

**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)

**MOTION OF REPUBLIC WIND, LLC
TO STRIKE DIRECT TESTIMONY OF MARK SHIELDCASTLE
AND *IN LIMINE* TO EXCLUDE RELATED HEARING TESTIMONY**

Pursuant to Ohio Administrative Code 4906-2-27, Applicant Republic Wind, LLC (“Applicant”) moves to strike portions of the pre-filed direct testimony of Local Residents’ purported expert witness Mark Shieldcastle, filed on October 28, 2019 in this docket. Specifically, the Applicant seeks to strike any testimony relating to bats and bat studies/surveys. The Applicant also seeks an order *in limine* prohibiting Mr. Shieldcastle from testifying on these matters at the hearing. The reasons supporting the motion to strike and *in limine* are set forth in the attached memorandum.

Respectfully submitted on behalf of
REPUBLIC WIND, LLC



Dylan F. Borchers (0090690)
Devin D. Parram (0082507)
Dane Stinson (0019101)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-Mail: dborchers@bricker.com
dparram@bricker.com
dstinson@bricker.com

**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-) Case No. 17-2295-EL-BGN
Powered Electric Generating Facility in Seneca)
and Sandusky Counties, Ohio)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Local Residents filed “Direct Testimony of Mark Shieldcastle” on October 28, 2019, prior to the hearing scheduled on November 4, 2019 (hereafter “Shieldcastle Testimony”). The Applicant respectfully submits that Mark Shieldcastle is not qualified as an expert on bats, including endangered bat species, or on bat surveys, bat monitoring, and bat migration patterns. As to bats and bat studies, Mr. Shieldcastle attempts to testify to facts, opinions, and conclusions that go well beyond his training, knowledge, and skills. Accordingly, the Applicant requests that the Board strike the words “and bats” and “and bat studies” as those words are set forth on Lines 7, 14, 19 and 21 on Page 3; the sentence on lines 3-4 (“There was additional . . . older data.”), the words “one bat study” at Line 7 on Page 4; Lines 9-23 on Page 21; Lines 1-8 on Page 22; and the words “and bat” and “and bat species” at Lines 13 and 16 on Page 23 of the Shieldcastle Testimony from the record in this case. Applicant further requests that the Board prohibit Mr. Shieldcastle from testifying on any issues relating to bats and bat studies/surveys.

II. LAW AND ARGUMENT

A. *The Standard for Expert Opinion Testimony*

The Board is empowered by statute to establish its own rules of procedure to govern its administrative proceedings. R.C. 4901.13. Pursuant to that authority, the Board has promulgated

OAC Rule 4906-2-09(B)(7), which requires expert and factual testimony to be pre-filed with the Board, in writing, and served upon all parties and Staff according to a schedule to be set by the Administrative Law Judge.

Notwithstanding, it is well established that “the Commission seeks to maintain consistency with the Ohio Rules of Evidence to the extent practicable.” *In re Dayton Power & Light Co.*, Case No. 12-0426-EL-SSO, et al. Opinion and Order, at 8 (Sept. 4, 2013) citing *Greater Cleveland Welfare Rights Org. v. Pub. Util. Comm.*, 2 Ohio St. 3d 62, 68, 442 N.E.2d 1288 (1982). Those rules provide that an expert witness must: 1) possess knowledge in the relevant subject area superior to the ordinary layperson; 2) provide testimony based on specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and 3) provide testimony based on reliable scientific, technical, or other specialized information. Evid. R. 702. According to the Ohio Supreme Court, a witness becomes qualified to testify as an expert by virtue of the fact that he has been exposed to and has absorbed information from sources that may not be admissible under the Rules of Evidence. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 25 (2005). Furthermore, an expert witness must confine his opinion to matters within his specialty or scientific field of inquiry and may not express an opinion upon matters as to which the finder of fact is capable of forming a competent conclusion. *Burens v. Indus. Commission*, 162 Ohio St. 549, 554, 124 N.E.2d 724, 728 (1955).

B. *Portions of the Testimony of Mark Shieldcastle Should Be Stricken From the Record and Prohibited at the Hearing.*

The Local Residents’ witness Mark Shieldcastle fails to satisfy the standard set forth in Evid. R. 702 for expert witnesses in relation to testimony and opinions on bats and bat surveys/studies. Discovery materials provided on Mr. Shieldcastle disclose no qualifications to testify as an expert on the behavior of bats generally, the surveying of bats, bat monitoring, and bat migration. Mr.

Shieldcastle's education, background, and work experience as set forth in response to Question 5 and in his attached Resume (Ex. A) also do not indicate he has any research or training experience in the study of bats. The Shieldcastle Testimony vaguely notes Mr. Shieldcastle's participation in "statistical and study design workshops," and provides his experience in recovery plans, all pertaining to birds. (Shieldcastle Testimony, at Page 2, Lines 9, 18-22.) Importantly, not once does Mr. Shieldcastle note *any* experience regarding the study of bats, surveying or monitoring of bats, bat mist-netting, or bat migration in either his written testimony or his 10-page curriculum vitae, which recounts his experience in wildlife management since 1974. (Shieldcastle Testimony; Exhibit A.)

Mr. Shieldcastle also seeks to testify to the "scientifically valid data" and "validated methodologies" used to determine the "probable environmental impact and the adverse environmental impact" of the Republic Wind Project on bats. (Shieldcastle Testimony, at 2 ¶ 3-5.) Specifically, Mr. Shieldcastle seeks to testify as to the validity of the bat acoustic and bat mist netting surveys conducted by Applicant. But again, Mr. Shieldcastle has never conducted or managed a bat survey or study of any type. Accordingly, he cannot competently address the validity of the bat surveys performed here, and his testimony relating to this subject area is properly excluded.

Given Mr. Shieldcastle's lack of expertise in the study of bats generally, bat surveying, and bat monitoring, Mr. Shieldcastle is not qualified to testify as an expert in these matters.

III. CONCLUSION

For the reasons set forth above, the Applicant respectfully requests that the Board strike from the record the words "and bats" and "and bat studies" as those words are set forth on lines 7, 14, 19 and 21 on Page 3; the sentence on lines 3-4 ("There was additional . . . older data"), the words "one bat study" at line 7 on Page 4; lines 9-23 on Page 21; lines 1-8 on Page 22; and the words "and bat" and "and bat species" at lines 13 and 16 on Page 23 of the Shieldcastle Testimony. Applicant further

requests that the Board prohibit Mr. Shieldcastle from testifying on any issues relating to bats and bat studies/surveys. The Applicant requests that the Administrative Law Judge issue an order *in limine* precluding Mr. Shieldcastle from testifying on the subject matter of bats, including the bat survey and studies conducted for this Project. The Applicant seeks this entry now so that an order *in limine* may provide guidance and clarity to the parties.

Respectfully submitted on behalf of
REPUBLIC WIND, LLC



Dylan F. Borchers (0090690)
Devin D. Parram (0082507)
Dane Stinson (0019101)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-Mail: dborchers@bricker.com
dparram@bricker.com
dstinson@bricker.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion was served upon the following parties of record via regular or electronic mail this 7th day of November, 2019.



Devin D. Parram

cendsley@ofbf.org

lcurtis@ofbf.org

amilam@ofbf.org

mleppla@theoec.org

tdougherty@theoec.org

ctavenor@theoec.org

jvankley@vankleywalker.com

cwalker@vankleywalker.com

dwd@senecapros.org

jclark@senecapros.org

mulligan_mark@co.sandusky.oh.us

jodi.bair@ohioattorneygeneral.gov

dennyh7@frontier.com

mkessler7@gmail.com

william.cole@ohioattorneygeneral.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/7/2019 3:53:46 PM

in

Case No(s). 17-2295-EL-BGN

Summary: Motion of Republic Wind, LLC To Strike Direct Testimony of Mark Shieldcastle and In Limine To Exclude Related Hearing Testimony electronically filed by Teresa Orahod on behalf of Devin D. Parram