities can prevent them from
25 doing, so I am doing that in hypotheticals.

1 So day one you submit the plan. Day two
2 you build. Day three, ODNR says, Your plan is no
3 good, and they say, Don't start operating. Day four
4 you start operating. All right?

5 And you are out there operating and you
6 don't have -- you don't have approval from ODNR for a
7 post-construction bird and bat avian and bat
8 collision plan. They don't think what you submitted
9 is valid.

10 Now, let's move to paragraph 24. If the
11 staff and the ODNR in consultation with the Fish &
12 Wildlife Service determine the project results in
13 significant adverse impact, under the scenario we
14 have built to this point, you're operating, and ODNR
15 has said to you, your plan is insufficient, not
16 scientifically valid. How are they going to be able
17 to determine if there are significant adverse impacts
18 happening out at the site if in their minds the plan
19 that you've proposed is not valid, does not provide
20 them with valid data as to whether or not it's
21 killing birds and bats?

22 A. I answered that a while ago. There are
23 other means of detecting mortalities. It's not
24 solely dependent upon the collision monitoring
25 system. The other thing I said is that we would

1 install the collision monitoring system and attempt
2 to prove it out and to demonstrate it is effective.
3 That, in our mind, would help ODNR come to a
4 conclusion that it is effective, so they would have
5 the tools. And, further, when there is tons of high
6 risk, until we have that decision by ODNR, we
7 wouldn't run the turbines in high risk of migratory
8 birds.

9 Q. Where does it say that?

10 A. Condition 19.

11 Q. It says you voluntarily will not do that?

12 A. It says that ODNR may require us to do
13 that. So I am assuming in that scenario where they
14 don't even want us to build the project, they would
15 exercise the right -- which they don't have the right
16 to in this. They would exercise the right under 19
17 to require us to curtail. So in your scenario, I am
18 assuming that decision by ODNR.

19 Q. Okay. Now, let's go back to 24. If
20 somehow Staff and ODNR, in consultation with the Fish
21 & Wildlife Service were to determine that the project
22 results in significant adverse impacts -- would
23 killing 100 migratory birds in one night be a
24 significant adverse impact?

25 MR. SECREST: Objection, speculation.

1 A. Yeah. I would defer to our wildlife
2 experts. We would go through details how that comes
3 to pass.

4 Q. Well, I thought you opined for me the
5 conditions of the -- for us that the conditions in
6 the Stipulation represent -- maintain the minimum
7 adverse environmental impact. Don't you tell us that
8 on page 11?

9 A. Yes. Given the current state of
10 technology and the economics of the alternative, yes.

11 Q. So I want you to explain to us the basis
12 for that testimony of yours. And so are you telling
13 me you don't know if the killing of 100 birds in one
14 night would be a significant adverse impact?

15 MR. SETTINERI: Objection, as to what
16 type of birds?

17 MS. LEPPLA: Your Honor, I also object.
18 It's defined in the Stipulation what that means, and
19 Mr. Karpinski has already noted there are other
20 experts that will testify as to what exactly that
21 means, so I don't think this is an appropriate line
22 of questioning for him.

23 ALJ WALSTRA: I'll allow him to answer to
24 the extent he does know, and if he needs
25 clarification, he can ask.

1 A. There is a lot of aspects about that.
2 What kind of birds are they? When was it? You know,
3 it's not a game of just -- you know, it's not a
4 simple answer, I guess.

5 Q. All right. Pick a bird.

6 MR. SECREST: Objection.

7 Q. Is there any circumstance under which the
8 killing of 100 migratory birds in one night would
9 constitute a significant adverse impact under this
10 paragraph?

11 A. Again, I would have to defer to our
12 wildlife experts who will go through how that
13 definition was arrived at and what constitutes a
14 significant event.

15 Q. Okay. Fair enough. You don't know.

16 A. I don't know. I would also add that ODNR
17 hasn't offered a definition either for us to go by,
18 so.

19 Q. Now, continuing, it says if this occurs,
20 the Applicant will develop and submit a mitigation or
21 adaptive management strategy to Staff and the ODNR to
22 confirm compliance with this condition; is that
23 correct?

24 A. That's correct.

25 Q. All right. Now, the Staff Report

1 requires approval of that mitigation or adaptive
2 management strategy, correct?

3 A. That's what the Staff condition stated,
4 yes.

5 Q. Icebreaker took that out, right?

6 A. Icebreaker had a revision of that, like
7 we did, on many of those conditions, to make it
8 consistent with prior cases in Ohio. So we think it
9 is appropriate to treat this one case like other wind
10 cases in Ohio, so adjustments were made based on the
11 way prior certificates and conditions were worded,
12 yes.

13 Q. Have there been any prior certificates
14 granted for wind turbine facilities in Lake Erie?

15 A. No. But there have been certificates
16 issued for wind projects.

17 Q. Okay. But not in Lake Erie?

18 A. No, not in Lake Erie.

19 Q. Okay. This is a one-off, right? It's
20 not been done before.

21 A. The fact that it's not been in Lake Erie,
22 yes, but there are many things that are similar and
23 the same as land-based wind. Just because it's in
24 Lake Erie doesn't mean everything about the project
25 is different and every behavior of wildlife is

1 different just because it's in Lake Erie.

2 Q. So under this draft, ODNR is not required
3 to approve the mitigation and adaptive management
4 strategy that Icebreaker submits to it; is that
5 correct?

6 A. That's correct. Just like the other wind
7 cases in Ohio and the current rules state, yes, it's
8 consistent with current rules and other cases.

9 Q. So let -- let me understand your
10 understanding of how this paragraph 24 works. If the
11 staff and ODNR, in consultation with Fish & Wildlife
12 Service, determine the project results in a
13 significant adverse impact -- okay? Let's assume
14 that's happened, and they notify Icebreaker that
15 there's been a significant adverse impact. The
16 Applicant, Icebreaker, will develop and submit a
17 mitigation or adaptive management strategy to Staff
18 and the ODNR to confirm compliance with this
19 condition. That's what would happen; is that
20 correct?

21 A. Yes.

22 Q. Okay. Is there any time period in this
23 paragraph within which the Applicant must submit its
24 mitigation or adaptive management strategy to Staff
25 and ODNR?

1 A. No. As it's drafted, there is none, so
2 right.

3 Q. All right. So Icebreaker receives
4 notification from Staff and ODNR that they -- the
5 project results in a significant adverse impact on
6 day one. Okay, day one?

7 A. Yes, hypothetically, okay.

8 Q. Hypothetically, day one. Day two
9 Icebreaker has not yet put together and submitted to
10 ODNR its mitigation or adaptive management strategy,
11 and Icebreaker still continues operations on day two.

12 MR. SETTINERI: Just object to the extent
13 it calls for a legal conclusion and this witness is
14 not an attorney, your Honor.

15 MR. STOCK: I am asking for his
16 understanding.

17 ALJ WALSTRA: Overruled.

18 A. So just like every other wind project in
19 Ohio, the same conditions would apply, and we
20 would -- we would work to put a mitigation strategy
21 together. In the interim we would -- we would be
22 continuing operation.

23 Q. Okay. So day one, notice from Staff and
24 ODNR that there's a significant adverse impact. Day
25 two, you haven't submitted the mitigation or adaptive

1 management strategy yet, and it doesn't require you
2 to submit it on day two, correct?

3 A. Right.

4 Q. All right. So you are still operating.
5 Day three, still haven't submitted the mitigation
6 plan. You are still operating, right?

7 A. Yes, yes. And we're working on a
8 mitigation plan.

9 Q. All right.

10 A. We are getting together. We are trying
11 to understand what the issue was or trying to come up
12 with appropriate mitigation measures. This isn't a
13 simple matter of, you know, choose plan A, B, or C
14 and you're done. There is work to be done, and
15 Icebreaker would be pursuing that work to put
16 together an appropriate mitigation plan.

17 Q. Okay. So day three you are still
18 operating. And on day three, Staff and ODNR notify
19 Icebreaker yet again -- oh, on day two we determined
20 you had another significant adverse impact. On day
21 four, Icebreaker is still operating, right?

22 A. Yes. Yes.

23 Q. Okay.

24 A. According to the scenario, again, just
25 like -- I have to repeat, just like every other wind

1 project in Ohio, the whole basis for this is that our
2 risk conclusion was very low risk. Like I said, this
3 condition isn't ever expected to be triggered. It's
4 an approved measure to be appropriate for the
5 unexpected, but this is nothing anyone expects to
6 happen.

7 Q. Take a look at tab D1.

8 MR. STOCK: Which I guess will be, what,
9 Exhibit 5?

10 ALJ WALSTRA: Yeah.

11 Q. Which is a public comment submitted by
12 the Black Swamp Bird Observatory and the American
13 Bird Conservancy in this case.

14 MR. SECREST: Note a continuing objection
15 to foundation and relevance.

16 ALJ WALSTRA: I will allow him to explore
17 foundation.

18 MR. STOCK: Pardon?

19 ALJ WALSTRA: Are you asking foundational
20 questions for him regarding this?

21 MR. STOCK: No.

22 ALJ WALSTRA: Okay.

23 MR. STOCK: He can -- I believe it's from
24 the Black Swamp Bird Observatory ABC or not. I am
25 not asking him to authenticate the truth of it.

1 There are assertions made in this to which I wish him
2 to respond and I'm allowed to ask him to respond to.

3 MR. SECREST: He is introducing a
4 document with no foundation based on hearsay from an
5 entity that's not a party to this case.

6 ALJ WALSTRA: You can go ahead.

7 Q. There's some comments regarding condition
8 19 so you might want to keep the Joint Stipulation
9 paragraph 19 before you.

10 MS. LEPPLA: Mr. Stock, if you aren't
11 going to produce copies for everybody, could you at
12 least let us know which comments you are referring
13 to? I think there may have been several on the
14 docket.

15 MR. STOCK: Look, I apologize. I tried
16 to bring as many binders as I could.

17 MS. LEPPLA: I understand, but I do need
18 to be able to see what you are referring to. So if
19 you could let me know what comments they are, I could
20 pull them up.

21 MR. STOCK: It's the September 14, 2018,
22 Black Swamp Bird Observatory.

23 Chris, you guys have two copies of the
24 binders, don't you? Can you look on one and allow
25 one over here for the --

1 MS. LEPPLA: I am happy to pull them up
2 online.

3 MR. STOCK: But, yeah, I am not trying --
4 okay.

5 Q. (By Mr. Stock) Condition 19 on the second
6 page there reads "There are a number of shortcomings
7 in this Condition that are worthy of discussion.
8 First, the Condition calls for a 'collision'
9 monitoring plan. This has been discussed elsewhere
10 as a 'thunk' detection technology. This technology
11 only detects actual collisions, but does not address
12 the fact that many, if not most bat fatalities do not
13 involve actual collision with the turbine, but are
14 rather a result of barotrauma resulting from pressure
15 differentials around the turning blades." The first
16 point I want to ask you about, Mr. Karpinski, is is
17 post construction avian and bat collision monitoring
18 plan, does that -- will that plan, as suggested here,
19 only attempt to determine if there are collisions
20 with birds or bats and the turbines?

21 MR. SECREST: Objection, lack of
22 foundation with regard to this document and
23 suggestion that the question is, as suggested here,
24 is reliant upon these documents for the truth of the
25 matter asserted.

1 MR. STOCK: No, it isn't. I am asking
2 him if it's true.

3 MR. SECREST: You are asking him about a
4 document authored by a party -- authored by someone
5 who is not a party to this case and who cannot sit
6 here and answer whether it is true or not or what
7 they meant by this.

8 MR. STOCK: I didn't ask him what they
9 meant. An assertion is made, and I am asking him if
10 it's true. It's no different than if I made the
11 assertion. In fact, you can assume it's my
12 assertion, but I am going to read it off the paper,
13 and there doesn't need to be any foundation to it.
14 An assertion is made, and I am asking him to respond
15 to it, is it true --

16 ALJ WALSTRA: Overruled.

17 A. So what's your question?

18 Q. "There are a number of shortcomings in
19 this Condition which are worthy of discussion.
20 First, the Condition calls for 'collision' monitoring
21 plan. This has been discussed elsewhere as a 'thunk'
22 detection technology."" What I am asking is is the
23 post construction avian and bat collision monitoring
24 plan that is being proposed by Icebreaker, will that
25 only measure collisions with the turbine structures?

1 A. No, no. There are several technologies
2 evaluating. One of them, as this letter points out,
3 is called thunk. There are several others and one of
4 our witnesses will talk more in depth about those
5 different technologies and what state they're in.
6 Some of them use cameras to sense collisions and, you
7 know, impacts to the turbines, but in all cases it's
8 an attempt to sense that a collision happened and the
9 collision is assumed to be a fatality. It is
10 actually very conservative because all collisions may
11 not be fatalities, but the assumption is that every
12 collision is a fatality.

13 Q. And I think you're answering my question.
14 It's going to measure collisions.

15 A. And assume that every collision is a
16 fatality.

17 Q. Okay.

18 A. Yeah.

19 Q. Is there anything in the system that will
20 determine -- any of the systems that are under
21 consideration that will determine whether or not
22 barotrauma occurs to bats such that there might be
23 fatalities to bats without hitting the structures?

24 A. So there is no collision detection system
25 that I am aware of that is not based on detecting

1 collisions.

2 Q. Is there --

3 A. And the collision monitoring plan is that
4 collision monitoring plan.

5 Q. Okay. Fair enough.

6 ALJ WALSTRA: Mr. Stock, do you have a
7 significant amount more?

8 MR. STOCK: I don't. I probably got a
9 couple more minutes on this, and then if we could go
10 into whatever we call it, special session, I've got a
11 minute or 2 only in that, and then I'll be done.

12 ALJ WALSTRA: Okay.

13 MR. STOCK: Okay. We'll get it done. I
14 will get it done quickly.

15 A. I would also like to clarify the
16 requirements for a collision monitoring plan, not a
17 whatever this letter states.

18 Q. If you go down a few lines just before it
19 says "Third," the sentence before that, "In his
20 comments to the Ohio Power Siting Board dated 06
21 September 2018, Mr. Karpinski, of LEEDCo, mentions in
22 this regard an 'accepted and proven' technology, but
23 the fact of the matter is that such technology simply
24 does not yet exist." Did you in your testimony refer
25 to an "accepted and proven technology"? Do you

1 recall?

2 A. I may have. I don't recall exactly if I
3 used those words.

4 MR. STOCK: Okay. Those are all the
5 questions I have with respect to that. If we could
6 go into whatever we call our private session, that
7 would be great.

8 ALJ WALSTRA: Okay. We will go into the
9 confidential portion. I will defer to Icebreaker if
10 anyone needs to leave the room.

11 MR. SECREST: Thank you, your Honor. We
12 are not sure. A number of parties did sign onto a
13 confidential agreement, but we are not aware of the
14 identity of everyone in the room.

15 MR. STOCK: We have.

16 MR. SECREST: Correct.

17 MR. SETTINERI: I was going to raise my
18 hand. I think we're covered.

19 MR. STOCK: Yeah. Who signed it?

20 MR. SECREST: We think everybody at the
21 table is fine, your Honor. I think all the parties
22 signed the confidentiality agreement. Perhaps limit
23 participation to parties to the case.

24 ALJ WALSTRA: Right. And we have a lot
25 of Staff back there.

1 MR. JONES: I am not sure who this lady
2 is back here. She's a resident.

3 ALJ WALSTRA: Are you a resident? We
4 have to go into a confidential portion. If you would
5 step out, we are going to break for lunch after this
6 anyway.

7 (CONFIDENTIAL PORTION EXCERPTED.)
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Monday Afternoon Session,

September 24, 2018.

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(OPEN RECORD.)

ALJ WALSTRA: We'll go back on the record. In particular, we will go back on the public record. Come back up, Mr. Karpinski. I will remind you, you are still under oath.

THE WITNESS: Yes.

ALJ WALSTRA: Staff, whenever you are ready.

MR. JONES: Thank you, your Honor.

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CROSS-EXAMINATION

By Mr. Jones:

Q. Good afternoon, Mr. Karpinski. Get my voice up here. I want to refer to your testimony on -- on page 10, lines 14 and 15, that begin with "However." Let me know when you are there.

A. Okay. I'm there.

Q. Okay. Would you read that sentence, please.

A. "However, there are three conditions that, in my opinion, make the project un-financeable and, therefore, fatal conditions."

1 Q. And you repeat that several times
2 throughout your testimony; is that correct?

3 A. Yes.

4 Q. And I can reference you, for instance, to
5 page 11, in reference to condition 19, that would be
6 lines 19 and 20, again, you make reference there to
7 the project's -- that condition makes the project
8 unfinanceable. Do you see that?

9 A. Yes.

10 Q. And the same thing with condition 22(c).

11 A. Yes.

12 Q. And the same thing with condition 24.

13 A. Yes.

14 Q. Okay. And what's your -- you don't have
15 a degree in economics, do you?

16 A. No. I have many years experience on this
17 project working on many facets of financing, talking
18 to banks, investors, financial advisers, attended
19 conferences, reading articles on the topics. So many
20 years I have been involved in this project gaining a
21 wealth of experience in this field.

22 MR. JONES: Your Honor, I move to strike
23 the entire answer. I asked him if he had a degree in
24 economics.

25 ALJ WALSTRA: I'll grant the motion.

1 MR. JONES: Thank you.

2 A. No, I do not have a degree in economics.

3 Q. Okay. Do you have a degree in finance?

4 A. No.

5 Q. Okay. And for the majority of your
6 career you've been in the manufacturing sector, is
7 that correct, 33 years in the manufacturing sector?

8 A. Yes.

9 Q. And do you hold any finance positions
10 with any of those businesses you were associated with
11 during that part of your career?

12 A. No; but I was involved in financial
13 decisions.

14 Q. And then in 2013, you joined LEEDCo; is
15 that correct?

16 A. Yes.

17 Q. And you joined LEEDCo as a vice president
18 of operations; is that correct?

19 A. That's correct.

20 Q. Okay. And in 2015, you were in charge of
21 a geotechnical investigation for this project; is
22 that correct?

23 A. Yes. That was one of my responsibilities
24 at LEEDCo, yes.

25 Q. Is that one of your primary

1 responsibilities?

2 A. At that particular time that project
3 started and finished, so that part -- that was part
4 of my primary responsibility. There were still other
5 things, but...

6 Q. So you were in charge of that
7 investigation and also the coordination of that
8 report; is that correct?

9 A. Yes.

10 Q. And how long did that take?

11 A. The planning began in March of that year.
12 The field investigation was completed, I believe, in
13 September. Starting in August, it was completed in
14 September, the fieldwork, and then there were reports
15 that came out the end of the year and then were
16 subsequently kind of amended into 2016.

17 Q. Okay. Now, I want to get back to your
18 testimony as it refers to making the statement
19 several times through your testimony that the project
20 is unfinanceable. If the Board were to adopt Staff's
21 condition 19, 22(c) and 24, what's -- what's that
22 position based on?

23 A. It is based on my experience with this
24 project and my other experience with investors but,
25 more specifically, this project. Again, as I

1 mentioned in the previous answer, I've been
2 discussing -- had discussions about the project with
3 lenders, potential lenders. I think it's important
4 to back up and understand when I say "financing,"
5 what that means because that really isn't defined,
6 that term.

7 So to build up to get the funding to pay
8 for everything, you need to pay for everything to
9 build this project. There are several sources of
10 money. It's called the capital stack, and some of it
11 deals -- part of that funding is from the Department
12 of Energy, but it's not all the funding necessary.
13 Part of the funding comes from --

14 MR. JONES: I'm sorry, can I stop you
15 there?

16 Your Honor, I am going to have to object.
17 That was not answering my question. I asked for the
18 basis of his opinion why this is not financeable,
19 these conditions are not financeable. It's very
20 clear what my question is, and I am not getting an
21 answer to that question. Would you direct the
22 witness to answer my question, please?

23 MR. SECREST: I think he is answering the
24 question. You asked the basis for his opinion, and
25 that's exactly what Mr. Karpinski is providing.

1 MR. JONES: Your Honor, he is talking
2 about financing in general. I asked him what's the
3 basis of his opinion.

4 ALJ WALSTRA: I'll allow him to answer
5 the question.

6 A. So I'm explaining this to put in context
7 my opinion. So one of the sources of financing is
8 nonrecourse project debt and loan from a bank.
9 Another source that's necessary for the project is
10 from equity investors. So the DEO grant isn't
11 impacted by these conditions, so I will focus on
12 equity investor and the banks.

13 So the banks, based on my experience
14 talking with them, again, listening to conferences,
15 to their advice, reading research on the internet,
16 discussing -- we engaged two financial advisors
17 through this project, and the banks will do a
18 due-diligence process to ensure there is certainty in
19 your revenue stream, such as you will be able to
20 repay the loan that they give you. It kind of makes
21 sense.

22 So when they evaluate this, they look at
23 the risks of you not being able to achieve that
24 revenue stream. And when these conditions, like
25 1922(c) and 24 are present, that presents, in my

1 opinion, based on what I know from the financial
2 community, a risk that the lender would not be
3 willing to take. So they will say, well, there's
4 this risk. You want us to lend you the money, and
5 you are going to pay us back. Based on the revenue
6 the project generates -- this is nonrecourse debt,
7 which means the company is not banking by its balance
8 sheet, so there's -- the only way the bank could be
9 paid back, there are no other guarantees. This is a
10 revenue-stream project.

11 So they look at, take for example, 19(c)
12 as it's written in the Staff Report, and there -- the
13 problem with that is they say, well, you know, we
14 could be -- this project could be faced with a
15 condition where it may be -- may be required to
16 operate in a condition that doesn't allow it to
17 operate 40 percent of the time. That means you are
18 not generating revenue during that time, and that
19 makes it impossible for you to pay back that
20 obligation, so they would assess that as an
21 unbearable risk and not loan us the money.

22 24, 24 says that the state agency at any
23 time if they deem there was an adverse impact,
24 without any definition of what that means, could
25 prescribe mitigation measures. There is no limit to

1 the mitigation measures that are -- that are listed
2 there, so, you know, when you are assessing risk, as
3 a bank will do, an investor, one of those could be
4 the project is shut down for an indefinite period of
5 time or forever. That, again, would mean that the
6 project wouldn't be able to generate the revenue to
7 repay that loan.

8 22(c) is a little bit different because
9 it's before, earlier on, before construction, before
10 we would go to get funding from the bank. That falls
11 into the equity investor's bucket. So the equity
12 investor is funding these activities now that we are
13 currently engaged in very, you know, more risky
14 capital with anticipation we will get to the point
15 where we can build the project.

16 So we are faced with the condition in 22
17 where we are held to a standard that is based on
18 conditions that are outside of our control. What
19 that means is that we -- if we fail to meet that
20 standard, my interpretation, based on reading the
21 Staff Report condition, is we would have to repeat
22 the survey, and we don't know if the next time we
23 embark on that we would have conditions that would
24 enable us to satisfy that standard, so we would have
25 to repeat it again.

1 So you have this condition where
2 situations outside your control could prevent you
3 from accomplishing this goal, and you can't move
4 forward to ever getting to the point where you seek
5 financing, and you are continuing to spend money over
6 and over again potentially and not satisfying this
7 condition.

8 And so that's a condition that investors
9 would not continue to fund without this certainty of
10 if we do things within our control a certain way,
11 then we'll get to the finish line, so that's my long
12 answer to the question.

13 Q. So if I could sum up your long answer,
14 your long answer is this is -- this is your judgment,
15 right, with no input from anybody else?

16 A. It's based on my opinion, as I said in my
17 testimony, and that opinion is informed by -- by
18 years interacting with the people that I mentioned,
19 the banks, investors, financial advisers, and that
20 industry.

21 Q. So nobody else was looking at these
22 conditions, just you were looking at these
23 conditions, and you arrived at that opinion; is that
24 correct?

25 A. Yeah. We discussed those among our team,

1 but, yes, there is no external bank or financial
2 adviser, that's true.

3 Q. Okay. And based on your opinion that
4 this is unfinanceable, are you saying it's not
5 financeable at all, or are you saying that it's
6 financeable but higher interest rate?

7 A. I'm saying it's not financeable at all
8 given the conditions we would have to achieve for
9 this project to justify moving forward.

10 Q. Okay. As you have said previously under
11 cross-examination, you're saying that Stipulation
12 condition 19 meets the minimum adverse environmental
13 impact?

14 A. Yes.

15 Q. Criteria 4906.10(A)(3)?

16 A. Yes, that's my opinion.

17 Q. Well, let's look at that condition 19 in
18 the Stipulation, Joint Exhibit 1, page 6. And let me
19 know when you're there.

20 A. Okay, I'm there.

21 Q. Okay. So did you -- did you help develop
22 this condition?

23 A. Yes. I was part of the team that led to
24 this proposal here.

25 Q. But specifically this condition?

1 A. Yes, I was involved in this condition.

2 Q. When it says, the part in the lower end
3 of the condition, that the -- this is like three
4 lines from the bottom, "The ODNR and Staff may
5 require turbines to be feathered up to 30 minutes
6 prior to sunset to 30 minutes after sunrise," what --
7 who would then determine you say "up to"? The "up
8 to" language, the up to 30 minutes prior to sunset,
9 the 30 minutes after, who would decide that?

10 A. ODNR and Staff. So the window is -- that
11 window, and they could say we want you to, in my --
12 you know, my interpretation, we want you to feather 9
13 p.m. to 4 a.m. for certain reasons, so it's up to
14 that point.

15 Q. And what's feathered mean in this
16 context?

17 A. Feathered means that the turbine is
18 essentially stopped spinning. You actually rotate
19 the blades, that's called the feathering, and that
20 causes the turbine not to spin anymore.

21 Q. And then your comments then on Staff
22 condition 19, and I refer you to -- if you have a
23 copy in front of you. Do you have a copy of the
24 Staff Report?

25 A. No, I don't. I have a copy of the

1 Stipulation but not the Staff Report.

2 MR. JONES: Your Honor, can I approach
3 the witness and provide him a copy of the Staff
4 Report of Investigation?

5 ALJ WALSTRA: You may.

6 MR. JONES: Thank you.

7 ALJ WALSTRA: Are you going to mark this
8 for the record, Mr. Jones?

9 MR. JONES: Yes. It will be Staff
10 Exhibit 1.

11 ALJ WALSTRA: So marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.))

13 MR. JONES: Thank you.

14 Q. (By Mr. Jones) And if you would turn to
15 condition 19 on page --

16 A. I'm there on page 47.

17 Q. 47, right. Okay. Now, did you have an
18 opportunity to read Staff witness Erin Hazelton's
19 testimony?

20 A. Yes, I did.

21 Q. In that she provided clarification on how
22 Staff condition 19 would work; is that correct?

23 A. I know that she addressed that. I
24 couldn't tell you exactly what she said on that
25 topic. I've read a lot of testimony and documents.

1 Q. Do you recall from reading that testimony
2 that she testified in her testimony that the
3 Applicant may demonstrate that the plan and
4 technology is sufficient either prior to construction
5 or during operation through lab and field testing?

6 A. Yes. That's what our condition says as
7 well, yes.

8 Q. Okay.

9 A. I would add our intent is we would prove
10 that it's sufficient beforehand, before any
11 construction. That's in the best interest of all of
12 us, so that's certainly what we hope to do in the
13 spirit of the collaboration we've been pursuing for
14 many years with ODNR.

15 Q. Right. And so it's possible then, given
16 that statement, that the Applicant can make this
17 demonstration before operation, correct?

18 A. It's possible, although there's no --
19 there's no definition of what the conditions would be
20 under such that the Staff would make that
21 determination, what criteria they would use, what
22 process they would use to make that evaluation, so
23 it's possible -- it's not well-defined, and there is
24 no pathway defined for that.

25 Q. So you could -- you could submit that --

1 you could submit that plan at the time you submit the
2 rest of the mitigation plan. To be compliant
3 with condition 18, you could submit that
4 post-collision-monitoring plan at that time, at 60
5 days prior to construction consistent with condition
6 18?

7 A. Yeah. I mean, there's a whole collection
8 of plans, and they have different names, and there is
9 sometimes confusion with what they are. But, no, we
10 envision that -- we understand there has to be an
11 approved plan by ODNR and OPSB throughout this
12 process and different ramifications at different
13 times.

14 Ultimately, if we don't have a proven
15 plan, ultimately the certificate could be, you know,
16 I would imagine, revoked. OPSB still controls the
17 certificate long after it's operating, so, you now,
18 we would -- we would intend to continue to
19 collaborate to approve this.

20 One of the things, just I would point
21 out, about condition 19 specifically is although it
22 uses the word "plan," which is the language taken
23 from the Staff Report, we understand that to mean not
24 just the plan of which you -- plan which you intend
25 to do in the future, which is what a plan typically

1 is, but also a demonstration that the technology that
2 the collisions is working and actually measuring
3 collisions, that's different than necessarily a plan.

4 But that's what we understand that to be.
5 So that may require -- you know, that's not just a
6 simple matter of putting a good plan together with
7 the right people in a room and submitting it. It
8 actually, in our view, in our understanding, ODNR
9 wants to demonstrate it's actually detecting
10 collisions, and there is a provision that could be
11 done in a lab or some other -- some other wind
12 turbine somewhere else or on our own turbines for
13 this project.

14 Q. Okay. I want to refer you to your
15 testimony page 13, line 29. Let me know when you're
16 there.

17 A. I'm sorry page 13, line?

18 Q. 29.

19 A. Okay. I'm there.

20 Q. Okay. There you state, "There are
21 thousands of offshore wind turbines around the world
22 and I am unaware of any offshore wind farm in the
23 word with a condition like Staff Report Condition
24 19." Do you see that?

25 A. Yes.

1 Q. Did you review those -- those
2 applications, those plans for all thousands, the
3 thousands you are referring to there? Did you go
4 through each one?

5 A. No. No. I said I am not aware of any.
6 I am aware of many developers. As I mentioned, I
7 have been in this industry a long time and had many
8 discussions at conferences with other peers, and we
9 discuss, you know, many aspects of projects. I am
10 not aware of any project that's required to feather
11 for 10 months out of the year at night, and that's
12 kind of what I am referring to in my testimony.

13 Q. But you didn't do any research on that
14 either, did you?

15 A. No. I didn't go to every one of these.
16 It's based on my knowledge of talking with other
17 developers that are responsible for projects.

18 Q. And jump --

19 A. I would like to clarify one thing. I can
20 say the Block Island Wind Farm, which is the first
21 offshore wind farm in the U.S., does not have a
22 condition like this, that we did research and consult
23 with them.

24 Q. So under Stipulation condition 19,
25 jumping back to your condition 19 --

1 A. Okay.

2 Q. -- the Applicant modified the regime so
3 that it was limited to nonspecific peak spring and
4 fall migrations when cloud ceilings are low; is that
5 correct?

6 A. Yes. Again, the rationale, that's when
7 we believe the highest risk period is. And our
8 wildlife experts will -- will get into more why that
9 is.

10 Q. Under Stipulation condition 19, wild
11 animals are not protected during full migratory
12 seasons, are they?

13 A. I'm sorry, I am not sure I understand.

14 Q. Yeah. Under Stipulation condition 19,
15 wild animals and birds, bats are not protected during
16 migratory seasons.

17 A. Well, yeah. I guess the question, what
18 do you mean by protected? Do you mean the turbine is
19 feathered during times other than what they say here?
20 No. Again, our position is, and demonstrate by the
21 wildlife experts, that the risk is low, very low. So
22 that the risk to wildlife, avian birds and bats
23 specifically, is low for a list of reasons based on
24 all kinds of information that they will testify to.

25 So are they protected? I would say by

1 virtue of the fact that it's a low-risk project and
2 low-risk location with other mitigation plans in
3 place, there's a whole collection of monitoring and
4 mitigation, and that the management strategy 19(c) is
5 one particular part of that, but there's a whole
6 collection of plans that are in place and measures
7 that are in -- have already been taken, some that
8 will be taken in the future, to protect birds and
9 bats.

10 Q. I am not talking about the peak times as
11 proposed in the Stipulation condition 19. Migratory
12 seasons cover what time frame, do you know?

13 A. Generally from April -- April to mid-June
14 and from August to mid-November. Depending on the
15 species there are various times within that window,
16 depending what species you are talking about.

17 Q. But the proposed condition that you have
18 in Stipulation condition 19, it wouldn't cover the
19 full migratory season, would it, for both spring and
20 fall?

21 A. The condition 19 doesn't cover -- as it's
22 stated covers the high risk period of peak migration.
23 But as I mentioned, there are other measures beyond
24 19(c) that are intended to protect wildlife and
25 adverse impact. So in my view, you have to look at

1 this as a collection, not just one thing. There are
2 other measures that are -- have already been taken,
3 as I stated, and citing other situations and measures
4 that will be taken, as documented in the requisite
5 plans, that the Stipulation calls for prior to
6 construction that ODNR has to approve and so on.

7 So there is, I think, a complex network
8 of plans and measures that are in the process of
9 being developed, that will be developed, that all
10 have to be signed off on by ODNR, and those are all
11 intended to protect wildlife and minimize impact.

12 Q. I am talking about feathering, though. I
13 mean the feathering. You've got the feathering in
14 your conditions just during peak times, correct?

15 A. Again, yes. In 19(c), yes, the
16 feathering in 19(c) for this be particular case, yes,
17 it's just during peak migration.

18 Q. And the full migratory season is much
19 broader than that, correct?

20 A. Yes.

21 Q. Okay.

22 A. It's a question of risk during that time.

23 Q. I'm sorry.

24 A. It is a question of what are the risks
25 during those times, and I think that's where our

1 wildlife experts will cite you. The question is how
2 to manage the risk and ensure minimum impact, and you
3 have to know something about the risk during certain
4 periods to have the appropriate measures, and I think
5 our wildlife experts will get into that more than I
6 can.

7 Q. And let me clarify. When I'm talking
8 about protection, I am talking about the feathering,
9 the feathering at -- during the evening, okay, that,
10 you know, Stipulation condition 19 does not provide
11 protection in terms of the feathering, complete
12 feathering, for the full migratory season. You would
13 agree with that?

14 A. Complete feathering, yes. But I would go
15 back to my other comments about -- about the problems
16 we have with complete feathering that make the
17 project unfinanceable. If it doesn't get built. We
18 don't achieve the benefits I testified to in my
19 testimony. So it's a question of certainly if you
20 never install a turbine, that's the -- there is no
21 risk. But that's not what we are here to talk about.
22 You know what I mean?

23 So I'm -- in my mind it's a minimum
24 adverse impact, and I think we've in our collection
25 of this condition and all the others and all the

1 other plans that are contemplated and already
2 processed to address ensuring minimum adverse impact
3 throughout the whole year, not just during this peak
4 time.

5 MR. JONES: Your Honor, again, I move to
6 strike the second half of his answe4r there dealing
7 with financing. That was not connected to my
8 question. It was about protection and feathering,
9 and he added all that stuff about the financing
10 again, which is not responsive to my question. I ask
11 to strike that part of his condition.

12 THE WITNESS: I understand the condition
13 to be considering economic --

14 ALJ WALSTRA: Hold on. Hold on.

15 Mr. Secrest.

16 MR. SECREST: I think it was responsive
17 to the question, your Honor, because it was, in fact,
18 a broad question that delved into what protections
19 were provided.

20 MR. JONES: Your Honor, I clarified the
21 protection was the feathering, was referring to
22 specifically during nighttime.

23 ALJ WALSTRA: I will allow the first part
24 of the sentence that says, "Complete feathering,
25 yes," and then strike everything from "but I would go

1 back to my other comments." After that will be
2 struck.

3 MR. JONES: Thank you, your Honor.

4 Q. (By Mr. Jones) Mr. Karpinski, if you
5 know, how many days make the peak time in the spring?

6 A. I think the peak migration period is 30
7 days. But, again, I'll defer to our wildlife
8 experts. That's my understanding.

9 Q. How about in the fall?

10 A. Same, 30 days, one month.

11 Q. So for full spring and fall seasons,
12 you're talking about 60 days, which would then be
13 less than 60 days because you would have low ceilings
14 come in -- low cloud ceilings come into play, too; is
15 that correct?

16 A. Yes. That's according to -- but, again,
17 I have to keep stressing that's one provision among
18 many, many other measures that are all intended to
19 work together to protect wildlife and impact. I
20 think it's difficult to pull one out and focus on it,
21 so.

22 MR. JONES: Your Honor, I am going to
23 move to strike his answer, again, the second half of
24 that answer. He is volunteering stuff. I am not
25 asking that stuff. You know, my question is very

1 directed, and if he wants to testify on redirect or
2 something like that, I got my question. I want him
3 to answer my question, stick to it. I am not
4 soliciting anything else.

5 ALJ WALSTRA: I'll allow this one to
6 stand.

7 Q. (By Mr. Jones) Mr. Karpinski, looking at
8 Stipulation condition 19, there is no limitation for
9 the Applicant to operate without a -- with the --
10 with the -- with the limitation provided by the
11 feathering language in the condition. Outside of
12 that limitation, there would be no other limitations.
13 You could operate continuously for whatever period of
14 time without a collision monitoring plan being
15 approved by Staff; is that correct?

16 A. That's not the way I understand it.
17 This -- this provision says we have to have an
18 approved plan. It doesn't say you can operate
19 forever without an approved plan, so my understanding
20 is wrapped around this. We are pursuing a
21 certificate. OPSB is in charge of certificates.
22 There are enforcement actions if we don't achieve an
23 approved plan, I think ultimately to revoking the
24 certificate. So I think wrapped around all these
25 conditions is the enforcement capability of OPSB is

1 the issue of the certificate, and it does say we have
2 to have an approved plan. It doesn't say you never
3 have to have it. If you don't have it, here are the
4 measures that have to be taken, but it doesn't
5 eliminate the need to have an approved plan.

6 The only thing I would point out is 18
7 talks about needing an approved plan before we even
8 go to construction, and the collision monitoring
9 would be an element of that, of those plans that are
10 contemplated in 18. And, as I said, this 19 is its
11 proof that the technology operates, which is a little
12 different than a plan, so I think that's where 19
13 kind of comes into play. But the expectation of an
14 approved plan before even starting construction is
15 outlined in 18.

16 Q. So the post-collision monitoring plan,
17 where is -- where the limitation you are -- you
18 testified there is a limitation. Where is that
19 limitation? In condition 19?

20 A. As I said, my understanding is not
21 explicit in every condition, but this is a
22 Stipulation in the context of a certificate governed
23 by the OPSB, so the OPSB has enforcement capability
24 in all of these. If we don't comply with these other
25 conditions, the OPSB has enforcement actions they

1 could take at their discretion, and I understand that
2 could lead to revoking certificates, which means a
3 project can't legally operate anymore and have to
4 move.

5 So by the nature of the authority of
6 OPSB -- it is not spelled out explicitly in condition
7 19, but condition 19 says we have to have an approved
8 plan, so if you don't have an approved plan, which we
9 fully intend to, then OPSB at its discretion, if you
10 haven't met this condition and you are not compliant,
11 may take enforcement action.

12 Q. But where can you point to the limitation
13 that says you have to have that plan approved before
14 you can operate?

15 A. Sir, that's not what I testified to. I
16 believe I said the 19 establishes we have to have an
17 approved plan. It doesn't say before or after
18 operation. And I am saying if we don't have an
19 approved plan, at some point OPSB can say, Where is
20 your approved plan? When you are going to have an
21 approved plan? And it's your discretion, OPSB's
22 discretion to take enforcement action if it's longer
23 than you deem is reasonable.

24 Q. All right. Let's go to Staff's condition
25 19. Staff's condition 19 provides a limitation as to

1 when you can operate without approval; is that
2 correct, of your post-collision monitoring plan?

3 A. I'm sorry. So it provides conditions on
4 when you can operate?

5 Q. Yes.

6 A. Yes. We can operate only -- well, we
7 can't operate March through January 9.

8 Q. For testing purpose, right?

9 A. Well, it says they could, may approve
10 modifications for testing. But I read it to be
11 without any modifications we can operate during the
12 day between March and January, just not at night
13 until the plan is approved.

14 Q. At nighttime, you can operate at
15 nighttime, but only in limited circumstances related
16 to testing; is that correct?

17 A. No. This says the turbine shall be
18 feathered completely from dusk to dawn, so at
19 nighttime we can't operate. We can operate during
20 the daytime unless OPSB or ODNR approves
21 modifications.

22 Q. That's correct. That's the second part
23 to 19, Staff condition 19.

24 A. Right, that they may -- they may make
25 modifications. They may not.

1 Q. For testing purposes, right?

2 A. Right.

3 Q. Well, there is no testing -- there is no
4 testing language in Stipulation condition 19, is
5 there?

6 MR. SECREST: Sorry, Stipulation 19.

7 Q. Stipulation condition 19.

8 A. Yes. The plan is sufficient --
9 considering that "the plan is sufficient either prior
10 to construction through lab and field testing or
11 during operation." It explicitly says field testing
12 and lab testing.

13 Q. Well, let's look at condition 22 on
14 page -- well, let's see. You had mentioned here on
15 page 11, 22 through 24, you're saying that the
16 Stipulation condition 22(c) provides a consistent
17 with the minimum adverse environmental impact; is that
18 correct?

19 A. Could you tell me what question that was
20 again?

21 Q. Question -- lines 2 to 24.

22 A. On page?

23 Q. 11.

24 A. Yes.

25 Q. Okay. Now, looking at the Stipulation

1 condition 22(c), what's your -- what's your
2 understanding of heavy precipitation and high sea
3 events?

4 A. So two different things, sometimes
5 related. Heavy precipitation is consistent with
6 rain. It's more than a drizzle and more than just
7 temporary or intermittent. High seas is a condition
8 where the waves are high and not -- the lake is not
9 flat.

10 Q. Well, on land you also have heavy
11 precipitation, land facilities, correct. Wind
12 turbine facilities on land, they experience heavy
13 precipitation too, don't they?

14 A. Yes. And our radar expert will testify
15 what the effect of precipitation has on the radar to
16 measure good data.

17 Q. And so the storms don't stop -- when you
18 come across the lake, the storms don't stop at the
19 shore, do they?

20 A. Most of them don't, yeah.

21 Q. Okay.

22 A. But, again, our assertion is
23 precipitation has an impact on radar, whether it is
24 on the lake or on land.

25 Q. So looking at Stipulation condition

1 22(c), it provides that there is -- you have
2 "80 percent or greater of survey time producing
3 viable data, unless precluded by heavy precipitation
4 or high sea events," correct?

5 A. Yes.

6 Q. So why isn't heavy precipitation and high
7 sea events included in the 20 percent buffer that's
8 already provided?

9 A. So the reason is that's -- those two
10 conditions are outside of our control, so it's -- we
11 can't agree and guarantee to a situation where the
12 conditions could prevent us from achieving that or
13 not in our control. We can't predict the weather.
14 Not only can't we predict it, we can't control it.
15 So we can't stop precipitation, and we can't control
16 the seas, so this puts us in a position where we
17 could go out onto the water, conduct the survey, and
18 the combination of heavy high seas and heavy
19 precipitation causes us to collect less than
20 80 percent data and we would not meet this condition.

21 Again, our radar -- our radar expert will
22 testify to the broader question of -- you know, we
23 think the important point here is the questions that
24 are trying to be answered by this survey, and we
25 think there is valuable information to be collected,

1 and that this 80 percent standard is not a necessary
2 requirement to be able to answer those questions and
3 provide that information.

4 Again, that will be Todd Mabee who will
5 testify to that. So what we propose in 22(c) is to
6 take a -- measure us against standards that are in
7 our control, the operation of the radar. Take out
8 those things that are outside our control.

9 Q. Would you agree that the objective
10 condition of 22, in general, is to have a successful
11 radar study protocol to ensure the resulting data
12 will be reliable and will adequately document bird
13 and bat activity at the project site in the
14 identified survey periods?

15 A. That's generally it, yes.

16 Q. And would you agree that quality data is
17 important so that post-construction comparisons can
18 be made, and an effective avian and bat mitigation
19 plan can be written assuring minimum adverse
20 environmental impact to avian and bat species? Would
21 you agree with that?

22 A. Yeah. I would agree that it is an
23 important element. Again, it's not the only element,
24 and it's an important piece of the collection of
25 plans, proposals we are putting on the table.

1 Q. So the way that Stipulation condition
2 22(c) is written, there is no floor provided when you
3 have heavy precipitation or high sea events involved,
4 right?

5 A. Nothing -- nothing in the -- in the
6 language. But, again, you know, we all know and have
7 experience of the range of conditions and, you know,
8 we've never had a case where it rained constantly the
9 whole migratory season. So based on your experience
10 and my experience of the weather, you know, it will
11 be ample time to collect the data necessary to answer
12 those questions.

13 I think for us that's what's important,
14 is getting enough data collected so it answers those
15 questions in a statistically valid fashion, and the
16 focus on this 80 percent standard is what I think
17 we've taken exception to, and, again, we'll elaborate
18 more on why that is not necessary.

19 Q. I am going to take you to page 16 of your
20 testimony, lines 27 through 31, and then on page 17,
21 lines 1 to 3. Let me know when you are there.

22 A. Okay, I'm there.

23 Q. Here you talk about data collected from a
24 buoy at the project site going on November 2015
25 through 2017. Do you see that?

1 A. Yes.

2 Q. Where is this data? Is this somewhere in
3 the case?

4 A. It's not my testimony. This data was
5 collected by our -- our aquatic and fisheries
6 consultant that have done the studies through the MOU
7 of ODNR. The buoys that I'm referring to were the
8 buoys that were employed like the data consistent
9 with use for the monitoring, so our -- our LimnoTech,
10 our consultant from LimnoTech, he conveyed it to me,
11 and he will be testifying later in the case as well.

12 Q. Why are you testifying as to this data?

13 A. Because I'm testifying to the relevance
14 of this high seas condition, so I am trying to assert
15 and describe, explain what typically high seas --
16 what conditions warrant high seas, and we've been
17 asked, How often do you think that's going to happen?
18 So we've tried to address that in my testimony to
19 answer that question for you.

20 Q. Did you analyze this data?

21 A. I analyzed it to come up with the
22 average, I guess. I was presented with a series of
23 data that said what the measurement of the wave
24 heights were, and I was able to take the average of
25 that over a period of data that was given to me.

1 But, again, you know, I would stress LimnoTech is the
2 company that collected the data and presented it to
3 me.

4 ALJ WALSTRA: Who is testifying as to
5 that?

6 THE WITNESS: Ed Verhamme, I don't know
7 if he was intending to testify on that point, because
8 it just kind of came up, but I guess I am saying he
9 will be here testifying on a variety of aquatic
10 issues, and I guess I spoke out of turn, but it seems
11 like he could testify while he is here on that.

12 ALJ WALSTRA: Thank you.

13 Q. So 8 percent, it's over two years there
14 from 2015 through 2017. The waves were over 6 feet
15 or higher, right?

16 A. Right.

17 Q. Right. And so based on those conditions
18 when it's 6 feet or higher, then you are saying that
19 the barge would have to come off the lake?

20 A. I'm saying in general, and I think what I
21 testified to was it's not a black-and-white, you
22 know, objective decision. The company in charge of
23 the barge makes a judgment call on when it's safe to
24 leave it deployed. The wave height plays a role in
25 that. The forecasted weather plays a role in that,

1 so there are many factors that ultimately lead to a
2 decision that they make. Through discussions with
3 them, it's my understanding that's what they are
4 saying. Generally the conditions will be for wave
5 height. But, again, I just want to stress it's not
6 an absolute, you know, number, where if they register
7 at 6 they move the barge off. So, again, kind of go
8 back to my experience with the barge on the geotech
9 work, and that's --

10 Q. What was -- what's the average percentage
11 over those two years?

12 A. Percentage of what?

13 Q. Being 6 feet or higher over those two
14 seasons.

15 A. Eight percent.

16 Q. Eight percent is the average?

17 A. Yes. It's not 8 percent month by month.
18 That was the average over the period.

19 Q. So assuming it's 8 percent, that still
20 falls within 20 percent, correct, the 20 percent
21 buffer?

22 A. It's within the 20 percent buffer, but
23 what about precipitation? I could have 11 percent
24 precipitation and 11 percent high seas and I'm below
25 the 80 percent threshold. So both of them have to be

1 considered together because both conditions could
2 prevent you from collecting the data, so I have to
3 combine both of the effects of those.

4 And I have to count for -- as you pointed
5 out, it's two years, you know, representative, but,
6 again, we don't know. There are fluctuating weather
7 patterns. We can't be sure. We can't guarantee it's
8 going to be 8 percent when we go to do the survey,
9 and the precipitation is going to be under the 12
10 percent that would allow us to do that. We can't
11 control these factors. Then, you know, it's not
12 reasonable then to -- to have to perform under
13 that -- under factors you can't -- you can't control.

14 And, again, not necessarily to answer the
15 questions, but I think that's what's lost a little
16 bit in this discussion, is, you know, the value that
17 we are trying to achieve as answering those questions
18 that are intended to be addressed by these studies.

19 Q. So did -- you're familiar then with radar
20 on land at facilities, wind turbine facilities on
21 land with radar?

22 A. I am not a radar expert, but I am
23 familiar generally with what it's used for and that
24 it's been done and surveys have been done, yes.

25 Q. And if I were to tell you on land that

1 you have a 96 percent viable reliable radar accuracy,
2 would you dispute that?

3 MR. SECREST: Objection, assumes facts
4 not in evidence.

5 MR. JONES: Its relevance is in
6 comparison to the lake as to the 80 percent.

7 MR. SECREST: I didn't say it wasn't
8 relevant. I said it assumes facts not in evidence.

9 MR. JONES: I asked if he knew.

10 ALJ WALSTRA: I will allow the question.

11 A. Can you repeat that?

12 Q. Yeah. That there is a 96 percent viable
13 data quality for wind turbines on land for radar
14 studies?

15 A. So you are saying there has been at least
16 one study done that achieved 96 percent.

17 Q. I am saying as an average on land.

18 A. I am not aware of that, no. Again, our
19 radar expert will testify to what our underring of
20 the current state-of-the-art patterns are on land.
21 What I can say is I'm also aware there are -- there
22 are mechanisms that some radar companies and people
23 that perform studies that correct for precipitation
24 and claim to be able to still detect birds in the
25 midst of precipitation, and that's disputed. So I

1 don't know if it's 96 percent is based on the radar
2 study adjusting the data during precipitation events.

3 Q. All right. Let's go back to the
4 80 percent here. Now, Dr. Diehl, he prepared a
5 report which is part of your application; is that
6 correct?

7 A. Yes.

8 Q. Are you familiar with that report?

9 A. Yes.

10 Q. And do you recall after reading that
11 report that Dr. Diehl said reliable -- you have to
12 have reliable data 80 percent of the time? Let me
13 get you the reference here. It would be in our
14 supplement to the application in Attachment 5 on page
15 24 of his report.

16 A. I'm sorry. I don't remember the details.
17 Could you show me a copy?

18 Q. Let me read to you and see if you agree
19 that this is accurate. Starting here on page 24 of
20 his report, again, this is Attachment 5 to the Fourth
21 Supplement to the Application, and this is a report
22 that was made and prepared for LEEDCo by Dr. Robert
23 Diehl, research ecologist, and this was provided in
24 December of 2017.

25 And on page 24 he states that, "Arguably,

1 the most important data criteria for a radar system
2 in relation to the Icebreaker Wind Project concerns
3 the ability to gather data on altitude specific MTR
4 or density and behavioral response to turbine
5 presence in (pre versus post construction comparison
6 to attempt to assess avoidance/traction), and the
7 ability to do so with high reliability (80 percent or
8 greater available time) while avoiding contamination
9 by clutter, primarily from insects and lake surface."

10 Do you recall reading that from
11 Dr. Diehl's report?

12 MR. SECREST: Let me note an objection.
13 That was an awfully long sentence. If you could
14 present the witness with a copy of what was just
15 read.

16 ALJ WALSTRA: Please do.

17 MR. SECREST: Thank you.

18 MR. JONES: Thank you, your Honor.

19 A. For time, could you point me to the page
20 number?

21 Q. Page 24.

22 MR. JONES: Your Honor, would the Bench
23 like a copy as well?

24 ALJ WALSTRA: We have it.

25 A. So, yes, that's what this report says.

1 It doesn't say that --

2 Q. So I --

3 A. It doesn't say that without 80 percent
4 it's invalid and would not be acceptable. So we
5 interpret that as a goal of 80 percent. We still do.
6 We still think a goal of 80 percent is appropriate.
7 What the condition we've recommended is, is the hard
8 standard, that means we don't comply if we don't
9 achieve, that is what's problematic.

10 Q. But he doesn't say that, does he? He
11 doesn't say that's a goal.

12 A. It a parenthetical comment. I mean, to
13 me that obviously --

14 Q. My question to you, I said --

15 A. I am trying to answer your question.
16 What it says to me, a parenthetical comment when I
17 draft something means it is obviously not important
18 enough to be in the main body. It's a parenthetical,
19 oh, by the way, this is what I mean. If it were that
20 important, I think it would be stated that unless you
21 have 80 percent, you know it's not worth doing.

22 Q. I am going to ask my question, okay? He
23 didn't say that was a goal, did he?

24 A. No, he didn't say it was a requirement
25 either.

1 Q. And, furthermore, there is no other
2 discussion there on page 24 where you reference that
3 80 percent or reliability as to the clutter or heavy
4 precipitation, does he?

5 A. I don't see any other references.

6 Q. High seas or heavy precipitation, he
7 doesn't make those -- he doesn't state anything about
8 that in that area, does he, where he talks about
9 80 percent?

10 A. Well, as you pointed out, he only
11 mentioned 80 percent once in parentheses, so he
12 doesn't mention it. I think the fact he doesn't
13 mention it, again, you know --

14 Q. Thank you.

15 A. -- leads me to believe it is not really
16 that important.

17 Q. And in comparison to Staff condition
18 22(c), Staff has a standard, not a goal, of
19 80 percent, right, for viable data?

20 A. That's a Staff condition in the report,
21 yes.

22 Q. Are you familiar with a letter that was
23 sent from the U.S. Fish and Wildlife Service to
24 Dr. Diehl on December 21, 2017?

25 A. Yes.

1 Q. Okay. And do you recall that in that
2 letter that the -- he outlined for what would be a
3 successful full study and included the 80 percent
4 standard, just as Staff provides in 22(c), very
5 similar?

6 A. Again, it's been a long time since I
7 looked at that letter, if that's what it says, and I
8 am not disputing you, but I don't recall that.

9 MR. JONES: Your Honor, may I approach?

10 ALJ WALSTRA: You can.

11 MR. JONES: Does the Bench need a copy?

12 ALJ WALSTRA: Please.

13 Q. And I want to refer your attention
14 here -- first of all, is this the letter you told me
15 you had reviewed?

16 A. Yes. I'm familiar with this letter.

17 Q. Okay.

18 ALJ WALSTRA: Are you marking this,
19 Mr. Jones?

20 Q. I would like to direct your attention to
21 page 2 of the letter.

22 ALJ WALSTRA: Mr. Jones, are you marking
23 this.

24 MR. JONES: Yes. Staff Exhibit 2.

25 ALJ WALSTRA: Thank you. So marked.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 Q. And I want to refer your attention to
3 page 2 to the fourth bullet point in the middle of
4 the page.

5 A. Yes.

6 Q. Okay. And would you read that bullet
7 point, please.

8 A. "Radar must suppress false detections
9 from insects, wave clutter, and weather (greater than
10 or equal to 80% of surveyed time producing viable
11 data, including during heavy precipitation events.)
12 Additionally, downtime should be non-biased. That
13 is, each biological period (Dawn, Day, Dusk, and
14 Night) should meet the greater than or equal to
15 80% threshold. This was not part of the February 28
16 letter and is added here as a clarification."

17 Q. Okay. So Staff's condition 22(c) would
18 be supported by U.S. Fish & Wildlife Service,
19 correct?

20 MR. SECREST: Object to the
21 characterization.

22 Q. The same -- the same criteria, right,
23 standard. I'm sorry, is there is an objection?

24 ALJ WALSTRA: If you could rephrase.

25 Q. The same standard is used by U.S. Fish &

1 Wildlife as the Staff uses for their condition 22(c);
2 is that correct?

3 A. In the December letter, yes, and then
4 later I think there was a March -- March letter
5 that -- that clarified more and opened up the door to
6 this being a viable way to collect the data. I would
7 further add that our view, and you will hear it from
8 our radar expert, that this 80 percent standard is
9 not necessary, not warranted, and there are studies
10 done that -- Fish & Wildlife studies that have less
11 than 80 percent of viable data, but I will leave that
12 for our wildlife expert or radar expert to testify
13 to.

14 Q. You're saying the March 12 letter
15 addressed the 80 percent standard?

16 A. In my view, yes. Not explicitly, but
17 again, if you had a copy of the letter, we could go
18 through that.

19 Q. Has the -- has the Applicant chosen a
20 vendor for this barge?

21 A. Not for the barge, no. There's several
22 contractors that offer that kind of service, barges
23 in the lakes.

24 Q. Okay. Now I want to move on here to
25 condition 24, Stipulation 24, and I believe, again,

1 you state that Stipulation condition -- this is on
2 page 12 of your testimony at lines 1 through 4. You
3 state that the Stipulation condition 24 satisfies the
4 minimum adverse environmental impact. Do you see
5 that?

6 A. Yes.

7 Q. Now, looking at Stipulation condition 24,
8 does Staff have -- according to your condition 24,
9 does Staff have to demonstrate that there is a
10 population level impact to a -- to a species before
11 we look to mitigate further, according to your
12 condition?

13 A. Our condition tried to address some
14 ambiguity in the Staff condition and defines adverse
15 impact. The Staff's condition had no definition for
16 adverse impact. We assert a definition here in our
17 Stipulation to try to bound that and make that
18 determination ahead of time, so in our condition,
19 yes, we define what a significant adverse impact
20 would constitute.

21 Q. And that would be a population level
22 impact to a species; is that correct?

23 A. Yes, biologically significant impact on
24 population, or that's one of the conditions. The
25 other condition is a large mortality event, so either

1 one of those would trigger that.

2 Q. And referring -- do you still have the
3 Staff Report up there?

4 A. Yes.

5 Q. And Staff's condition 24, and I know
6 that's been modified here by Staff Witness Erin
7 Hazelton. Again, you did read that part of Erin
8 Hazelton's testimony for that modification?

9 A. Yes. Yes, I did.

10 Q. And do you understand then from that
11 modification that after there is a significant
12 adverse impact to all animals, that's then notice to
13 the Applicant that the Applicant would then have 30
14 days to provide a mitigation plan in response to that
15 impact?

16 A. That's generally what I remember,
17 Mr. Jones. Again, I don't have it in front of me,
18 but generally that sounds like what I remember when I
19 read it.

20 Q. And that would be subject to review for
21 compliance with the condition by Staff and ODNR by
22 Staff?

23 A. The submission of our plan you mean? Is
24 that what you're asking?

25 Q. Yes.

1 A. Yes.

2 Q. Okay. And that further provided that
3 temporary adaptive management may be prescribed until
4 a mutually agreed upon plan is implemented. Do you
5 recall reading that?

6 A. Yeah. Generally, again, yes.

7 Q. Okay. And that if Applicant shall
8 implement the plan -- that Applicant shall implement
9 the plan within 14 days after receiving approval. Do
10 you recall that piece?

11 A. Yes, generally, without having it in
12 front of me, but, yes, generally.

13 Q. And then further the condition provides
14 that if the significant adverse impact persists,
15 Applicant shall be prescribed adaptive management.
16 Do you recall that piece?

17 A. Yes, I do remember that.

18 Q. I thought you did. So looking at the
19 difference -- differences between the Staff Report
20 and condition 24, Stipulation condition 24, here the
21 Stipulation condition 24 provides that there has to
22 be an agreement among the Applicant, ODNR, and Staff
23 that -- if the mitigation plan -- say the plan fails
24 and the significant adverse impact is going to
25 persist, then there has to be an agreement, right, as

1 to what further adaptive management would be
2 necessary; is that correct?

3 A. Yeah. That's the way it's written, and I
4 think what's the reason, part of the rationale for
5 that position, we think it's important all the
6 players, especially those knowledgeable about the
7 project and biological impact and the measures that
8 were designed, are part of that discussion and come
9 together, come to the best conclusion.

10 Q. And there's no provision in Stipulation
11 condition 24 that would allow Staff to take an
12 intermediate action to stop the significant adverse
13 impact until such time that there is an agreement
14 between all parties; is that correct?

15 A. Again, I would kind of point to my
16 understanding of the overall certificate, the Staff
17 has enforcement authority on all these conditions,
18 and if Staff deemed that we weren't -- we weren't
19 being forthcoming, that we weren't in good faith
20 pursuing this plan, they could bring enforcement
21 action, and, again, that could lead to pulling the
22 certificate.

23 So I think Staff has tremendous recourse
24 on all these conditions. They are not explicitly
25 called out in each one. And we are really looking

1 for the collaboration. That's what we think is
2 important, is these are not simple matters, and the
3 collaboration of all the parties involved with the
4 different perspectives they provide and experience
5 and expertise, that all those parties together coming
6 up with the best solution.

7 Q. But my question to you, there is no
8 intermediate action that Staff can take, and in the
9 meantime, while we are trying to work out what that
10 adaptive management plan would be, there is -- your
11 condition doesn't provide that language, does it?

12 A. Again, if the Staff is not satisfied with
13 our response, I think I would kind of go back to this
14 overarching enforcement action and the whole
15 certificate that the Staff holds.

16 Q. And let me understand. I think you are
17 referring to your testimony on page 25. Is that what
18 you are referring to, question 54, lines 26 through
19 30?

20 A. Page 24, did you say, Mr. Jones?

21 Q. 25.

22 A. 25. Yeah, that's 26 through 30, yes.

23 Q. So your testimony is -- if you want, why
24 don't you read that, from lines 27 through 29.

25 A. "If, after good faith efforts by all

1 parties, we cannot agree upon a revised mitigation or
2 adaptive management strategy, then Staff could
3 initiate an enforcement action under Board rules.
4 Those rules define due process to address such
5 matters."

6 Q. So then the Staff, according to your
7 Stipulation condition 24, Staff would have to go
8 through the process of initiating an enforcement
9 action with the Board to work out what would be
10 prescribed for addressing the significant adverse
11 impact; is that correct?

12 A. It would -- it would take appropriate
13 action they deem necessary if we were in
14 noncompliance, yes.

15 Q. And would you agree with me, having to go
16 through that process would cause a delay in
17 responding to the significant adverse impact that's
18 presented?

19 A. I don't know the process, sir. I don't
20 really know all the details of the process. So I
21 really don't have a good appreciation for what it is.
22 I do think it's important that there is some due
23 process.

24 Q. Well, in the meantime, though, until an
25 agreement is reached to address the persistent

1 significant adverse impact, you get to continue to
2 operate, correct?

3 A. I'm sorry, could you re --

4 Q. Yeah.

5 A. -- repeat that.

6 Q. There's no -- there's nothing there that
7 would help alleviate the significant adverse impact
8 until there is an agreement or enforcement action
9 taken by Staff.

10 MR. SECREST: Objection, to the extent
11 with regard to the enforcement action. He already
12 testified he wasn't actually familiar with the
13 process, so I think that calls for a legal
14 conclusion.

15 ALJ WALSTRA: Overruled.

16 Q. So the significant --

17 A. So, you know, the significant adverse
18 impact could be, you know, we don't know what it is
19 we are talking about, so it could have been one
20 incident that's not repeating, which in case it is
21 not an issue.

22 But I think it's important that -- that
23 all the right parties are together that can have
24 input into this decision what the mitigation ought to
25 be. I think that's what we're -- that's what we are

1 proposing. That's the spirit of everything we've
2 done to this date with these -- the dialogue and
3 negotiations and agreements with ODNR on the MOU, on
4 the protocols, and we've already done so.

5 We see this as a continuation of that
6 environment, that we all work together and not one of
7 us has all the answers, and we think it's stronger
8 when all the parties come together with the right
9 expertise to solve whatever problem is in front of
10 us. And, again, I kind of go back and say this is
11 what we believe is consistent in other wind farm
12 projects that have been permitted by the Board in
13 Ohio.

14 Q. I want to look at the language here in
15 Stipulation condition 24 where it pertains to the 30
16 days in the last paragraph of that condition. Would
17 you read that?

18 A. The last sentence, sure.

19 Q. The last paragraph of the Stipulation
20 Condition 24.

21 A. The last paragraph, you are talking about
22 the last sentence? That last sentence, yes.

23 "Within 30 days of an agreement between
24 the Applicant, Staff, and the ODNR, the Applicant
25 will submit a revised mitigation and adaptive

1 management strategy to Staff and the ODNR to confirm
2 compliance with this condition."

3 Q. So that 30 days is tied to the date that
4 there is an agreement. It's not tied to the date of
5 the -- of the notice of persistent significant
6 adverse impact, correct?

7 A. That's correct. And, again, if we -- you
8 know, if the Staff believes we're not in good faith
9 working to an agreement, then I kind of go back to
10 this enforcement action that is available to Staff.

11 Q. Okay. All right. I want to move on
12 here. Let's look at Stipulation condition 35. I
13 believe you covered that in your testimony on page
14 12.

15 A. Yes.

16 Q. Let me know when you are there.

17 A. Yes, I'm there.

18 Q. And there you say that -- from 13 to
19 15 -- that "It is important to note that the
20 Signatory Parties provide advisory input only.
21 Stipulation Condition 35 does not detract from, or
22 limit or override the authority of the agencies in
23 any way." Do you see that?

24 A. Yes.

25 Q. Now, this is -- this condition has never

1 been in any other -- any other case before the Board.
2 Would you agree that this condition has never been in
3 any other case?

4 A. That's what I've been told, sir, yes.
5 There are other conditions that haven't been in any
6 other as well.

7 Q. So this condition provides rights to the
8 signatory parties that other -- other entities who
9 are not would not have; is that correct?

10 A. Yes. It is the signatory parties, yes.

11 Q. And --

12 A. Again, it's advisory input.

13 Q. I'm sorry?

14 A. It's advisory input. There is no binding
15 authority that these parties have in any way. So in
16 our view, you know, these are -- these are other
17 viewpoints that could be valuable in helping find
18 solutions and framing this all in the interest of,
19 you know, protecting minimum adverse impact.

20 Q. So is that your definition of advisory
21 input? What's your definition?

22 A. Advisory input has no -- has no authority
23 to cause any action to be taken. It's input which
24 means can be considered or not considered by -- by
25 the authorities that have -- by the groups that have

1 authority, OPSB, ODNR.

2 Q. What programs and plans are you referring
3 to there, in that condition 35?

4 A. Basically it's a lot of the development
5 we've been discussing, for efficient aquatic species
6 and birds and bats. So 17 is the aquatic resources,
7 monitoring plan. 18 is the avian and bat impact
8 mitigation plan, which incorporates post-construction
9 monitoring. 19 we've talked about at length, which
10 is collision monitoring. 20 -- let me refresh my
11 memory on 20. 20 is the resources mitigation plan or
12 mitigation plan for fish residual and aquatic
13 resources. 21 is the avian/bat one. 22 we've talked
14 about at length, and 24 is what we just talked about.
15 22 is the radar, the radar protocol.

16 Q. Well, let me ask you, did you go to the
17 public hearing in this case?

18 A. Yes.

19 Q. Okay. And did you hear testimony from
20 the Audubon Society?

21 A. Yes.

22 Q. How about the Black Swamp observatory?

23 A. Yes.

24 Q. They would have an interest, too,
25 wouldn't they, to participate in these discussions?

1 A. They may. They are not intervenors, so
2 their interest can't -- it's hard to assess because
3 they are not intervenors.

4 Q. So they wouldn't have the same rights as
5 you, right?

6 MR. SECREST: Objection.

7 Q. The signatory parties?

8 ALJ WALSTRA: He can answer if he knows.

9 A. They would not have the same rights as
10 the signatory parties. Not all parties have the same
11 rights as intervenors, yeah.

12 Q. The same would be true for the Bratenahl
13 intervenors, Ms. Dempsey and Mr. Maloney? They
14 wouldn't have the same rights either?

15 A. Right. That's the way we drafted this,
16 yes. They did not agree to the Stipulation.

17 Q. So look at the conditions covered by
18 condition 35, 17, 18, and 20. These conditions are
19 referring to and related to the MOUs, is that
20 correct, being submitting, the protocols, mitigation
21 plans?

22 A. Well, these plans are called for in the
23 MOU. They are also called out here in the
24 Stipulation, yes.

25 Q. Okay. Now, the other conditions covered

1 by 35, 19, 22(c) and (g) and 24, these conditions are
2 being legally disputed in this proceeding, correct?

3 A. They are being disputed, yes.

4 Q. And these conditions 19, 22(c) and (g)
5 and 24 mostly involve standards. They don't involve
6 the MOUs, do they?

7 A. I think they do involve the MOUs, the
8 radar protocol, and the fact that we committed to
9 construction monitoring and post construction -- I'm
10 sorry. Radar pre and post construction is an MOU.
11 The collision monitoring is part of the MOU. The
12 fact that we committed to a bird/bat conservation
13 strategy in the MOU, and that's 24, so I think they
14 do all in some way relate to the MOUs.

15 Q. But it depends on which way the Board
16 rules, right, on these conditions, as to what party
17 they are going to go with on these conditions?

18 A. It depends. Yes, certainly the Board has
19 the decision. I am not sure what the question is,
20 that if -- is there a question in there?

21 Q. We have different ideas as to what the
22 standards should be, right, for those conditions?

23 A. We have different ideas of the conditions
24 themselves, yeah.

25 Q. Right. All right. So looking at --

1 let's look at these conditions one by one. Let's
2 look at condition 17. So how would condition 35
3 apply to condition 17 of the Stipulation, Stipulation
4 condition 17?

5 A. The way I understand it is the signatory
6 parties could, if they chose, review and provide
7 input into these monitoring plans, the reports that
8 come from there and offer suggestions that they think
9 may help advance the whole cause here. They may not.
10 They may not have any input, but it gives them the
11 opportunity to do so.

12 Q. So would that input be limited to the
13 time that the plans are submitted?

14 A. The time that they're --

15 Q. Submitted.

16 A. I think up to the time they are approved
17 is what I would think, Mr. Jones. As the dialogue
18 goes, you know, through the closure of these plans,
19 that that input would be appropriate under
20 Stipulation 35 throughout that whole process.

21 Once it's approved, there is really not
22 much more point to input once it's approved and
23 finalized. Now, I would clarify that in some cases
24 some of the documents are living documents, which
25 means they could evolve over time throughout the life

1 of a project, which I think 35 would leave the door
2 open for the parties to provide input again that they
3 chose.

4 Q. So then after the plans were submitted on
5 top of that, you seem to require advisory input then
6 to whether or not the condition is complied with?

7 A. Only -- I don't think they have input
8 into how the Board decides, the Staff decides to
9 accept them or not. I think they have input the way
10 the draft intent is. They've input into these plans.
11 The Staff then will make their assessment of the
12 plans and all these inputs, our input alike, along
13 with the signatory parties. Fish & Wildlife was
14 really not a signatory party. You know, they don't
15 have any standing here either, but they have input
16 into this. So all this input is weighed, and I think
17 the Staff and ODNR have to accept and confirm
18 compliance, that we've complied with that plan if
19 they accept it.

20 Q. I am trying to understand your condition,
21 though. I mean, are you assuming that Staff wouldn't
22 understand your plans and you need to give input, or
23 how does that work?

24 A. No. We are saying that there are
25 different people that have different perspectives and

1 viewpoints that may have a different input, to raise
2 what we raised, and we think this diversity of inputs
3 is probably helpful in coming up with the best
4 solution.

5 Again, I would just stress it's not
6 binding. It doesn't force the hand of Staff or ODNR
7 in any way. It doesn't limit their authority in any
8 way. It's advisory input is all it is.

9 Q. Okay. So now if the Board were to adopt
10 Staff's condition 19, what advisory input could you
11 see being given in that instance?

12 A. I can't speak to what might happen or
13 not, what input they may or may not have, Mr. Jones.
14 I am just saying this provides the ability that they
15 could offer input if they had it.

16 Q. So if you look at Staff condition 19, it
17 says, "Turbines shall be feathered completely from
18 dusk to dawn from March 1 through January 1 until the
19 Applicant has demonstrated that the post-construction
20 avian/bat collision monitoring plan is sufficient, as
21 determined by the ODNR in consultation with Staff."
22 Do you see that?

23 A. Yes.

24 Q. So would advisory input be put into that
25 piece of Staff condition 19?

1 A. Again, if I can -- you asked me to
2 speculate on what kind of input they might have. So
3 the Staff condition 19 allows for certain adjustments
4 during testing, so maybe they might have input on
5 what those limitations should be or shouldn't be.
6 So, again, I am speculating on what they might
7 provide input on. We don't know what it might be,
8 but I think there's a wide variety of possibilities
9 that they could offer opinion that could be
10 considered, and it is up to Staff and ODNR to act on
11 it or not or integrate or not, but I think there is
12 room for input on all of these.

13 Q. Okay. Let's see. And then as to --
14 let's say that the Board adopted Staff condition
15 22(c), what -- then that would set the 80 percent or
16 greater standard, right? So what advisory input
17 would there be on that standard being 80 percent or
18 greater?

19 A. Well, you know, let me check something
20 here. 35 doesn't limit the input to just 22(c).
21 It's the whole condition 22, so there are other parts
22 of 22 just beyond the 80 percent standard.

23 Q. But 22(c) is the 80 percent standard,
24 right? That's what that whole part talks about.

25 A. What you asked me, what kind of input

1 would they be able to provide if the Board adopted
2 the Staff's position on 22(c), and I guess what I am
3 saying, there is 22(a), (b), (c), (d), (e), (f), and
4 (g). They might have input on all or a part of
5 condition 22.

6 Q. Well, let's look at the signatory parties
7 here in relation to Staff condition 22(c). Are there
8 any other radar experts besides the Applicant's radar
9 expert that would have input here?

10 A. Again, Mr. Jones, I don't know the depth
11 of the expertise they may choose to bring to the
12 table. I am not representing them as radar experts.
13 They are representing themselves as radar experts.
14 They may say, we don't have expertise, so there is no
15 input we offer. I don't really know.

16 MS. LEPPLA: Your Honor, if I could have
17 just an objection to this. He is asking
18 Mr. Karpinski to speculate on what the signatory
19 parties may or may not provide, and I am just not
20 sure why this is relevant. It's advisory input, and
21 Mr. Karpinski has already testified to what he thinks
22 that means.

23 MR. JONES: If he knows. I am asking him
24 if he knows of any other experts in this proceeding
25 or any other parties, signatory parties, besides the

1 Applicant having an expert. That's my question. I
2 am not asking him to speculate at all.

3 A. So, again, I don't know if they have
4 radar expertise.

5 ALJ WALSTRA: I will allow the question.

6 A. They may or may not have. I don't know.

7 ALJ WALSTRA: Mr. Jones, I think we might
8 take a quick recess. I know the court reporters
9 needs to sync up here, so before you get to the home
10 stretch, we'll break to. It's a little after 4.

11 MR. STOCK: Excuse me.

12 ALJ WALSTRA: We shall go off the record.

13 (Discussion off the record.)

14 MR. STOCK: Can we be on the record?
15 Thank you. In a court of law counsel are not to
16 confer with witnesses during breaks while they are
17 still on the stand. Does that rule hold true in this
18 proceeding?

19 ALJ WALSTRA: No, not typically. We
20 usually break when we go for redirect. We try to
21 limit it to --

22 MR. STOCK: So what I am asking, counsel
23 are allowed to confer with their witness while the
24 witness is still on the stand under oath?

25 ALJ WALSTRA: Yes.

1 MR. STOCK: Okay. That's the
2 clarification I wanted.

3 ALJ WALSTRA: Noted. All right. We'll
4 go off the record.

5 (Discussion off the record.)

6 (Recess taken.)

7 ALJ WALSTRA: Ready to go back on the
8 record.

9 Mr. Jones.

10 MR. JONES: Thank you, your Honor. I
11 just have a few more questions.

12 ALJ WALSTRA: Okay.

13 Q. (By Mr. Jones) Mr. Karpinski, would you
14 agree there are annual fluctuations in migration of
15 birds over Lake Erie?

16 A. That's what I understand, yes.

17 Q. Okay. Now, I want to focus back on 22C
18 for a second. So who -- who decides to remove the
19 barge from the Lake in assessing heavy precipitation
20 or a high sea event?

21 A. As I -- as I indicated in my testimony,
22 the barge operator, the company that owns and
23 operates the barge and charters it to us.

24 Q. And how would he know when the -- when
25 the seas provide waves more than 6 feet, 6 feet or

1 more?

2 A. So there is numerous forecasts and
3 measurements that are available to the operators and
4 marine vessels so he has various sources available to
5 him. That's what he uses, you know, now in other
6 deployments of their equipment.

7 Q. And so this condition then is left up to
8 the barge operator, the owner of the barge to
9 determine in his judgment when he should take the
10 barge off the Lake?

11 A. Yes. It's -- that's the way the industry
12 operates, that they're responsible for the safety of
13 their equipment and they are the experts in the
14 marine equipment that they charter so that's the way
15 we understand the industry to operate. That's the
16 way it operated when we did the geometric survey from
17 2015, and they have that authority. You know, first
18 and foremost, it's a safety concern, that that's
19 really what it's about is to ensure the safety of the
20 equipment. Not so much the equipment for equipment
21 sake but a runaway barge, as you might imagine, can
22 cause, you know, could cause harm to others if it
23 kind of gets away in a high seas event.

24 Q. So it's totally within the barge
25 operator's discretion; is that correct?

1 A. Yes, yeah.

2 Q. Okay. And so what would be the protocol
3 then for after he or she removed the barge from the
4 Lake, how soon afterwards would the barge be returned
5 after the condition dissipated?

6 A. So, again, it's not a black and white
7 decision. It's based on many factors, the
8 forecasting being one of them, so when do you think
9 or when is it forecasted conditions will return to a
10 state that's safe. So he will make that assessment
11 based on the available forecast data. There is a
12 variety of forecasts for the marine environment they
13 can utilize, and they'll make that decision.

14 Q. So after the conditions have dissipated,
15 it could be -- it could be a few days later that the
16 barge went back on the Lake; is that correct?

17 A. There's nothing I know of why they would
18 hesitate to bring it back, to redeploy it if the
19 conditions were such that it was safe to go back out.
20 If it was going to be nice a few days, that would
21 indicate a safe condition. It's only a few hours to
22 get out there, so it's not like it's a multi-day
23 journey or something.

24 Q. So --

25 A. The only thing I would clarify is in the

1 Applicant's standpoint and the person covering the
2 expense of an event, every time it comes in we have
3 to pay the costs for the tugboat to get it and bring
4 it in. So, you know, we want the barge out there
5 just like Staff and ODNR do as well, so it's not in
6 our interest to have the barge kind of multiple trips
7 taking in and out and sitting in port so.

8 Q. So the 80 percent or greater unless
9 prevented by heavy precipitation or high seas events,
10 say that based on the factors here, the barge
11 operator removing the barge and we end up with a
12 40 percent data quality here, reliable data, then
13 that -- and then according to your condition, the
14 condition would be satisfied with 40 percent quality
15 data; is that correct?

16 A. So, again, I go back to we have to
17 produce the study and ODNR has to -- has to accept
18 the study and to confirm compliance, that we conform
19 to that, so if they -- if they believe that it's --
20 that it's totally invalid, then I think they have
21 actions they can take. I think it depends on when
22 the data was missed. You know, the whole migration
23 period isn't uniform.

24 The other thing that our experts will
25 testify to is during periods of heavy rain, there is

1 less migration so if the vessel is not monitoring it,
2 it is in times when there is likely no migration.

3 The other thing we will get into more
4 detail is that if the barge isn't out collecting
5 data, then we will be using Nexrad data to kind of
6 supplement the data collected in the marine radar.
7 So there are a lot of provisions around this to
8 ensure we are collecting, you know, a viable dataset
9 that can help draw -- you know, answer the questions
10 that are being asked.

11 MR. JONES: Your Honor, I am going to ask
12 to strike his response to Nexrad radar. He is not a
13 radar expert. He's already said he's not. I didn't
14 ask him a question on that, Nexrad radar, anyway so
15 beyond the scope of questioning.

16 MR. SECREST: I don't believe it is, your
17 Honor. He asked a question with regard to whether
18 40 percent would be producing sufficient and
19 adequate, and Mr. Karpinski testified not only could
20 it be but that there would be supplementation of that
21 data also. It was responsive.

22 ALJ WALSTRA: I'll deny the motion to
23 strike.

24 MR. JONES: I have no other questions,
25 your Honor.

1 ALJ WALSTRA: Thank you.

2 MR. JONES: But I would -- I would like
3 to renew my motion to strike the 8 percent. He did
4 testify he didn't prepare that analysis. You know,
5 he reviewed it, but he didn't prepare it, and it's
6 hearsay. It's provided -- it was provided by
7 somebody else, and he also said that this other
8 person, witness will testify to it who did prepare
9 it, so it is clearly hearsay. I would ask to strike
10 that 8 percent from his testimony.

11 ALJ WALSTRA: I'll allow it to stay in,
12 and the Board will give it sufficient weight.

13 MR. JONES: Thank you, your Honor.

14 ALJ WALSTRA: Ms. Leppla.

15 MS. LEPPLA: I just have a few questions.

16 - - -

17 CROSS-EXAMINATION

18 By Ms. Leppla:

19 Q. Hi, Mr. Karpinski. I just have a few
20 questions for you to follow up on the conversation
21 you had with Mr. Jones about condition 35. I think
22 there was some confusion over the definition of
23 advisory. There seems to be concern that maybe that
24 overrides ODNR and staff's authority, so I just want
25 to make sure we understand, we're on the same page

1 what that definition is. So would you agree that
2 advisory means having or consisting of an ability to
3 make recommendations but not to take action enforcing
4 it?

5 A. Yes.

6 MR. JONES: Your Honor, I am going to
7 object. This is friendly cross. These parties are
8 all signed to the same joint stipulation and that's
9 friendly cross and that's prohibited. I would ask
10 for that -- those questions to be stricken from the
11 record.

12 MS. LEPPLA: Your Honor, I would like to
13 make sure we have a full record here because it seems
14 to be there is not an understanding of what condition
15 35 is.

16 ALJ WALSTRA: I'm inclined to agree with
17 Mr. Jones here.

18 MS. LEPPLA: Your Honor, no further
19 questions.

20 ALJ WALSTRA: Thank you.

21 Any redirect?

22 MR. SECREST: Yes, your Honor. Thank
23 you.

24 - - -

REDIRECT EXAMINATION

By Mr. Secrest:

Q. Mr. Karpinski, at the outset of your cross from Mr. Jones, you were asked questions about your background, specifically background related to this project. You did provide some testimony related to financing and investor relation duties that you have undertaken with regard to this project. How long have you undertaken those duties?

A. Since 2013 when I joined LEEDCo.

Q. And if you still have your testimony in front of you --

A. Yes.

Q. -- page 5 has various bullet points. And then in response to question 6 you detail some of the tasks you performed related to this project.

A. Yes.

Q. Does that adequately represent your efforts on the project on behalf of LEEDCo?

A. Yes, I think so. Yeah, those are the major activities.

Q. And with regard to your experience prior to LEEDCo, did your experience at NorTech assist you with understanding what investors and/or lenders look

1 for with regard to projects?

2 A. Yes. My experience at NorTech I was
3 involved in working with startup companies in
4 northeast Ohio that were attempting to bring advanced
5 energy technologies to the market and part of that
6 was helping them meet kind of the demand of investors
7 as they sought capital investment for their
8 businesses. They were under due diligence and trying
9 to understand what that meant and how that -- what
10 kind of information to provide, so I was part of not
11 only learning about what that was but then also as an
12 outsider kind of coaching them and helping them kind
13 of comply with those demands of the investment
14 community.

15 So throughout that time I got a really
16 good background on what it takes to secure funding
17 from -- from an investor. I would also say at
18 LEEDCo, you know, we secured the investment from
19 Icebreaker Windpower. So that whole process, I was
20 in the middle of that whole process of, you know,
21 eventually ended in Icebreaker Windpower deciding to
22 invest in this project.

23 Q. And your testimony related to the
24 financing ability, or lack thereof, with regard to
25 certain conditions, is that based upon your

1 experience both with this project as well as your
2 experience with work at NorTech?

3 A. Yes, it is. Yeah. Again, as I
4 mentioned, just a wide array of sources kind of form
5 that direct, you know, engagement with many lenders,
6 engagement with potential -- other potential
7 investors, financial advisers, different financial
8 advisers throughout the course of this. I prepared
9 the financing plan for the Department of Energy
10 grants, compiled all that information, and the
11 numerous conferences and readings that I have done on
12 the topic.

13 Q. And have those interactions, your
14 experience, and your reads helped inform you as to
15 lenders' and investors' tolerance for risk?

16 A. Absolutely, yeah. That's -- that's what
17 kind of keeps coming up over and over again is the
18 way that they approach risk and due diligence and
19 identification of risk and the assessment of risk,
20 and the assessment of the impact it could have on the
21 deal if risk actually comes to fruition.

22 ALJ WALSTRA: Mr. Secrest, I think our
23 mics are borderline useless. If you could speak up a
24 little bit so the court reporter can hear you.

25 MR. SECREST: Certainly. More

1 importantly for the witness to speak louder but sure.

2 Q. How far from the Lake Erie shoreline is
3 the project site?

4 A. So the first turbine is about 8 miles and
5 the last turbine is about 10 miles away.

6 Q. And was this the original proposed site?

7 A. No, no. The original site was closer and
8 there were many other sites evaluated before we
9 arrived at this where we are at now.

10 Q. How many additional sites were evaluated?
11 Do you recall?

12 A. I think there were at least 7, maybe up
13 to 11 different sites, variations of sites within the
14 Cleveland area.

15 Q. And why was the site moved to its current
16 location?

17 A. The major factor in this latest move was
18 to move it to areas with less environmental impact
19 based on the ODNR analysis.

20 Q. And currently is the project, according
21 to the ODNR favorability analysis, currently is the
22 project located in the lowest risk category?

23 A. Yes, yes.

24 Q. Do you know what a decommissioning fund
25 is?

1 A. Yes. It's -- it's the moneys necessary
2 to uninstall, remove the project from the Lake either
3 end of life or other triggers that could trigger that
4 based on the conditions of the lease and the
5 conditions.

6 MR. JONES: Your Honor, I want to
7 interject an objection. This is beyond the scope of
8 cross -- or redirect. Decommissioning wasn't covered
9 on cross-examination.

10 MR. SECREST: Withdraw the question.

11 ALJ WALSTRA: Thank you.

12 Q. Do you recall questions on
13 cross-examination related to the PPA with Cleveland
14 Public Power?

15 A. Yes.

16 Q. Was that an arm's length transaction?

17 A. Yes. Again, you know, CPP is a willing
18 buyer. They entered this willingly. They understood
19 all the -- all the aspects of the deal. Many of
20 those were pointed out and there is some others that
21 are documented as well. They willingly entered into
22 the agreement.

23 Q. And do you know, was that agreement
24 approved by Cleveland City Council?

25 A. The actual agreement of the authority to

1 enter into the agreement was before it was entered
2 into so, yes.

3 Q. Okay. And you were asked questions on
4 cross-examination related to the pricing associated
5 with that agreement. Other than pricing are there
6 other attributes, beneficial attributes, associated
7 with wind energy?

8 A. Absolutely. That's -- you know, prices
9 as one point. The renewable energy and environmental
10 benefits of this energy are highly desirable, and I
11 would say demand is ever increasing. Recently the
12 mayor of Cleveland committed to 50 percent -- or
13 100 percent of renewable energy usage in the City of
14 Cleveland by 2050 underscoring the increasing demand.
15 So this project represents energy that satisfies that
16 demand.

17 We also know of many other companies that
18 are increasingly demanding more and more renewable
19 energy. The fact that it is generated in the local
20 area has impacted as well. So what I mean is
21 renewable energy generated in a local vicinity has
22 more environmental impacts than -- to that local
23 community than generated in Texas or Oklahoma.

24 It also has benefits of creating jobs
25 through the construction operations of the project

1 which is an important factor for the City of
2 Cleveland.

3 It also has some benefits in just the
4 technical benefits of being connected to the City of
5 Cleveland's facilities, and they avoid some costs as
6 compared to getting that power from the PJM grid.

7 Q. Do you know, are Ohio's renewable energy
8 targets increasing through 2026?

9 A. Yes, yes. It's an escalating standard.

10 Q. What impact does that have or potentially
11 have on the project?

12 A. It increases demand for renewable energy,
13 and, you know, the question then is where are you
14 going to get the renewable energy from as demand
15 increases? And that's just -- I point out that's
16 just one aspect of demand. There are other voluntary
17 demands that are not covered by that standard that
18 companies and the City of Cleveland voluntarily
19 deciding to adopt more and more renewable energy.

20 Q. You were asked numerous questions on
21 cross-examination related to Staff conditions.
22 Overall was Icebreaker pleased with the Staff Report?

23 A. Yeah. I think overall the conclusion
24 that the certificate should be issued was definitely
25 well received by us and just had issues with these

1 few conditions. Again, there is many conditions that
2 we agreed with, many that we just have minor tweaks
3 to, and really I think underscores the agreements
4 we've made with ODNR in the past many years to use in
5 other collaborations that led us to this point.

6 Q. When you say "led us to this point," tell
7 me a little bit about the collaborative efforts with
8 ODNR.

9 A. So we've been -- we've been in
10 discussions with ODNR, predated LEEDCo, and other
11 agencies of the State around the time -- we did
12 submit an application to OPSB back in 2014. So we
13 had initial very focused discussions on how to do
14 this and what would be necessary.

15 There were issues with that application
16 we discussed with ODNR. We learned some more what
17 they were interested in and what they needed. We
18 collaborated with them to come up with acceptable
19 protocols for fisheries and aquatic monitoring which
20 we now completed two years of, so now we have that
21 data that's been completed in accordance with this
22 agreement we reached. We shared information on a
23 regular basis, I think it's quarterly, with an annual
24 report that's submitted.

25 On that front we've, you know, negotiated

1 and agreed upon several different monitoring in the
2 bat space. We've completed several of those as well,
3 the acoustic bat monitoring. We shared that data of
4 the aerial waterfowl surveys we completed and
5 provided that data.

6 We collaborated quite a bit on this
7 pre-construction radar with ODNR. We brought in
8 Ralph Diehl to kind of help bring clarity to the
9 topic. So there was a lot of discussion around that
10 on the best way to do that.

11 I think it's all been in the spirit of
12 how do we do this. We recognize it's not the same as
13 a land-based site. So there are some differences in
14 how this has to be done, and I think we've worked
15 sensibly with them to reach these agreements that
16 we're now executing and hoping we can reach agreement
17 on these last few.

18 Q. With regard to agreements, do you still
19 have the Staff conditions in front of you?

20 A. Yes.

21 Q. Staff Report? If you turn to page 47,
22 please.

23 A. Okay.

24 Q. Look at staff condition 17. It states
25 "At least 60 days prior to commencement of

1 construction, the Applicant shall submit a fisheries
2 and aquatic resources construction monitoring plan to
3 the ODNR and Staff for review to confirm compliance
4 with this Commission." Do you see that?

5 A. Yes.

6 Q. Did Icebreaker leave that condition
7 unchanged in its revision -- in its joint
8 stipulation? Excuse me.

9 A. Materially, yes. We made no material
10 changes. I don't know if we had any adjustments at
11 all but no material changes.

12 Q. So Icebreaker agreed 60 days prior to
13 commencement of construction to submit a fisheries
14 and aquatic resources construction monitoring?

15 A. Yes.

16 Q. Condition 18, "At least 60 days prior to
17 commencement of construction, the Applicant shall
18 submit an avian and bat impact mitigation plan which
19 incorporates the most current survey results and
20 post-construction avian and bat monitoring plan to
21 the ODNR and Staff for review and confirm compliance
22 with this condition, that implementation of the plans
23 would be effective in affording significant impacts
24 to avian and bat species." Do you see that?

25 A. Yes.

1 Q. Did Icebreaker agree to this condition?

2 A. Yes. We had this one minor change about
3 conforming and compliance as opposed to I think
4 accept, but other than that we agreed with all those
5 and we complied, yes.

6 Q. And it goes on to state "The Applicant
7 shall also provide the monitoring plan to, and seek
8 consultation with, U.S. Fish and Wildlife Service."
9 Did Icebreaker agree to that condition?

10 A. Yes.

11 Q. And previously in your testimony you had
12 referred to questions specifically related to
13 condition 19. You referred just in general to other
14 plans and that these all work together. Were plans
15 such as the fisheries and aquatic resources
16 construction monitoring and avian and bat impact
17 mitigation plan examples of plans you were referring
18 to?

19 A. Yes, absolutely. Those were some of the
20 primary plans that encompassed part of what I talked
21 about, the condition 19. It's actually included in
22 those plans.

23 Q. Okay. So do you read 19 as a stand-alone
24 condition or in conjunction with the other
25 conditions?

1 A. No. 19 -- as I testified earlier, 19 has
2 to be considered in connection all these other
3 monitoring mitigation plans and management strategies
4 that we have agreed to and continue to agree to and
5 support.

6 Q. And you were asked questions by Mr. Stock
7 on cross-examination related to the ability to
8 construct without post-construction avian and bat
9 monitoring. Do you recall that?

10 A. Yes.

11 Q. If you would please refer to Staff Report
12 condition 19 which is page 47.

13 A. Yes.

14 Q. It says "Turbines shall be feathered
15 completely from dusk to dawn from March 1 through
16 January 1 until Applicant has demonstrated that the
17 post-construction avian and bat collision monitoring
18 plan is sufficient, as determined by the ODNR in
19 consultation with staff. The ODNR may approve
20 modifications to turbine operation for testing
21 purposes." That doesn't require approval of the
22 post-construction avian and bat collision monitoring
23 before starting construction, does it?

24 A. No, not the way it's stated.

25 Q. And it doesn't require approval prior to

1 operation, does it?

2 A. No, it does not.

3 Q. With regard to joint stipulation 1 and
4 condition 19, what was the intent of that from
5 Icebreaker's perspective?

6 A. The intent was to -- to allow for the
7 possibility that -- well, I guess back up and say our
8 intent when you look at the MOUs and the monitoring
9 plans we've been discussing, the agreement is that we
10 will commit a collision monitoring system, a radar --
11 our experts will testify to the state of this
12 technology, the various stages, but we've committed
13 to implement one, the best one at the time when we
14 make that decision, and we fully intend to have that
15 approved by ODNR prior to construction.

16 But recognizing that ODNR may not either
17 be in a position or be willing to approve it prior to
18 construction, condition 19 allows for the opportunity
19 to build the project, have the collision system
20 installed, and have further input into further
21 information for ODNR to make that determination.

22 The only thing I would point out the
23 language "as planned," but we understand that to mean
24 we have to prove and demonstrate that the technology
25 actually monitors and detects what it's supposed to

1 monitor and detect. So it's not just a plan of which
2 you think when you say you are going to do in the
3 future. We interpret this to mean we have to
4 demonstrate that the technology that we plan to use
5 effectively performs the function that it's
6 attempting to perform.

7 And, again, sort of kind of come back to
8 your question, we understand that ODNR may not be
9 either willing or able to approve that prior to
10 construction so this gives all of us the provision to
11 build the project, install collision monitoring,
12 provide more data, ultimately leading to ODNR and
13 Staff approving our plan.

14 Q. From that standpoint how does it differ
15 from the condition of the Staff Report No. 19?

16 A. From that standpoint it doesn't differ.
17 The difference is in -- is in the -- is in the
18 operational constraints while that approval is
19 pending. The Staff condition requires, you know,
20 blanket curtailment, feathering it's called in the
21 report, but that means you have to not operate the
22 turbines from dusk to dawn from March to January.
23 And our joint stipulation 19 says, well, let's be
24 more strategic about what the risk really is, and we
25 target the periods of high risk and curtail during

1 those periods of high risk. And that makes it more
2 acceptable, financeable frankly.

3 Q. How so?

4 A. Well, the Staff condition 19, you know,
5 puts us in a position where we could be losing
6 40 percent basically of our revenue. So, again, we
7 have a project that's built. We have to generate
8 electricity as we pointed out in the PPAs to be able
9 to get revenues from those sales, so if we can't
10 operate the turbines for 40 percent of the time, we
11 lose 40 percent of our revenue. The revised
12 condition more focused, targeted on the high risk
13 areas, shortens that window when we are going to lose
14 revenue to an acceptable time that is within the
15 contingency of the risk that would allow us to secure
16 financing.

17 Q. Was the stipulation condition No. 19
18 modeled after Staff Report condition 19?

19 A. Yes, I think it was. Again, as we
20 already discussed, it allows for this idea that
21 sometimes you can be approved beforehand, but it may
22 not be and establishes the operating kind of
23 constraints under which it can operate if it's not
24 proven. The difference is what those constraints
25 are.

1 Q. Please refer to joint stipulation
2 condition 19.

3 A. Okay.

4 Q. This states "The Applicant shall submit a
5 post-construction avian and bat collision monitoring
6 plan and shall demonstrate that, considering the
7 state of availability technology, the plan is
8 sufficient either prior to construction through lab
9 and field testing or during operation. Compliance
10 with this condition will be determined by the ODNR in
11 consultation with Staff." Icebreaker does not
12 determine compliance under joint stipulation 19, does
13 it?

14 A. No, not at all.

15 Q. Does joint stipulation 19 cede any of
16 ODNR's authority with regard to determining whether
17 the post-construction avian and bat collision
18 monitoring plan is sufficient?

19 A. No. It doesn't detract from their
20 authority in any way.

21 Q. And specifically states "you shall
22 demonstrate." Do you see that language?

23 A. Yes.

24 Q. Is it your understanding that Icebreaker
25 is going to be required to demonstrate that it's

1 avian -- post-construction avian and bat collision
2 monitoring plan is sufficient?

3 A. Yes. That's the way I interpret shall.
4 It's not that we have the option to never have a
5 plan. We have -- still have to have a plan
6 regardless of what this condition says. We have to
7 have a plan. If we don't have a plan, we kind of get
8 back to some of the answers that I talked about with
9 Mr. Jones, then Staff of the OPSB have enforcement
10 authority. We are not compliant with this so I think
11 19C doesn't relieve us of the obligation to have a
12 plan. It just allows for the period that if ODNR
13 Staff can't approve it for some reason, there may be
14 very good reasons that we can operate leading towards
15 getting a finally approved plan, but the goal clearly
16 and the requirement clearly is we have to have an
17 approved plan.

18 Q. And is it your understanding that without
19 an approved plan you can operate -- operate in
20 perpetuity?

21 A. I don't -- I don't see that. I mean, the
22 conditions say we have to have an approved plan. I
23 can't imagine OPSB would -- would allow this to
24 happen. We don't intend to have it happen. We
25 intend to have an approved plan and I think that's

1 OSPB's Staff and ODNR's intent so I don't -- I can't
2 imagine a scenario where they would not enforce this
3 provision in some event we didn't agree upon the
4 plan.

5 Q. Mr. Karpinski, you had referenced various
6 MOUs related to monitoring with ODNR. Do you recall
7 that?

8 A. Yes.

9 Q. Are you familiar with the bird and bat
10 monitoring plan that Icebreaker has developed?

11 A. Yes.

12 Q. Are you aware that it states "Prior to
13 the date of construction as identified by the
14 Applicant pursuant to Ohio Administrative Code
15 4906-3-13(B) post-construction protocols in this plan
16 must be finalized and upon timely approval by ODNR in
17 writing will be incorporated into this document as an
18 amendment"?

19 A. Yes, I'm aware that agreement we had they
20 had to be finalized before.

21 Q. Okay. So is it your understanding that
22 plans must be finalized but then ODNR will determine
23 whether or not those plans are sufficient pursuant to
24 condition 1?

25 A. Yes. And, again, I point out this

1 condition 19 calls it a plan; but, again, it's our
2 understanding that it's proof that the technology
3 actually works in operation which is more than a
4 plan.

5 Q. You were asked some questions about what
6 peak spring and fall migration mean. Do you know if
7 those terms are defined in the PPS?

8 A. I am really not sure. I know there are
9 wildlife experts who will testify to that, but I
10 believe that they are.

11 Q. What is a PPS?

12 A. Yeah. The Bird and Bat Conservation
13 Strategy defines a variety of things. It defines
14 mitigation measures to mitigate impacts on wildlife,
15 birds and bats, and it also defines adaptive
16 management measures. Should an unexpected event
17 occur what measures will be taken to mitigate those
18 impacts.

19 Q. So is Icebreaker committed to taking
20 other adaptive management measures other than just
21 post-construction collision monitoring?

22 A. Oh, absolutely, yes. There are many --
23 there's several measures that identify some of the
24 mitigation measures we have talked about. There are
25 other adaptive measures that are impacts on certain

1 species that defines what has to be done, what the
2 response would be and the mitigation strategy would
3 be.

4 Q. What are the potential benefits
5 associated with this project?

6 A. So there are --

7 MR. STOCK: Objection. This is well
8 beyond the scope of cross.

9 ALJ WALSTRA: Mr. Secrest.

10 MR. SECREST: I think it's well within
11 the scope of cross. He was asked questions on
12 cross-examination related to agreements with
13 Cleveland Public Power. I think this is relevant to
14 that issue, and I think it's relevant to the
15 condition issues and limitations that were Mr. Jones'
16 questions.

17 MR. STOCK: He's already been asked about
18 the agreement and testified. There was no
19 questioning about general, you know, is wind power
20 good, is wind power bad. This is well beyond the
21 scope, and if it isn't, then I want it to be crossed.

22 MR. SECREST: He was specifically asked
23 questions on cross-examination by Mr. Stock related
24 to price. Relevant to wind is not just prices
25 Mr. Karpinski has already testified to and that is

1 what I am asking him, what are the benefits
2 associated with this project.

3 ALJ WALSTRA: I'll allow the question.

4 MR. SECREST: Thank you, your Honor.

5 ALJ WALSTRA: Mr. Stock, there is an
6 opportunity for recross.

7 MR. STOCK: Good. Thank you.

8 A. So the benefits that I believe this
9 project represents, I mentioned a little ago it
10 creates renewable -- clean renewable energy, and this
11 clean renewable energy is not readily available in
12 northeast Ohio today. There aren't many sources.
13 There is very little, in fact. And there's an
14 increasing demand. As I also mentioned, the City of
15 Cleveland has just established the goal commitment to
16 achieve 100 percent renewable energy by 2050.

17 So the first thing is renewable energy.
18 The other benefit renewable energy brings is
19 environmental health and benefits, so it really
20 contributes to all way of life in the region, gets to
21 the geographical location that renewable energy in
22 the region has direct environmental benefits
23 replacing other dirty power sources that causes
24 health impacts and harms the environment. To the
25 extent that this project contributes to reducing some

1 of those we actually improve the environmental health
2 and quality and, therefore, quality of life in the
3 region for the citizens of the region, that's
4 predicated on being resources that actually create a
5 geographical region.

6 It also creates jobs for people in the
7 region which again is another -- is another, you
8 know, one of the factors that lead to the City of
9 Cleveland supported, many other supporters. That
10 time and space where the economy is struggling in
11 northeast Ohio and Cleveland specifically. This
12 creates a source of job creation.

13 It also provides some very specific
14 benefits to the City of Cleveland's Cleveland Public
15 Power utility in that since we are generating power
16 locally within their premises, they could avoid some
17 costs that they would incur from PJM if they were to
18 procure that power through the PJM wholesale market.

19 Q. Mr. Karpinski, with regard to staff
20 condition No. 19, in comparison to joint stipulation
21 condition 19, Icebreaker has added the phrase
22 "considering the state of available technology." Was
23 the phrase "available technology" taken from a code
24 section or statute?

25 A. Yes, from the primary statutes I

1 understand the project has to be -- in order for the
2 Board to decide the Board certificate, they have to
3 find the project represents minimum adverse
4 environmental impact considering the state -- current
5 state of technology and environmental impacts of
6 alternatives and other factors. That's where it was
7 borrowed from.

8 Q. Could you please turn your attention to
9 the joint stipulation and condition 22, specifically
10 C.

11 A. Okay.

12 Q. Obviously there was quite a bit of
13 discussion on this condition on cross-examination and
14 you were asked a question about the Diehl report. Do
15 you still have the Diehl report?

16 A. Yes, I do.

17 Q. And that was Applicant's Exhibit 6,
18 Attachment 5 as well. If you could turn to page 4 of
19 the Diehl report, please.

20 A. Okay.

21 Q. Under data collection D1, it states
22 "Automated and continuous operations during the study
23 period with data collection occurring during greater
24 than 80 percent of the study period where
25 precipitation does not obscure data." Do you see

1 that?

2 A. Yes, I do.

3 Q. Okay. This report based upon that
4 reading was Dr. Diehl making an allotment for time
5 when precipitation obscured data?

6 A. Yes, that's the way I interpret that,
7 that he is saying 80 percent of the time where there
8 is no precipitation you have to be collecting data so
9 obviously the times there are precipitation, it's not
10 expected to be collecting 80 percent of the data --
11 or data 80 percent of the time.

12 Q. Thank you. And does joint stipulation
13 condition 22C also provide for an allowance for heavy
14 precipitation?

15 A. Yes, it does, yes.

16 Q. And why is that?

17 A. I could say it's an acknowledgment we
18 can't -- we can't be held to a standard under the
19 conditions outside of our control would prevent us
20 from achieving, so consistent with Diehl's opinion
21 here, we framed condition 22C to say let's set a
22 standard that takes out the conditions we can't
23 control, and we'll live with the standard based on
24 conditions we can control. We think that's a very
25 reasonable approach, and we think it's consistent as

1 you pointed out with Diehl's opinion as well.

2 Q. And is that the same logic for the heavy
3 seas?

4 A. Yes.

5 Q. You have not selected a barge operator
6 yet; is that right?

7 A. No, we haven't. There's several
8 contractors that provide the services at Lake Erie,
9 those resources.

10 Q. Do those contractors get paid if the
11 barge is not on site?

12 A. The barge operator actually is paid --
13 sometimes there's a -- there can be a lower rate if
14 it's not deployed and that's part of the negotiation
15 of the contract but what we do incur is we're
16 responsible to pay for the fees to move the barge out
17 to the site, move it back out to the site, and move
18 it back as many times as the barge operator deems
19 it's necessary for safety. That's a cost we have to
20 bear.

21 Q. If the agreement with the barge operator
22 provides for a lower rate if the barge is not on
23 site, is it not to the barge operator's advantage to
24 have the barge on site?

25 A. Oh, yes. I would say even without that

1 condition the barge operator -- our goal is to have
2 the barge deployed to perform the function. To the
3 extent they can safely keep it there, that -- that
4 actually satisfies our requirements more than if they
5 decided to take it off the site. I think the next
6 time we are looking for a barge operator, one that is
7 able to keep the barge deployed doing the work we
8 need to do more often is going to be more favorable.
9 So there is incentive for them to keep it deployed
10 and that's true not just in our case. Anybody that
11 charters a barge or any resources, you know, charters
12 them for a reason to do some kind of job and it's
13 not -- it's like being at work, they are
14 underutilizing that, it's unfavorable.

15 Q. If you refer, please, to joint
16 stipulation condition 22d, e, and f.

17 A. Okay.

18 Q. Compare those to Staff Report conditions
19 d, e, and f. Did Icebreaker accept the Staff's
20 conditions 22d, e, and f?

21 A. Yes. They are the same.

22 Q. So with regard to the 80 percent
23 condition, if you look at 22d, it states "Radar must
24 be able to determine flight altitude of migrants at
25 altitudes near and entirely within the rotor-swept

1 zone at the project site to quantify collision risk."

2 Do you see that?

3 A. Yes.

4 Q. Is that affected by 22c, by Icebreaker's
5 changes to its 22c?

6 A. No, it's not.

7 Q. You still have to meet that requirement.

8 A. Right, right.

9 Q. And do you still have to meet the
10 requirement of 22e that "Radar must be able to
11 provide information that can be used to determine and
12 quantify behavioral avoidance or attraction to
13 turbines in the open water setting"?

14 A. Yes.

15 Q. And do you still have to meet 22f?

16 A. Yes.

17 Q. So regardless of the 80 percent standard
18 and whether there is an allotment for heavy seas,
19 Icebreaker still has to meet 22d, e, and f.

20 A. Yes.

21 Q. That's your understanding?

22 A. Yes.

23 Q. And is it your understanding that it's
24 necessary to obtain data 80 percent or greater of the
25 time in order to have sufficient viable data?

1 A. My understanding is the opposite, that it
2 is not necessary to achieve, collect data 80 percent
3 of the time to answer those questions. It's one of
4 the factors I think our expert on radar will address
5 that in more detail.

6 Q. Why does this condition as proposed in
7 the Staff Report 22c make the project unfinanceable?

8 A. So the problem is that we have a
9 situation where we have to conduct this study and
10 complete this radar study before we can move on to
11 satisfy this condition, and we have conditions in the
12 Staff Report conditions that are outside our control
13 that could make it impossible to achieve that. We
14 have no way of knowing when we embark on the study we
15 are going to encounter those conditions. We can't
16 predict or control those conditions, so now we are in
17 a situation of we've paid for the study. We
18 mobilized the study. We are counting on the study
19 being completed and we encounter conditions we can't
20 control and we don't meet the standard. Have to do
21 the studies the following year and what if we don't
22 meet it the next year or next year? So, now, I have
23 a case where the investor that's funding these
24 activities has no certainty of any kind that we are
25 going to be able to meet this condition and he's

1 faced with a proposition I have to just keep funding
2 this until it's satisfied.

3 In the meaning time I am not only funding
4 that activity I'm funding other activities of the
5 team that I have to kind of maintain to have a viable
6 project.

7 And as you -- as you probably guessed,
8 delays are very expensive and have significant
9 impacts and have led to killing many projects.

10 So not only in my opinion the investor
11 wouldn't continue to fund that. Even if he did,
12 these uncertain delays could be catastrophic for the
13 project as well.

14 Q. And if catastrophic for the project, the
15 benefits of the project you mentioned in your
16 testimony isn't realized?

17 A. No. Those benefits only come through the
18 construction and operation of the project so anything
19 that prevents that from happening really denies those
20 benefits to the City of Cleveland and the mayor of
21 Cleveland and all those who have those, you know,
22 aspirations of this project being fulfilled.

23 Q. And what changes did Icebreaker propose
24 to 22g?

25 A. So 22g they required -- staff condition

1 22g required two seasons of post-construction radar.
2 And all our -- all our joint stipulation said is,
3 well, if Staff and ODNR at their sole discretion
4 determined that the second season isn't necessary to
5 answer the questions that they are answering -- or
6 asking, then they could decide and not require a
7 second season. The way the Staff condition was
8 worded it mandated two seasons, and we said our
9 proposal was it seems prudent but it really doesn't
10 add value to the discussion, not discussion but add
11 value to the body of knowledge in answering the
12 questions of ODNR and Staff have, then why should
13 anyone spend money? Why should we invest that
14 resource unnecessary? It's purely ODNR's discretion.

15 So there is no compulsion on our part to
16 compel them. They don't have to justify it to us.
17 It was at their sole discretion. They could say
18 okay. We agree it's not necessary, so we don't have
19 to do the second season; or we don't agree, and we
20 would do the second season. We have no say in it.
21 We are not asking for any role in that decision.
22 It's purely up to ODNR.

23 Q. Icebreaker cannot -- under joint
24 stipulation 22g Icebreaker cannot unilaterally decide
25 not to do the second year?

1 A. No, absolutely not. There is nothing in
2 there that even would hint anything like that. It's
3 clear that it's the sole discretion of the agencies.

4 Q. Turn your attention to joint stipulation
5 condition 24, please.

6 A. Okay.

7 Q. I believe you testified on
8 cross-examination that you tried to inject some
9 certainty with more precise definition or a
10 definition of significant adverse impact. Was that
11 your testimony?

12 A. Yes.

13 Q. And how was that --

14 MR. JONES: Your Honor, can counsel speak
15 up? I can barely hear what he is saying.

16 Q. How was that definition developed?

17 A. So we consulted with our wildlife experts
18 on what a reasonable approach, defining that is, and
19 that's the definition we used in the stipulation.

20 Q. And under joint stipulation condition 24
21 who determines whether there is a significant adverse
22 impact?

23 A. It's ODNR and Staff in consultation with
24 Fish and Wildlife.

25 Q. So it's ODNR in consultation with Staff

1 and Fish and Wildlife. It's their discretion whether
2 a significant adverse impact has occurred?

3 A. Right, right.

4 Q. Even under the revised 24 as contained in
5 Ms. Hazelton's testimony, does that not include the
6 word "prescribed" two times?

7 A. Yes, yes, it -- the original staff
8 definition has prescribed once. In her testimony now
9 we have got another layer of prescription so, yes, it
10 has prescribed twice.

11 Q. And what is problematic about the use of
12 that word from a financing standpoint?

13 A. Again, it gets to risk. The -- you know,
14 the lenders are -- when they decide to make --
15 whether or not to issue loans to this project, I
16 mentioned this forced concept which means the company
17 is not backing the loan. So if the loan can't be
18 repaid from the revenue of the project, you know,
19 banks lose money, so they have no one else to go to.
20 There's no recourse.

21 So we are in a situation now where staff
22 24 is worded and Ms. Hazelton's testimony of revised
23 24 that the State Agency have this unilateral
24 authority that has no limits that I could see on the
25 remedies they could prescribe that they could order

1 us to undertake. So the way we interpret this and
2 the way that lenders would interpret we have a State
3 Agency that has unbridled authority, who has no
4 limits if they deem at their sole discretion there
5 has been a significant adverse impact, they could
6 order any action and we have no choice but to comply
7 or we would be in noncompliance with the certificate
8 and they could pull the certificate. So they
9 basically have this broad authority that without any
10 due process, without any justification, without
11 anything, they could take these severe actions and
12 that's a risk that in my opinion no bank would want
13 to undertake.

14 Q. So under your reading of the revised
15 condition 24 per Ms. Hazelton's testimony is there
16 any limit as to what adaptive management can be
17 prescribed?

18 A. No, there's none that I can see at all.
19 There's no limit as described there. The language
20 doesn't address any kind of limits on what the State
21 could -- could prescribe.

22 Q. And if Icebreaker does not agree with the
23 adaptive management that's been prescribed, per your
24 reading what is the recourse?

25 A. The way I read this we have no recourse.

1 It's the State sole's discretion to prescribe the --
2 to order, to force us to do this activity. And,
3 again, if we don't, then I think we are in
4 noncompliance with the condition, and then we face
5 the whole certificate being revoked eventually and
6 the enforcement action we talked about before.

7 Q. And with regard to an enforcement action
8 are you aware there is due process associated with an
9 enforcement action?

10 A. Yes, yes.

11 Q. And you were asked questions on
12 cross-examination by Mr. Jones that essentially as to
13 whether or not there could be any immediate action by
14 ODNR or Staff under the proposed stipulation
15 condition 24. Do you recall those questions?

16 A. Yes.

17 Q. Are you aware that there is conjunctive
18 authority provided to the Staff and ODNR?

19 A. I am not aware of all the legal, but I am
20 aware that ODNR and Staff can take legal action to
21 force actions or prevent actions on our part.

22 Q. So you are generally aware legal actions
23 can be taken to either force you to take action or
24 force you to stop?

25 A. Force us, yeah, yeah.

1 Q. Why is stipulation condition 24 more
2 appropriate or reasonable than Staff condition 24?

3 A. So I think I would like to back up even
4 one step and say the other plans we have to submit 60
5 days prior to construction already address a
6 mitigation plan. They have to manage the strategies,
7 so we'll already define ahead of time, in fact, we've
8 already submitted the first draft for the bird and
9 bat conservation strategy for review, so we will have
10 defined actions that we'll take under certain
11 conditions already. So that's before 24 even gets
12 triggered.

13 So the idea that there are -- no
14 immediate actions will be taken I think isn't quite
15 accurate, that if the conditions in the bird and bat
16 conservation strategy or as worded in the stipulation
17 language these impact mitigation plans, if those
18 conditions arise, there is immediate action that's
19 called for in those plans. So this 24 arises if
20 those plans that tried to foresee unforeseen
21 circumstances, if we didn't foresee other conditions
22 that arise that aren't addressed in that plan, then
23 this kicks in. So we're talking about a, you know,
24 level of potential events that I think are well
25 beyond reasonable expectations that ever would occur

1 in the first place, but it is prudent to be prepared.

2 So this says, well, if this unforeseen
3 circumstance appears or happens, we obviously know,
4 first thought, ODNR or us, so we need all the people
5 at the table that understands the project, biology,
6 and the aspects, and we'll together come up with a
7 solution we think is fair and reasonable, that it's
8 the same standard that I understand other wind farms,
9 all the other wind farms in Ohio have been held to in
10 the certificates that have been issued by OPSB.

11 And we're saying that all the impacts and
12 the potential for this -- for our project or other
13 projects, similar projects, or smaller it's even less
14 significant than other larger scale projects, so we
15 just want to be treated like it. We think it's fair
16 to be treated like other wind projects that the Board
17 has already issued certificates.

18 Q. So is it your testimony prior to the
19 operation there will be a bird and bat conservation
20 strategy in place?

21 A. Yes, yes. And, again, we call it -- our
22 terminology is bird and bat conservation strategy.
23 In the stipulation language it's called an impact
24 mitigation strategy, in fact, mitigation plan and
25 adaptive management strategy.

1 Q. And is it your understanding that plan
2 has to be approved by ODNR?

3 A. Yes. They have to confirm compliance
4 with its condition. We have a plan in place, and
5 they are not going to confirm compliance unless the
6 plan is acceptable to them.

7 Q. Mr. Karpinski, you were asked numerous
8 questions on cross-examination related to joint
9 stipulation condition 35.

10 A. Yes.

11 Q. What is your understanding of the
12 application of condition 35?

13 A. The way I understand, the signatory
14 parties would be invited to participate in
15 discussions, and these items that are called out by
16 17, 18, 19, 20, 22, and 24, they could provide input
17 which means they could express their views that are
18 relevant and germane to these topics for
19 consideration by Staff and ODNR. And that's where it
20 ends. It's input only. It has no binding authority
21 in any way. It doesn't worsen or limit or constrain
22 ODNR's and Staff's actions or ability to approve or
23 not approve certain things or incorporate their
24 input. It's really just another way to get input on
25 this topic to perform a good solution.

1 Q. And based upon your interaction with the
2 signatory parties, do they have particular expertise
3 that would be valuable for input from an input
4 standpoint?

5 A. Yes. I think that varies by party. So
6 they have different expertises. But, yes, I think
7 depending on the condition they all have a certain
8 expertise they could bring to the pocket.

9 Q. Are you aware the MOU monitoring plan
10 specifically says that the applicant will consult
11 with ODNR and OPSB and other agencies and
12 stakeholders to design a post-construction mortality
13 monitoring plan using innovative technologies that
14 are economically and logically feasible for this
15 demonstration project?

16 A. Yes, yes. I think we've already done
17 that to some extent, will continue to do that, yeah.

18 Q. And with regard to that language,
19 "economically and logically feasible," do you
20 understand that to be a factor in the joint
21 stipulation conditions?

22 A. Yes, again, I kind of go back to the
23 standard that says that the Board has to find that
24 this represents minimum adverse impact considering
25 the current technology given the economics of the

1 alternatives and other factors. So economics have to
2 be part of this. It's viable. It's not the only
3 criteria obviously. That doesn't mean that all
4 decisions are made solely on what's the best interest
5 of the economics but it is a factor and these all
6 have to be balanced and I think our stipulations kind
7 of balance the both of those, the minimizing the
8 adverse impact while considering economical
9 considerations.

10 Q. And in cross-examination Mr. Jones
11 brought up the Audubon Society. Have they provided
12 advisory input on some of the mitigation plans?

13 A. Yes, they have, yes.

14 Q. You were also asked questions by
15 Mr. Jones on cross-examination related to U.S. Fish
16 and Wildlife letter dated December 21, 2017. Do you
17 recall --

18 A. Yes.

19 Q. -- that questioning? With regard to the
20 economics of the project, is it your understanding
21 that -- strike that.

22 The U.S. Fish and Wildlife letter states
23 "For this pilot project the Service has requested on
24 multiple occasions that all commercial available
25 options of avian radar be considered to expeditiously

1 and cost effectively obtain data that address the
2 three-study objective." With regard to cost
3 effectively obtaining data, do you believe that
4 Icebreaker has deployed available, suitable,
5 sufficient technologies while also considering the
6 cost factors?

7 A. Yes, absolutely. The -- this is based
8 on -- on others in the European industry that have
9 used a similar configuration of radar on a vessel to
10 collect this similar kind of data, so it's not as if
11 we are proposing something that's never been done in
12 the world. It's been done in the industry, in the
13 market that actually created the offshore industry.
14 There's a high degree of confidence in their history
15 with it.

16 We also have -- we also have the opinions
17 of Robb Diehl who is an independent objective radar
18 expert that confirms that these -- these solutions we
19 solicited from suppliers could meet these conditions
20 that he has his -- the one he felt was the best one,
21 that's the way -- his opinion as well.

22 Yes, we think we've done a good job
23 balancing this economics with the ability to create
24 good data. I think his conclusion was -- conclusion
25 in the March 12 letter was that this approach that we

1 are pursuing is highly likely to be able to answer
2 these questions and accrues the data that's needed.

3 MR. SECREST: May I have a moment, your
4 Honors?

5 ALJ WALSTRA: Sure.

6 Q. Mr. Karpinski, in the Staff Report do you
7 recall a reference to fixed platform radar?

8 A. Yes. I don't remember exactly where it
9 was but, yes, I am very familiar with this concept of
10 fixed platform radar.

11 Q. Why was a mobile-based radar suggested as
12 opposed to fixed platform?

13 A. A fixed platform radar requires just
14 that, a fixed platform at the project site. Maybe
15 obvious to some but maybe not to all, there is no
16 platform -- such a platform there right now. So if
17 we wanted to implement a fixed platform radar means
18 there's some kind of structure that has to be affixed
19 to the Lake that's immoveable so that structure has
20 to be designed. It would have to be fabricated, have
21 to be installed. And all that carries obviously an
22 expense. And our assessment was a very high expense
23 and such that the cost to do that and create that
24 platform for the sole purpose of this radar study
25 added so much cost to the small project that it

1 really created a condition where it was difficult to
2 finance the project because the cost got too high and
3 exceeded what we were able to fund.

4 And we had an alternative that was deemed
5 to be able to create good data to answer these
6 questions. We also had this situation where there
7 was an assumption that just because the radar was on
8 a fixed platform out in the Lake, the high seas would
9 have no impact on the quality of the data and
10 that's -- I will defer to our radar experts, sea
11 clutter, which you will hear, about is present
12 whether or not we are on a moveable or immoveable
13 platform. So the benefits that you would get from a
14 fixed platform, obviously precipitation would affect
15 the floating platform and the fixed platform the
16 same. So you had this case of a very high cost that
17 really tipped the project into the point of not being
18 viable for really very, if any, benefit.

19 So we kind of weighed that and said, you
20 know, this radar was a solution that provided the
21 necessary outcome and was a very cost effective
22 solution that allowed the project to be able to
23 continue, and it was proven in other markets as well.

24 Q. When you say high cost, what is the cost
25 associated with fixed platform?

1 A. Our estimate was to do all the things I
2 mentioned, design the structure, get it certified,
3 fabricated, install it, and then uninstall it when we
4 are done, obviously we have to take it back out, was
5 \$9 million.

6 Q. \$9 million?

7 A. \$9 million.

8 MR. SECREST: Thank you, Mr. Karpinski.
9 I have nothing further.

10 ALJ WALSTRA: Thank you.

11 Mr. Stock, do you anticipate a fair
12 amount of recross?

13 MR. STOCK: Oh, yeah.

14 ALJ WALSTRA: We'll break for the day
15 then.

16 We'll go off the record.

17 (Thereupon, at 5:10 p.m., the hearing was
18 adjourned.)

19 - - -

1 CERTIFICATE

2 I do hereby certify that the foregoing is
3 a true and correct transcript of the proceedings
4 taken by me in this matter on Monday, September 24,
5 2018, and carefully compared with my original
6 stenographic notes.

7
8
9 Karen Sue Gibson, Registered
10 Merit Reporter.

11 Rosemary F. Anderson, Registered
12 Professional Reporter.

13 (KSG-6618)

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

Summary: Transcript in the matter of the Icebreaker Windpower, Inc. hearing held on 09/24/18 - Volume I. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.