

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
ICEBREAKER WINDPOWER, INC. FOR A
CERTIFICATE TO CONSTRUCT A WIND-
POWERED ELECTRIC GENERATION
FACILITY IN CUYAHOGA COUNTY, OHIO.

CASE NO. 16-1871-EL-BGN

ENTRY

Entered in the Journal on August 9, 2019

{¶ 1} Icebreaker Windpower, Inc. (Icebreaker or Applicant) is a person as defined in R.C. 4906.01.

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} On September 13, 2016, Applicant filed a pre-application notice with the Board regarding its intent to construct the electric generation facility being proposed in this case. On February 1, 2017, as supplemented, Icebreaker filed an application for a certificate to construct its proposed project, which it has described as a 6-turbine demonstration wind-powered electric generation facility located 8-10 miles off the shore of Cleveland, in Cuyahoga County, Ohio. The wind turbines are expected to have a nameplate capacity of 3.45 megawatts (MW) each, with a total generating capacity of 20.7 MW.

{¶ 4} The adjudicatory hearing in this case commenced on September 24, 2018, as scheduled, and concluded on October 2, 2018. At the conclusion of the hearing, the administrative law judge (ALJ) instructed that initial briefs and reply briefs would be due by November 30, 2018, and January 8, 2019, respectively.

{¶ 5} On November 21, 2018, Icebreaker filed a motion seeking an extension of time to file the corresponding briefs, indicating that the parties were attempting to engage in further settlement discussions that could result in a revised stipulation that resolves some, or all, pending issues in this matter. That motion was granted that same day, and the ALJ

directed that a revised stipulation or, in the alternative, a proposed revised briefing schedule, be filed at a later date. Since that time, the ALJ granted six additional requests for extensions, with the latest extension being granted on May 8, 2019, and setting the new deadline as May 15, 2019.

{¶ 6} On May 14, 2019, Icebreaker filed a fifth supplement to its application.

{¶ 7} On May 15, 2019, Icebreaker, the Business Network for Offshore Wind, Inc. (BNOW), the Sierra Club, Indiana/Kentucky/Ohio Regional Council of Carpenters (Carpenters), the Ohio Environmental Council, and Staff (collectively, Signatory Parties) filed a revised joint stipulation and recommendation (Stipulation). The Signatory Parties indicate that the Stipulation represents an agreement resolving all matters pertinent to the certification and construction of the wind-powered electric generation facility in Cuyahoga County, Ohio, as proposed in this proceeding.¹

{¶ 8} The Signatory Parties also filed a joint motion to reopen the proceeding on May 15, 2019.

{¶ 9} By Entry on May 22, 2019, the ALJ reopened the proceeding and scheduled a prehearing conference for June 5, 2019. The prehearing conference was held as scheduled.

{¶ 10} By Entry issued June 17, 2019, the ALJ scheduled a hearing to commence on August 20, 2019, to allow parties to introduce any new, relevant information into the record regarding the revised Stipulation and fifth supplement to the application. The Entry also specified dates upon which parties should identify their potential witnesses and file testimony.

¹ On May 13, 2019, intervenors W. Susan Dempsey and Robert Maloney (collectively, Bratenahl Residents) filed a response to the latest motion for an extension of the procedural schedule, indicating that they were not joining the Stipulation for the Board's consideration and were still opposing the project.

{¶ 11} On July 12, 2019, Bratenahl Residents' filed their potential witness list in the docket, identifying Jeff Gosse as a witness they may call during the adjudicatory hearing scheduled to commence on August 20, 2019.

{¶ 12} Icebreaker filed its supplemental testimony on July 26, 2019, as directed by the ALJ's June 17, 2019 Entry. Additionally, Icebreaker, BNOW, and Carpenters (collectively, joint movants) also filed a joint motion to exclude the testimony of Jeff Gosse in this proceeding. In support of their motion, the joint movants contend that federal regulations, known as *Touhy* regulations, prohibit Dr. Gosse from testifying in this proceeding without first obtaining the permission of the United States Fish and Wildlife Service (USFWS) or the Department of the Interior, as he was employed by the USFWS from 2009-2018 and cannot provide testimony regarding information he obtained while performing his official duties absent such permission. 43 C.F.R. §§ 2.280, 2.281, 2.290. See *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462, 468, 71 S.Ct. 416, 95 L.Ed. 417 (1951). Dr. Gosse was employed by USFWS as a Regional Energy Coordinator and, according to the joint movants, had significant involvement in the project subject to this proceeding as it relates to bird and bat impacts and vessel-based radar options (Tr. Vol. VII at 1622). Additionally, joint movants argue that, even if the federal regulations do not preclude his testimony, Dr. Gosse's testimony should nonetheless be excluded on the basis that such testimony is unfairly prejudicial to the application.

{¶ 13} On August 5, 2019, Bratenahl Residents filed a memorandum contra, contending that Dr. Gosse should be permitted to file testimony in this proceeding. Initially, Bratenahl Residents argue that the joint movants, as private parties, do not possess the requisite standing to attempt to prevent a retired USFWS employee from testifying in this case by invoking these federal regulations.² The more appropriate entities to make such argument, according to Bratenahl Residents, would be the USFWS or the Department of

² According to Bratenahl Residents' memorandum contra, Dr. Gosse retired from USFWS on March 30, 2018.

Interior. See *United States ex rel. Treat Brothers Co. v. Fidelity and Deposit Co. of Md.*, 986 F.2d 1110, 1119 (7th Cir. 1993); *United States ex rel. Liotine v. CDW Government, Inc.*, No. 05-33-DRH, 2012 WL 2807040 at *6 (S.D.Ill. July 10, 2012). Additionally, Bratenahl Residents claim that it would be unlawful for the Board to apply the *Touhy* regulations, which were designed to provide for federal agencies' internal management of their operations, to former employees no longer managed by such agencies. *Koopmann v. United States Dep't of Transportation*, 335 F.Supp.3d 556, 558 (S.D.N.Y. 2018) (where the Court determined that the United States Department of Transportation's (USDOT) denial of a request to depose a former USDOT employee was abuse of discretion, as *Touhy* regulations were unlawful to the extent they applied to former employees). Moreover, Bratenahl Residents note that the actual statute governing when and where former USFWS employees are prohibited from testifying, 18 U.S.C. ¶ 207, does not prohibit the testimony of Dr. Gosse. *Gulf Grp. Enters. Co. W.L.L. v. United States*, 98 Fed.Cl. 639, 645 (2011). In response to the joint movants' arguments pertaining to the prejudicial effect of Dr. Gosse's testimony, Bratenahl Residents maintain that the substance of Dr. Gosse's testimony, which is not yet known to the joint movants and the only testimony being produced in opposition to the Stipulation, will comply with the June 17, 2019 Entry limiting the scope of the hearing to commence on August 20, 2019.

{¶ 14} On August 7, 2019, joint movants filed a reply, arguing that the cases cited by Bratenahl Residents are not applicable to the facts presented in this proceeding. Initially, the joint movants conclude that private litigants may raise potential violations of the *Touhy* regulations, adding that in *Liotine* the Court ultimately concluded that there was no reason the employee could not obtain permission from the federal agency prior to providing testimony, despite following the *Treat Brothers* holdings. The joint movants add that the factual circumstances in this proceeding are distinct from that in *Treat Brothers*, as the USFWS has a clear interest in this project, both witnesses stated they had received permission to testify, and neither employee was testifying as an expert witness. *Treat Brothers* at 1118-1119. Furthermore, the joint movants cite to *U.S. ex rel. Pogue v. Diabetes*

Treatment Centers of America, 474 F.Supp.2d 75, 79 (D.D.C. 2007), in support of their argument that the *Touhy* regulations apply to former employees.

{¶ 15} Pursuant to Ohio Adm.Code 4906-2-09, the ALJ is vested with the authority to regulate the course of the hearing and conduct of the participants, including, but not limited to, ruling on procedural matters such as determining the extent of allowable testimony.

{¶ 16} Upon review of the filings, the ALJ finds that the joint movants' motion to exclude the testimony of Dr. Jeff Gosse should be denied. It appears that the joint movants may lack the requisite standing to pursue a violation of the *Touhy* regulations and that the more appropriate entity to make such an assertion would be the USFWS or the Department of Interior, neither of which have indicated their willingness to invoke the *Touhy* regulations as they may apply to Dr. Gosse. *United States ex rel. Treat Brothers Co. v. Fidelity and Deposit Co. of Md.*, 986 F.2d 1110, 1119 (7th Cir. 1993); *United States ex rel. Howard v. Caddell Construction Co., Inc.*, No. 7:11-CV-270-H-KS, 2018 WL 2291300 (E.D.N.C. Feb. 23, 2018) (where the Court stated "[i]f the government wishes to insist that defendants request permission under applicable regulations for their experts to testify, then it is free to do so" when it reaffirmed that the *Touhy* regulations were not intended to benefit private litigants). Moreover, the ALJ recognizes that joint movants have failed to include any precedent, from this Commission or any other state administrative agency in Ohio, or any other state for that matter, in which a state administrative agency has prohibited the testimony of a named witness in an administrative proceeding on the basis of complying with *Touhy* regulations. Rather, consistent with the *Pogue* holdings cited by joint movants, the ALJ believes a motion to strike is the more appropriate vehicle for USFWS to ensure Dr. Gosse's testimony "does not purport to pronounce official policy on behalf of the agency, discuss matters over which the agency asserts a privilege, and to otherwise safeguard the governmental interests that *Touhy* regulations serve to protect."³ The ALJ further notes that while the Bratenahl

³ Notably, "there is no authority indicating that [a federal agency] can block all testimony by a former employee as to that individual's personal opinions and observations, absent the assertion of a specific privilege." *Pogue*, 474 F.Supp.2d at 80.

Residents may be taking a risk by utilizing Dr. Gosse's testimony without authorization, as the joint movants have argued that such authorization is both necessary and lacking in this case, the joint movants have not persuaded the ALJ that the Bratenahl Residents should be prohibited from taking this risk. See *Christison v. Biogen Idec*, No. 2:11-CV-01140-DN-DBP, 2015 WL 1467520 (C.D. Utah Mar. 30, 2015) at *2.

{¶ 17} Furthermore, the ALJ finds that the joint movants' prejudice argument is premature at this time, as the substance of Dr. Gosse's testimony remains unknown and Bratenahl Residents maintain that his testimony will comply with the June 17, 2019 Entry's directives regarding the scope of the hearing. To argue that his testimony is inextricably tied to the work he conducted while employed at USFWS before the testimony is actually filed is mere speculation and the ALJ does not believe that rises to the level warranting exclusion of his testimony under the Board's administrative rules governing the hearing process.

{¶ 18} It is, therefore,

{¶ 19} ORDERED, That the joint movants' motion to exclude the testimony of Dr. Jeff Gosse be denied. It is, further,

{¶ 20} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/ Nicholas J. Walstra

By: Nicholas J. Walstra
Administrative Law Judge

JRJ/hac

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/9/2019 12:56:39 PM

in

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

Summary: Administrative Law Judge Entry denying motion to exclude testimony electronically filed by Heather A Chilcote on behalf of Nicholas Walstra, Administrative Law Judge, Ohio Power Siting Board