

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of **REPUBLIC WIND, LLC** for a Certificate of Environmental Compatibility and Public Need for a Wind-Powered Electric Generating Facility in Seneca and Sandusky Counties, Ohio ) Case No. 17-2295-EL-BGN )

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**REPUBLIC WIND, LLC’S MEMORANDUM IN OPPOSITION TO  
LOCAL RESIDENTS’ MOTION TO STRIKE AND MOTION IN LIMINE**

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**I. INTRODUCTION**

Republic Wind, LLC (“Republic Wind”) submits the following Memorandum in Opposition to Intervening Local Residents’ (the “Local Residents”) combined Motion to Strike and Motion in Limine (“Motion”).

As an initial matter, regarding the testimony of Mr. Dalton Carr,<sup>1</sup> Republic Wind intends to delete the testimony at issue during the hearing while Mr. Carr is on the stand. Therefore, although Republic Wind disagrees with the Local Residents’ arguments, it is not opposed to striking this portion of Mr. Carr’s testimony.

With respect to all other portions of the Motion, the Ohio Power Siting Board (the “Board”) should deny the Motion. The Local Residents make false claims regarding the expertise of Dr. Mundt. Dr. Mundt has worked in the field of epidemiology as it relates to acoustic impacts for over twenty years. Dr. Mundt has testified before the Board on this very issue in a prior Board case. *See In Re Champaign Wind LLC*, Case No. 12-0160-EL-BGN, Testimony filed December 3, 2012. Dr. Mundt’s curriculum vitae demonstrates his expertise in this area. Local Resident’s

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<sup>1</sup> Mr. Carr is misnamed as “William Carr” in the Motion.

claim that Dr. Mundt has no “expertise with noise” is incorrect. Local Residents offer only this one line explanation for the exclusion of four *pages* of Dr. Mundt’s testimony. Their argument is unsubstantiated, unsupported, and without merit, as further described below.

Additionally, the Motion as it relates to the request to exclude 12 of Republic’s 14 witnesses is actually an ill-grounded and undeveloped Motion to Compel. The Local Residents are attempting to circumvent the typical requirements of discovery motion practice by skipping to the most serious sanction for the disregard of discovery obligations: preclusion of testimony. The Local Residents argue in a single page that they are entitled to certain (still unnamed, still unspecified) documents from Republic Wind’s experts. They fail to state under what propositions of law they are entitled to these same documents. They fail even to state that the parties have reached an impasse. And they set up an untenable hostage situation: if those documents (which may or may not exist) are not produced to the satisfaction of the Local Residents, Republic Wind’s witnesses—all of its testifying witnesses—cannot take the stand.

This is simply not how discovery disputes—in which the Local Residents are clearly seeking to engage—function. And for good reason. In so attempting to circumvent the typical channels, the Local Residents fail to demonstrate that the documents they seek 1) have not already been produced to them (they have), and 2) that they are relevant, discoverable, and not unduly burdensome (they are not). Indeed, the Local Residents cite no law supporting the proposition they advance and the extreme outcome they request. For these reasons, and all the reasons discussed below, the Board should deny the Local Residents’ request to strike the written testimony of Republic Wind’s witnesses and preclude Republic Wind’s entire case in chief from taking place.

## **II. LAW AND ARGUMENT**

### **A. The Local Residents Fail to Provide Justification for Striking Testimony.**

The Local Residents seek to strike portions of the expert testimony of Kenneth Mundt on the basis that he is “not an acoustic engineer, nor does he have any expertise with noise.” (Motion, at p. 1.) They take issue with two pieces of his testimony; first, the following excerpt:

#### **a. Noise and possible health effects**

The Facility noise assessment produced as part of the Application indicates that noise from the proposed turbines will not exceed 46 dBA Leq(8hr) at non-participating residences (including seasonal residences). Sounds generated by industrial wind turbines are similar to sounds generated by any number of devices, human activities or environmental setting – including natural (e.g., surf, wind, rain insects, etc.) and anthropogenic (traffic, air handling systems, lawn equipment, video games, radio and television broadcasts, etc.) sources. The sound standards established as part of the Application are intended not to cause disease or harm to human health: a synthesis of the epidemiological evidence supports (and cannot refute) this.

Additionally, they seek to strike the entire portion of his testimony at Section V: “Sounds Levels of Wind Turbines and Infrasound.”

The Local Residents are mistaken that Dr. Mundt does not possess sufficient knowledge and expertise to provide expert opinions on these subjects. A review of his resume, attached to his filed testimony, reveals he works in the area of determining human health risks from environmental exposures, including those from wind turbine emissions. Moreover, the Local Resident’s position that Dr. Mundt must specifically be an “acoustic engineer” to opine on the effects on humans from sound is misplaced. The testimony found on pages 16-20 includes underlying information on sound produced by wind turbines that Dr. Mundt presents as the data and assumptions from which he conducts his further (epidemiological) analysis and states his opinions as to the risks and lack thereof to human health as a result of the sound from a wind farm.

The sound data used in this section is plainly cited to authoritative external sources, not made up by Dr. Mundt. For example, he provides several charts that set forth the decibel levels of common sounds, to provide context in considering the decibel levels produced by a wind farm. These sources include the National Research Council, the National Institute on Deafness and Other Communication Disorders, and a number of cited laboratory studies on infrasound from wind turbines. The sources and data are plainly identified, such that the Local Residents can examine Dr. Mundt on his data and assumptions, if they so choose. He is well within his field of expertise to review this data and studies and to consider the resulting effect of the sound associated with wind farms. His testimony should be admitted, and the Local Residents can test its weight and credibility by way of cross examination should they choose.

The Local Residents also seek to strike an exhibit from Dr. Mundt's testimony, an article he and others authored titled Wind Turbines and Health: A Critical Review of the Scientific Literature, Journal of Occupational and Environmental Medicine, Volume 56, Number 11, November 2014. It is not surprising that the Local Residents seek to strike this article, as it is directly on point to Dr. Mundt's expertise and testimony relative to Republic's Application. The Local Residents seek to characterize this article as a learned treatise, which can be relied upon by expert witnesses but that is not generally admitted into evidence under Ohio R. Evid. 803(18). However, the article at issue here is distinguishable from a learned treatise because it was authored by the witness himself on the subject on which he is testifying. It is more than a general reference guide, as a learned treatise is. It provides factual data that also underscores his opinions in this case, as well as his own analysis on the very subjects of his testimony. Therefore, the article should not be excluded from evidence.

**B. The Local Residents “Motion in Limine” is Without Merit.**

At the outset, the Local Residents do not cite a single proposition of law in rule, regulation, or case law, in support of their Motion in Limine. For this reason alone, this Board should see the Local Residents’ Motion for what it is: a delay tactic, meant to throw the pre-hearing process into disarray. As recently as the day before filing this Motion, the Local Residents advised the Administrative Law Judge (“ALJ”) in a pre-hearing conference that they had no discovery dispute they wished to be raised, as any remaining items were being worked out among the parties. One of the purposes of the pre-hearing conference is to provide the ALJ an opportunity to resolve discovery disputes before the hearing. *See* O.A.C. 4906-2-25(A)(1). It is procedurally inappropriate for the Local Residents to file a motion strike when they failed to raise this issue at the pre-hearing conference.

Further, Local Residents failed to file a motion to compel to address the alleged discovery dispute. A motion to compel is the appropriate way to address discovery disputes, not a motion to strike. *In Re East Ohio Gas*, Case No. 79-535-GA-AIR, Order at. FN. 1a, (July 9, 1980) (the Public Utilities Commission of Ohio (“Commission”))<sup>2</sup> denied a motion to strike testimony because the movant failed to first file motion to compel and waited until the hearing to attempt to strike testimony). After ruling on a motion to compel and determining that a party has failed to comply with their orders, the ALJ can strike testimony. However, it would be completely unfair and unprecedented for the ALJ to strike the entirety numerous witnesses’ testimony due to an alleged discovery dispute without first considering the parties’ position on a motion to compel. Local Residents are attempting to circumvent the discovery dispute process spelled out in the Board’s rules in order to completely preclude Republic Wind from presenting its case.

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<sup>2</sup> The Board often looks to Commission precedent for guidance regarding procedural matters.

Moreover, the Local Residents' Motion misrepresents the events that have transpired in this case. The Local Residents seek to preclude twelve of Republic Wind's fourteen expert witnesses from testifying *at all*. The Local Residents argue that the reason for such preclusion is that Republic Wind has not "produced the documents used by these experts to prepare their testimony." (Motion at 2.) This statement is not true. Republic Wind *has* produced these materials, and the Local Residents have failed to demonstrate why they are unable to move forward with the cross examination of these witnesses as proffered.

For example, Republic Wind diligently sought to produce the expert files and work papers for all expert witnesses that have such documents in their possession (outside of the references cited in the expert testimony, other docketed materials, and the Application, its appendices and bibliography). These have included, among others, work papers for the following experts:

- Doyle: Republic\_005598-005592
- Lawson: Republic\_004463-005054
- Marous: Republic\_5193-006625
- Old: Republic\_004407-004462; Republic\_007293-007309
- Kerlinger: Republic\_006012-006935; Republic\_004375; Republic\_004005; Republic\_004199; Republic\_006326; and Republic\_006617

Moreover, experts such as Dr. Mundt, have certified that he did not rely on work papers outside of the voluminous citations to studies contained in his direct testimony and the documents laid out at the outset of his testimony. Counsel for the Local Residents appears to imply that the ball is being hidden when it comes to the materials relied upon by Republic Wind's experts, but this is simply not the case.

Additionally, counsel for the Local Residents points to his Requests for Production of Documents as the source by which Republic Wind was to know exactly which documents counsel

sought and their relevance to the underlying matter. Notably, counsel for the Local Residents' requests contained such broad statements seeking "All documents containing information that Republic or its witnesses, representatives, or experts have created, referred to, read, relied upon, or used in any way," "All documents to which the Application refers," and "All studies, reports, notes, correspondence, and other documents used in, referred to during, or relating to, the preparation of the Application." (4<sup>th</sup> Set of Requests for Production by Local Residents Nos. 4, 11, and 12.) The Commission has previously emphasized the need for specific, well defined discovery requests. *See, In Re Columbus & Southern Ohio Elec. Co.*, Case No. 78-1438-EL-AIR, Entry on Rehearing of July 5, 1979 citing *In Re Monongahela Power Company*, Case No. 78-625-EL-FAC, Entry of July 24, 1978. Republic Wind has sought to work with counsel for the Local Residents, but beyond counsel's being willing to narrow and define such requests, Republic Wind has sought to simply produce the working files for its experts, wherein those files contain materials outside of those cited in the testimony itself.

The Local Residents' one-page Motion in Limine, seeking to exclude nearly every witness proffered by Republic Wind, without pursuing the typical Motion to Compel process to seek identifiable, named, and relevant documents, is an attempt at a short-cut that the Board should not embrace. Republic Wind has sought to comply with the specific requests related to its witnesses wherein those requests have been adequately set forth by opposing counsel. However, this last ditch effort by opposing counsel serves simply as a delay tactic at the eleventh hour. It cites no law or rule by which the Board could rule, and the Local Residents fail to justify the extraordinary relief they seek.

### III. CONCLUSION

For all of the reasons set forth above, the Board should deny the Local Residents' Motion.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the following parties of record via regular or electronic mail this 4<sup>th</sup> of November, 2019.



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