

**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)

**MOTION OF REPUBLIC WIND, LLC
TO STRIKE DIRECT TESTIMONY OF SARAH BETTS 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 Seneca County Park District’s lay witness Sarah Betts, filed on October 28, 2019 in this docket. Specifically, the Applicant seeks to strike the testimony at lines 20-173 and the Exhibits attached to her testimony. The Applicant also seeks an order *in limine* prohibiting testimony regarding the Park District-Ms. Betts’ proposed “2.5 mile turbine-free buffer zone” at the hearing in this matter. 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

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Seneca County Park District filed “Direct Testimony of Sarah Betts” on October 28, 2019, prior to the hearing scheduled on November 4, 2019 (hereafter “Betts Testimony”). Sarah Betts is not being offered as an expert witness, yet much of the subject matter of her testimony goes to facts, opinions, and conclusions that go well beyond her personal knowledge and training as a lay witness. The Applicant requests that the Board strike from the record Paragraphs 20-173 of Ms. Betts’ pre-filed direct testimony, as well as the Exhibits attached thereto. Applicant further requests that the Board prohibit Ms. Betts from testifying on those same topics at the hearing.

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 a lay witness' opinions or inferences must be: 1) rationally based on the witnesses' perception; and 2) helpful to a clear understanding of the witnesses' testimony or determination of a fact issue. Evid. R. 701.

Expert testimony would similarly contain the opinions of an individual qualified as an expert, in response to questions. *In the Matter of Columbia MHC East LLC*, Case No. 01-2567-WS-ACE, Entry, at 2 (Nov. 17, 2003). An expert's opinion must be based on some reliable scientific, technical, or specialized information. Evid.R. 702.

B. Portions of the Testimony of Sarah Betts Should Be Stricken From the Record and Prohibited at the Hearing

As to the essential purpose of her testimony, Sarah Betts failed to satisfy the standard set forth in Evid. R. 702 for expert witnesses. Her qualifications to testify as an expert on that subject matter are nowhere disclosed in the written discovery. Her pre-filed testimony contains none of the indicia of expert testimony on that subject matter. Instead, Ms. Betts only has "training, education, and experience as a natural resource manager and park planner." (Betts' Testimony, at lines 70-71.) She has obtained a Bachelor's and a Master's Degree in Education, Recreation, and Leisure Studies. (*Id.* at lines 2-5.)

Yet, her pre-filed testimony covers subject matters outside of her education and work experience, most notably, the methods environmental and research specialists employ to determine a representative species and the (alleged) analysis and application of the United States Fish & Wildlife Service's Section 7 and Section 10 Guidance for Wind Energy Projects ("Indiana Bat Guidance"). Ms. Betts' attempts to expound on subject matters "beyond the knowledge or experience possessed by lay persons" that, instead, require "specialized knowledge" on the visual

effects of wind turbines, disruption of bat habitats, disruption of bird migration, and related legal and regulatory standards.

Ms. Betts admits as much. She concedes that that there are “so many variables” at play on this issue, that she is “not a research specialist in any of these topics,” and that she had limited time and budget to consider them. (Betts’ Testimony, Lines 74-76.) Despite her admitted lack of expertise in this area she goes on to conclude, based on her lay person’s review and understanding of the Indiana Bat Guidance, that the Board should impose a 2.5 mile turbine-free buffer zone around all Seneca County Park District Nature Preserves. *Id.* at Lines 110-140.

In the first instance, Ms. Betts is unqualified to testify to the scientific research methods involved in establishing a representative species in the project area, let alone analyze and opine as to the appropriate representative species. More importantly, Ms. Betts’ reliance on the Indiana Bat Guidance to establish the requested 2.5 mile buffer is entirely misplaced and without scientific bases and, therefore, is unreliable. Ms. Betts, by her own admission, is not a research specialist. She is not a biologist. She has never conducted a bat survey or study. She does not understand the purpose of the Indiana Bat Guidance and when it is applicable. Indeed, the Indiana Bat Guidance has no application to set backs from nature preserves. Yet, she relies on it to form the basis for the Park District’s position.

Having no qualifications to opine on this subject matter, which clearly only an expert can and should testify to, Ms. Betts’ testimony on this subject matter must be stricken. Accordingly, the Board should strike the portions of her lay testimony that speaks to these matters as impermissible lay opinion testimony.

III. CONCLUSION

For the reasons set forth above, the Applicant respectfully requests that the Board strike lines 20-173 of Ms. Betts’ pre-filed testimony and the Exhibits thereto. The Applicant also requests that

the Administrative Law Judge issue an order in limine precluding Ms. Betts from testifying on these matters. 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

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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

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