BEFORE
THE OHIO POWER SITING BOARD

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

BRATENAHL RESIDENTS' POST-HEARING REPLY BRIEF[1]

I. INTRODUCTION

The Proposed Project is the first proposed freshwater offshore wind turbine facility to be located in North America and in the Great Lakes. Indeed, in its Brief, the Ohio Power Siting Board Staff ("Staff") acknowledges that "[i]n comparison to wind farm installations on land, construction and operation of the Icebreaker project offshore in Lake Erie presents a very different set of technological challenges, including those pertaining to wildlife monitoring and mitigation." Staff Brief at 1. Nonetheless, and despite Applicant Icebreaker Windpower, Inc.'s ("Icebreaker") complete failure to supply any information as to how it will meet these challenges, Staff recommends approval of the Revised Stipulation—and of the Project. Icebreaker has failed to establish the probable environmental impact of the Project on birds and bats, and has failed to established that the Project represents the minimum adverse impact to birds and bats, as required by R.C. 4906.10(A)(2) and (3), respectively. Thus, the Board would

[1]Icebreaker repeatedly whines in its Initial Brief that Murray Energy Corporation is paying the Bratenahl Residents' legal fees in this proceeding—while Icebreaker pays millions of dollars to its cadre of lawyers and retained experts to support its attempt to foist this disastrous Project on the citizens of the State of Ohio. However, Murray Energy is no longer paying the Bratenahl Residents legal fees, but they remain steadfast in their opposition to this Project. The Project remains as ill-conceived and disastrous for Lake Erie as it was on the date of its conception. The residents continue to fight to protect their interests and the interests of the citizens of the State. In glaring contrast, Icebreaker is spending millions of dollars for its own, private, economic self-interest. The Board must not abet Icebreaker's proposed fouling of the irreplaceable natural asset that is Lake Erie.

completely abdicate its obligations under R.C. 4906.10 were it to approve the Revised Stipulation and grant a certificate of environmental compatibility and public need (a "Certificate") for the Project.

Moreover, granting a Certificate for the Project would violate the State's obligation to hold its ownership interest in Lake Erie for the benefit of all citizens of the State of Ohio—not for the pecuniary benefit of a private, for-profit Norwegian corporation, Fred. Olsen Renewables. The State of Ohio's ownership interest in Lake Erie is governed by the "Public Trust Doctrine." *Illinois Railroad Company v. Illinois*, 146 U.S. 387 (1892). The State of Ohio holds title to its portion of Lake Erie in trust for the benefit of the people of the State of Ohio, and is specifically prohibited from using its public trust interest for the benefit of a private-party such as Icebreaker. The State of Ohio's title in Lake Erie:

> is a title different in character from that which the state holds in lands intended for sale. ***It is a title held in trust for the people of the state***, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing on them, ***freed from the obstruction or interference of private parties***. . . . The trust devolving upon the state ***for the public***, and which can only be discharged by the management and control of the property ***in which the public has an interest***, cannot be relinquished by a transfer of the property . . . .

146 U.S. at 452-453 (emphasis added). See also *State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 345-346 (1948). Because the State of Ohio—which includes this Board—holds title in Lake Erie in trust for the benefit of its citizens, the Board cannot and should not approve the Revised Stipulation or Icebreaker's Application with so many questions left unanswered, particularly when those questions go to the heart of the factors the Board must consider under R.C. 4906.10(A) before issuing a Certificate.

This is particularly true when, as here, the Proposed Project is not intended to be a commercially feasible, stand-alone electric generating facility. Instead, Applicant fully intends

for the Proposed Project to be simply an "icebreaker"—the first wind turbine project to be permitted for construction in the Great Lakes. Once the Proposed Project breaks the barrier against privately-owned wind turbine installations in the Great Lakes, Icebreaker intends to seek Board authorization to install an exponentially greater number of wind turbines in the Lake, capable of producing enough electricity, albeit uncompetitively-expensive electricity, to obtain some meaningful return on its enormous investment, all at the expense of Ohio's wildlife—particularly bats and birds—and the citizens, including the Intervening Bratenahl Residents, who enjoy that wildlife.

Icebreaker—now with Staff's acquiescence—attempts to convince the Board that it should break the barrier against permitting a private commercial enterprise to install and operate wind turbines in Lake Erie by asserting that the Proposed Project will be a "demonstration project" that will provide valuable information about the ecological effects of wind turbine projects in the Great Lakes and the financial viability of such projects, all for the purported purpose of assisting regulatory agencies in forming sound public policy for "future larger-scale offshore wind farms in Lake Erie and the other Great Lakes." Application (submitted as Applicant's Ex. 1) at 3. But, as the Bratenahl Residents maintain in their Brief, the construction and operation of the Proposed Project will provide little, if any, material information regarding environmental impacts or energy economics that cannot be obtained before, or without, construction of the project. Indeed, both the Staff and USFWS acknowledge that Icebreaker has to date failed to identify—much less implement—scientifically-sound methodologies for accurately assessing the probable environmental impacts of the Proposed Project on birds and bats. For that reason alone, the Board cannot grant a certificate to Icebreaker allowing it to proceed with construction of the Project.

As noted, the authority of the Board to grant a certificate is controlled by R.C. 4906.10. R.C. 4906.10(A)(2) & (3) specifically require that before the Board may grant a Certificate to Icebreaker, it must make findings and determinations (1) as to the nature of the probable environmental impact of the Project; and (2) that the Project represents the minimum adverse environmental impact. The record in this case irrefutably establishes that Icebreaker has failed to submit to the Board sufficient data and information at this juncture for the Board to make any valid findings or determinations with regard to either of these statutory requirements. Indeed, all parties acknowledge that Icebreaker has yet to even select the technology it intends to use to attempt to assess and monitor the environmental impact of its Project.

Icebreaker and Staff urge the Board to ignore these fatal defects in Icebreaker's Application by arguing that the Certificate should contain conditions, as set forth in the Revised Stipulation, that would allow Staff or ODNR—at some undetermined point in the future—to make determinations as to the environmental impact—the very determinations that the General Assembly has committed to the Board, not to its Staff or ODNR. The Board must not abdicate its statutory responsibility to make these determinations. Because Icebreaker has utterly failed to submit sufficient information to enable the Board to make these required determinations, the Board must reject the Revised Stipulation and deny Icebreaker's Application.

II. ARGUMENT

A. Icebreaker Has Failed to Demonstrate the Nature of the Project's Probable Environmental Impact or That the Facility Represents the Minimum Adverse Environmental Impact.

In its Brief, Staff candidly admits that "Icebreaker's proposed project is unprecedented, and although the expected impacts will be to birds and bats, ***the precise extent of the impacts is unknown***." Staff Brief at 27 (emphasis added). Staff further admits that "there will be collision,

avoidance, and attraction primarily affecting birds and bats," Staff Brief at 12, and that "[s]ince Icebreaker has not completed the pre-construction or post-construction monitoring, the precise impacts cannot be quantified at this time." *Id.* (citing 9/18/18 Hazelton Pre-Filed Test. at 6 (Staff Ex. 7)). See also Staff Brief at 15 ("***While the precise impacts to birds and bats in the project zone cannot be quantified at this time***, the general impacts are expected to be collisions, avoidance, and attraction situations.") (emphasis added).[2] While Staff argues that this deficiency in the evidence is not fatal, it goes on to concede that even Icebreaker's own witness, Dr. Caleb Gordon "stated the attraction that birds and bats might have to a wind farm located on Lake Erie, in comparison to a land-based facility, ***is unknown***," Staff Brief at 13 (emphasis added) (citing 9/25/18 Gordon Test. at 485), and that "***no proven effective technologies to perform bird/bat collision monitoring at offshore wind energy facilities are currently available***." Staff Brief at 13 (citing Icebreaker Ex. 38 at 12) (emphasis added).

What is clear is that Icebreaker has failed to submit evidence which would permit the Board to assess the Project's probably environmental impact or to determine that it represents the minimum adverse environmental impact. Although hundreds of thousands to millions of birds and bats migrate over Lake Erie every year, see 9/18/18 Hazelton Pre-Filed Test. (Staff Ex. 7) at 8 ("Radio telemetry tracking and radar surveys suggest hundreds of thousands to millions of

[2]The Bratenahl Residents' expert witness, Henry M Streby, Ph.D. ("Streby"), Assistant Professor of Ecology within the Department of Environmental Sciences at the University of Toledo, agrees with Staff's assessment that "***adequate pre-construction monitoring of bird activity in the Project area has not been completed, rendering it impossible to make a reliable determination of the nature of the probable environmental impact of the Project on birds, or that the Project represents the minimal adverse environmental impact on birds***. . . ." 9/14/18 Streby Pre-Filed Test. (Bratenahl Residents' Ex. 23) at 2 (emphasis added).

birds and bats migrate over Lake Erie, making it an important global migration pathway."),[3] Icebreaker has yet to conduct adequate radar testing at the project site. Despite more than a decade of ODNR and USFWS urging Icebreaker to conduct site-specific radar testing, see Bratenahl Residents Exhibit 7 at 2 (ODNR and FWS February 28, 2017 Memorandum) ("Preferred is radar data from the project area. Fish and Wildlife Service has been requesting this information since 2008."), Icebreaker failed or refused to do so.[4] 10/2/19 Hazelton Test. at 1768

[3]In its Initial Brief, Icebreaker persists in its absurd argument that migratory birds fly around Lake Erie, rather than over it. *Id.* at 30-31. Icebreaker does not attempt to explain why these birds, which migrate over the Gulf of Mexico (a distance some ten times greater than the distance over Lake Erie), see Streby Expert Report (attached to 9/18/18 Streby Pre-Filed Test. (Bratenahl Residents' Ex. 23)) at 9, would suddenly avoid flying a much shorter over-water distance once they reach the Lake. In any event, as Erin Hazelton, Staff's Wind Energy Administrator, acknowledges, the valid scientific evidence establishes that vast numbers birds (possibly in the millions) fly over the Lake each spring and fall. 9/18/18 Hazelton Pre-Filed Test. (Staff Ex. 3) at 8 ("Radio telemetry tracking and radar surveys suggest hundreds of thousands to millions of birds and bats migrate over Lake Erie, making it an important global migration pathway."). Icebreaker clings to this "the earth is flat" myth to justify its pre-ordained conclusion that the Project presents "low" risks to birds and bats. Icebreaker Brief at 26. But Icebreaker has ardently refused, for more than ten years, to collect avian radar data from the rotor swept zone (it has no data covering the RSZ) of the Project so that sound scientific assessments can even begin to be made.

[4]Icebreaker seeks to explain away its steadfast refusal to collect avian radar data from the Project RSZ by propounding another "the earth is flat" argument—that data regarding the number and density of birds (or bats) migrating through the RSZ is completely irrelevant to assessing turbine collision risks to birds and bats! Icebreaker Brief at 32. Such nasty scientific facts "would not change [Icebreaker's] conclusion of low risk for the Project on birds and bats . . . ." *Id.* But that equally-absurd argument is directly refuted by the C.V. of Icebreaker's avian radar expert, Todd J. Mabee. As Mabee touts in his C.V., he has performed (and accepted hundreds of thousands of dollars in payment for) numerous pre-construction avian radar studies: he "***used radar*** and/or night-vision optics to ***document flight directions, flight altitudes, and passage rates*** of Marbled Murrelets, diurnal migratory birds, and ***nocturnally-migrating birds and bats to assess collision risk***." 9/6/18 Mabee Pre-Filed Test., Attachment TJM1 at 2 (Applicant Ex. 32) (emphasis added). See also 9/27/18 Mabee Test. at 850-51. Furthermore, Icebreaker acknowledges in Condition 21(d) of the Revised Stipulation it urges upon the Board that the preconstruction avian radar studies of the Project RSZ that it must conduct, but it has failed to conduct to date, will be used "to determine flight altitude of migrants at altitudes near and entirely within the rotor-swept zone at the project sight to quantify the number of targets in the rotor swept zone to inform the potential for collision." Revised Joint Stipulation (Joint Ex. 2)

("There has not been a radar system deployed at the project site that I am aware of."). Without such testing, the Board is unable to assess the environmental risk the Project poses. See 10/2/18 Hazelton Test. at 1694 ("The goal of [pre-construction radar] would be, again, to quantify the risk. We understand generally what the risk would be, but we are unable to quantify that at this time with the information that we have."). See also 9/18//18 Hazelton Pre-Filed Test. at 6 (Staff Ex. 3) ("***Since Applicant has not completed the pre-construction or post-construction monitoring, the precise impacts cannot be quantified at this time***.") (emphasis added). Consequently, the Board cannot comply with its statutory mandate to make these determinations before issuing a Certificate. Icebreaker's Application must be denied.

Not only has Icebreaker failed to perform the necessary preconstruction radar testing sufficient to allow the Board to make the required environmental determinations, it has not even identified a technology that is scientifically-valid to conduct that testing. 8/20/19 Hazelton Test. at 1768 ("Applicant is still reviewing that technology."). Indeed, Staff has expressed serious doubts regarding the validity and reliability of the radar testing technology Icebreaking has been pushing—radar affixed to a floating platform. 8/20/19 Hazelton Test. at 1771, 1774. As a result of Icebreaker's failure to gather the necessary, fundamental, scientific data, the Board is simply left without any valid data upon which it can make any findings or determinations that Icebreaker's use of a radar unit on a floating platform, as proposed, is a scientifically valid methodology that will produce accurate data to establish the probable environmental impact of

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at 8, ¶21(d). See also 8/20/20 Hazelton Test. at 1767-69; October 4, 2017 FWS Letter to DOE (Bratenahl Residents' Ex. 12) at 3 ("Because of the potential risk of bird and bat mortality, and because this project is designed to be a demonstration project to evaluate offshore wind installation in the Great Lakes, *pre-construction monitoring to inform risk* and post-construction monitoring to assess actual impacts are necessary components of the project that must be implemented. * * * *If per-turbine impacts are not accurately measured for this precedent-setting project, risk levels of larger future projects may be substantially underestimated.*") (emphasis added).

the Projects on birds and bats or that the Project represents the minimum adverse environmental impact.

Moreover, there is no dispute that Icebreaker's turbines will kill birds and bats. 9/6/18 Gordon Pre-Filed Test. (Applicant Ex. 30) at 4, ¶19. Not only is the extent to which these turbines will kill birds and bats unknown, but Icebreaker has yet to identify any scientifically-validated technologies or methodologies it will employ to attempt to determine the number of birds or bats that will be killed by its turbines. Staff Brief at 18 ("To date, Icebreaker has not selected the type of collision monitoring technology it will use for the project.") (citing 9/6/18 Good Pre-Filed Test. (Applicant's Ex. 31) at 18). See also 9/18/18 Hazelton Pre-Filed Test. (Staff Ex. 3) at 8 ("***The Applicant has not identified a proven collision monitoring technology, and one may not be available until an undetermined point in the future***.") (emphasis added). See also 7/3/18 Staff Report (Staff Ex. 1) at 24 ("There are currently no proven post-construction collision technologies or methodologies available for the offshore wind setting.") See also 8/20/19 Hazelton Test. at 1775. Indeed, Staff refused to join in Icebreaker's proposed September 4, 2018 Joint Stipulation and Recommendation (the "Stipulation") (Joint Ex. 1), in part because ***"[a]t this time, the Applicant has not identified a suitable technology***" to monitor bird and bat activity at the project site and to detect bird and bat collisions with the wind turbines. 9/18/18 Hazelton Pre-Filed Test. (Staff Ex. 3) at 10 (emphasis added) (concluding that "Stipulation Condition 19 is not in the public interest regarding protection of wildlife and does not satisfy R.C. 4906.10(A)(3), which requires the project to represent the minimum adverse environmental impact."). See also *Id.* at 12 (concluding that "Stipulation Condition 22 is not in the public interest regarding protection of wildlife and does not satisfy R.C. 4906.10(A)(3), which requires the project to ensure the minimum adverse environmental impact."). Nothing has changed.

Icebreeaker still has not identified a suitable technology to monitor bird and bat activity or to detect bird and bat collisions. There is no principled basis for Staff's belated support for this Project via the deficient Revised Stipulation.

Staff initially recommended to the Board that it not issue a Certificate to Icebreaker unless any such Certificate include the conditions set forth in its July 3, 2018 Report of Investigation (the "Staff Report") (Staff Ex.1) to ensure that the Project represents the minimum adverse environmental impact, as required by R.C. 4906.10(A)(3). One of the most important conditions recommended by Staff was a requirement that Icebreaker feather its turbines from dawn to dusk from March 1 through January 1 each year until Icebreaker proved that its yet-to-be-identified avian radar and collision technologies will produce scientifically valid information. 9/18/18 Hazelton Pre-Filed Testimony (Staff Ex. 3). Staff abandoned that firm position when it joined the Revised Stipulation, which replaces the critical feathering condition with a provision that states that ODNR and Staff may require nighttime partial or complete feathering—or some "less restrictive feathering"—until Icebreaker's collision monitoring technology has been demonstrated to work. Fifth Supplement to the Application (Applicant's Ex. 57) at 3. See also Staff Brief at 19-20. This means that Staff—without Board oversight or review and without opponents' opportunity to present independent scientific evidence to the Board—will determine whether Icebreaker's to-be-proposed avian radar and collision technologies and methods are scientifically valid and will produce scientifically-accurate data. Yet, neither ODNR nor Staff have in their employ experts in avian radar or collision technology who are competent to make these scientific determinations that the citizens of the State of Ohio are asked to rely upon to

protect their interests. 8/20/19 Hazelton Test. at 1747-48; 1776, 1786.[5] Although Staff indicates that it will "partner with other entitites in order to gain that expertise . . . " 8/20/19 Hazelton Test. at 1779-80, it also acknowledges that the Revised Stipulation does not require Staff to engage an such necessary third-party experts to ensure a sound scientific basis for any ODNR approval of novel technologies and methodologies proposed by Icebreaker. *Id.* at 1779.

B. The Conditions Set Forth in the Revised Stipulation, if Approved by the Board, Would Constitute an Unlawful Delegation of the Board's Decision-Making Authority to ODNR Without Board Review in a Public Hearing.

As noted, under the proposed Revised Stipulation, Icebreaker and Staff propose that future determinations as to radar testing, collision monitoring technology, and feathering will be made by Staff, without Board oversight and review in a public hearing, and without the opportunity for opponents to present evidence contesting the viability and validity of the yet-to-be-selected technology. These determinations are central to the findings and determinations regarding the probable environmental impact and that the Project represents the "minimum adverse environmental impact" that the Board is required to make prior to the issuance of a Certificate. See R.C. 4906.10(A). See also *In re Application of American Transmission Sys., Inc.,* 125 Ohio St.3d 333, 336-37, 2010-Ohio-1841 at ¶¶20-21 (Board may delegate many of its responsibility to subordinates, but "[o]ne responsibility . . . cannot be delegated: 'the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.'") (quoting R.C. 4906.02(C)). These proposed after-the-fact, "behind closed doors" determinations by Staff would not only completely subvert the statutory requirement that the Board itself make these determinations, but

[5]Similarly, despite the fact that Condition 20 of the Revised Stipulation purports to require Applicant to report to Staff if its turbines kill any listed endangered or threatened species, ODNR acknowledges that it has no idea as to how to determine the species of a bird or bat killed by the turbines. 8/20/19 Hazelton Test. at 1791-92.

also would violate the requirements of R.C. Chapter 4906 that the determination be the subject of an adversarial process in a public Board hearing (the adjudicatory hearing) at which Project opponents (such as the Bratenahl Residents) may present (expert) testimony and evidence to controvert any proposed Staff approval of Icebreaker's proposed technologies/methodologies as scientifically-valid. See R.C. 4903.02-.09 (made applicable through R.C. 4906.12).

The Ohio Supreme Court has held the Board does not improperly delegate its authority where it "allows a certificate to be issued *upon such conditions as the Board considers appropriate." In re Application of Buckeye Wind, L.L.C.,* 131 Ohio St.3d 449, 452, 2012-Ohio-878 at ¶16 (citing R.C. 4906.10(A)) (emphasis in original). "Simply because certain matters are left ***for further review and possible public comment*** does not mean that they have been improperly delegated to staff." *Id.,* 131 Ohio St.3d at 452, 2012-Ohio-878 at ¶17 (emphasis added). The key to allowing such conditions decisions is that ***the Board*** must have the opportunity ***for further review***. *In re Ohio Power Co.,* 155 Ohio St.3d 320, 323-24, 2018-Ohio-4697 at ¶¶10-12 (PUCO did not commit error by including a placeholder rider because any rate for the rider could only be imposed after additional commission proceedings).

The Revised Stipulation does <u>not</u> provide for further Board review of ODNR's future determinations. Rather, it simply leaves these R.C. 4906.10(A)(2) and (3) determinations solely to the discretion of ODNR—findings and determinations that the Board must make before issuing a Certificate to Icebreaker. See Staff Brief at 16 ("Prior to commencing construction, the Applicant must obtain ODNR approval of all monitoring plans."); Staff Brief at 18 ("[T]he final [collision monitoring] plan must be approved, in writing, by ODNR."); Staff Brief at 21-22 ("[T]he Applicant is required to meet with Staff and ODNR to jointly develop a revised adaptive management strategy, which is subject to final written approval from ODNR."). With no avian

radar for the Project rotor swept zone and no validated collision monitoring technology even identified—because proven technologies do yet exist—the Board simply is unable, at this point, to make any valid findings or determinations as to the Project's probable environmental impact or whether the Project represents the minimum adverse environmental impact. The Revised Stipulation unlawfully delegates the authority to make these findings and determinations to ODNR in its sole discretion, at some future date. 8/20/19 Hazelton Test. at 1779. The proposed delegation of the Board's statutory responsibility to make these determinations is, therefore, unlawful. See *In re Application of Buckeye Wind, L.L.C.,* 131 Ohio St.3d 449, 462, 2012-Ohio-878 at ¶53 (Lundberg Stratton, J., dissenting) ("Issues are not to be settled ***after*** construction is approved, much less by unaccountable staff members without public scrutiny or judicial review.") (emphasis in original).

Over two and a half years since it filed its Application, Icebreaker has still not: (1) conducted the required (and repeatedly requested) pre-construction avian radar study at the Project site; (2) collected data as to the volume and density of birds and bats migrating through the Project rotor swept zone; (3) identified any technologies or methodologies by which it will determine whether birds or bats collide with the Project's turbines; (4) identified any technologies or methodologies by which it will determine whether endangered or protected species are killed the Project's turbines; or (5) subjected any such identified technologies to validation testing before employing them in Lake Erie. All of these failures prevent the Board from making any scientifically valid findings or determination as to the probable environmental impact of the Project, or from concluding that the Project represents the minimum adverse environmental impact, as mandated by R.C. 4906.10(A)(2) & (3). On this record, the Board has

no choice but to reject the Revised Stipulation and to deny Icebreaker's Application for a Certificate.

C. The ALJ Properly Denied Icebreaker's Motion *in Limine* to Exclude Dr. Brown's Testimony.

In its Brief, Icebreaker asks the Board to revisit the ALJ's ruling denying its motion *in limine* to exclude the testimony of Dr. Richard E. Brown. Icebreaker asserts that Dr. Brown's testimony should have been excluded because it goes beyond the factors the Board must consider in deciding whether to issue a certificate pursuant to R.C. 4906.10(A). Icebreaker Brief at 10-15. This renewed request is without merit and must be rejected by the Board.

As noted above, the factors the Board must consider in determining whether to issue a certificate are set forth in R.C. 4906.10(A). The portions of Brown's testimony and report that Icebreaker again seeks to exclude (highlighted in its attachment to its September 21, 2018 Motion *in Limine*) specifically relate to R.C. 4906.10(A)(4) and (6). R.C. 4906.10(A)(4) and (6) state, in pertinent part:

> The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless *it* ***finds and determines all of the following*** . . . (4) [i]n the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability; [and] (6) [t]hat the facility will serve the public interest, convenience, and necessity.

(emphasis added).

Subsection (4) and (6) above are two of the eight requirements the Board must find to grant a certificate to Icebreaker. *Id*. Indeed, as the statute directly states, the Board must find that the Application meets all eight requirements. Dr. Brown's testimony and report are within the scope of two of the eight requirements. The portions of Dr. Brown's testimony and report,

including the Highlighted Portions, directly address R.C. 4906.10(A)(4) and (6). Icebreaker's renewed request must be denied.

The Highlighted Portions are within the scope of R.C. 4906.10(A)(4). In their Petition to Intervene, the Bratenahl Residents stated the following as to their objections with regard to R.C. 4906.10(A)(4):

> The Application fails to establish that the Proposed Project will serve the interests of electric system economy and reliability as required by R.C. 4906.10(A)(4). Applicant admits that as a "demonstration" project, the Proposed Project is neither commercially feasible nor economically justified. The Proposed Project has a "nameplate" capacity of only 20.7 MW, and, according to Applicant, is expected to operate at only 41.4% of that modest capacity. Moreover, the Proposed Project is heavily dependent upon substantial public financial subsidies—including more than $40 million in federal grants, federal investment tax and production tax credits, and state property tax exemptions—with absolutely no showing that the project feasibly can lead to construction of a commercial-scale generation facility that would be efficient and economically competitive. The Proposed Project cannot compete in the wholesale electricity market. The April 2009 Great Lakes Wind Energy Center Final Feasibility Report shows that the Proposed Project would sell its small output at roughly three times wholesale electricity prices in the region.
>
> Moreover, PJM Interconnection LLC currently assigns only a 17.6% capacity factor for new, onshore wind-powered generation facilities. This means, for example, that a new, commercial-scale 1000MW wind facility would have to be supported by 824 MW of additional fossil fuel-fired electric generation to power 1000MW of load growth. Under no circumstances will the Proposed Project, or any expansion of the Proposed Project to a commercial-scale size of 1,000 turbines or more, ever supplant PJM base load fossil fuel-fired electricity. The Proposed Project does not serve the interests of electric system economy or stability.

(Petition at 12-13.)

The testimony of Dr. Brown that Icebreaker seeks to exclude specifically pertains to the objections the Bratenahl Residents raised in their Petition. The Bratenahl Residents are electric customers and taxpayers who will be affected by the adverse economic impacts and reliability deficiencies of the wind-powered electric generation of the Icebreaker Project, as demonstrated

in Dr. Brown's testimony. Further, for example, Dr. Brown addresses issues related to how the Icebreaker Project would impact the market and would require heavy subsidization while not eliminating needs for baseload generation. Dr. Brown's testimony and report as to the Icebreaker Project are relevant to the determination of whether the Icebreaker Project meets the requirement of "electric system economy and reliability" as set forth in R.C. 4906.10(A)(4).

Moreover, Dr. Brown's testimony also relates to R.C. 4906.10(A)(6).[6] In their Petition to Intervene, the Bratenahl Residents also addressed R.C. 4906.10(A)(6) in their objections to the Icebreaker Project, in pertinent part, as follows:

> For the reasons set forth herein, the Application fails to establish that the Proposed Project will serve the public interest, convenience and necessity as required by R.C. 4906.10(A)(6). In sum, Applicant requests the OPSB to authorize construction of a privately-owned project that will visit currently-unknown, and potentially vast, environmental harms upon Lake Erie for no economic return – the Proposed Project will intermittently, and inefficiently, produce expensive electricity that will never displace fossil fuel-fired base load electricity for the PJM system. Ohio electric ratepayers "lose" with this project. Ohio taxpayers "lose" with this project . . . The only party that "wins" with this project is publicly-subsidized foreign investor Fred. Olsen Renewables USA LLC. The Proposed Project does not serve the public interest of Ohioans. It violates the Public Trust Doctrine.

(Petition at 13-14.)

Dr. Brown's testimony relates directly to how costly the Icebreaker Project would be, how such costs would impact taxpayers, and the Project's lack of economic and financial viability. Dr. Brown also discusses the intermittent production of costly electricity and the overall inefficiency of the Icebreaker Project, especially in light of the fact that more economical options are already available. Such analysis is entirely relevant to a determination under

[6]Icebreaker argues in its Initial Brief that its Application meets the requirements of R.C. 4906.10(A)(6), without citation to meaningful evidence. Icebreaker Brief at 51-53. Icebreaker also argues that the Project will "benefit[] rate payers and the public interest." *Id.* at 54. The Bratenahl residents certainly have the right to rebut that specious argument with hard economic facts and the sound expert testimony presented by Dr. Brown.

subsection (6) of the statutory test as to whether the Icebreaker Project "will serve the public interest, convenience, and necessity."

D. The ALJ Properly Denied Icebreaker's Motion to Exclude Dr. Gosse's Testimony.

In its Brief, Icebreaker also asks the Board to revisit the ALJ's ruling refusing, properly, Icebreaker's request to exclude the testimony of Dr. Jeff Gosse, an avian radar expert who retired from the USFWS in March 2018. Dr. Gosse is the only independent avian radar expert to testify in this case. Icebreaker seeks to have the Board exclude the testimony of this independent, former FWS expert, because Dr. Gosse unequivocally testifies that Icebreaker has failed establish the probable environmental impact of the Project and that the Project represents the minimum adverse environmental impact. Icebreaker urges that Dr. Gosse should have been prohibited from submitting testimony in this proceeding pursuant to the United States Department of the Interior's ("Department") so-called *Touhy*[7] regulations, and that that even if the Department's *Touhy* regulations do not prevent Dr. Gosse from testifying (they do not), his testimony should have be excluded because it was "unfairly prejudicial" to Icebreaker. As the ALJ properly concluded, Icebreaker's arguments are without merit and should, again, be rejected by the Board.

Icebreaker's primary assertion is that Dr. Gosse's testimony violates the Department of the Interior's *Touhy* regulations, 43 C.F.R. §§2.280-2.290, which, *inter alia,* purport to require a federal agency to grant permission for employees, and former employees, to testify "in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest." In *Touhy,* the United States Supreme Court upheld the validity of a

[7] *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951).

United States Department of Justice order that required subordinate officials (still employed by that department) to obtain the Attorney General's permission before producing department records in response to a subpoena. *Touhy,* 340 U.S. at 468. The department's order was issued pursuant to the federal "Housekeeping Statute," the current version of which is codified at 5 U.S.C. §301. That section provides:

> The head of an Executive department or military department may prescribe regulations ***for the government of his department***, the conduct ***of its employees***, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. ***This section does not authorize withholding information from the public or limiting the availability of records to the public***.

5 U.S.C. §301 (emphasis added). At the time *Touhy* was decided, the Housekeeping Statute was found at 5 U.S.C. §22 and contained only the first sentence of the current version.

> The antecedents of §301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority ***to govern internal departmental affairs***. Those laws were consolidated into one statute in 1874 and the current version of the statute was enacted in 1958.
>
> Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority ***to the agency to regulate its own affairs***. * * *
>
> The 1958 amendment to §301 was the product of congressional concern that agencies were invoking §301 as a source of authority to withhold information from the public. Congressman Moss sponsored an amendment that added the last sentence to §301, which specifically states that ***this section "does not authorize withholding information from the public***." * * * It is indeed a "housekeeping statute," authorizing what the APA terms "rules of agency organization, procedure or practice," as opposed to "substantive rules."

Chrysler Corp. v. Brown, 441 U.S. 281, 309-10 (1979) (emphasis added) (footnotes and citations omitted). See also *Exxon Shipping Co. v. United States Dep't of Interior,* 34 F.3d 774, 776-77 (9th Cir. 1994).

Pursuant to the Housekeeping Statute, federal "[e]xecutive agencies may also promulgate regulations regarding the testimony of employees. Such federal regulations pertaining to the release of documents or information, including through testimony, have become known as *Touhy* regulations." *Louisiana Dep't of Transp. & Dev. v. United States Dep't of Transp.,* No. 15-2638, 2015 WL 7313876 at *3 (W.D.La. Nov. 20, 2015).

1. Icebreaker Lacks Standing to Assert a Violation of the *Touhy* Regulations.

As noted above, the *Touhy* regulations "govern internal department affairs." *Chrysler Corp.,* 441 U.S. at 309. Such regulations "establish policy between [a federal] Department . . . and its personnel, ***not between a private party and [department] employees***." *United States ex rel. Treat Brothers Co. v. Fidelity and Deposit Co. of Md.,* 986 F.2d 1110, 1119 (7th Cir. 1993) (emphasis added). Icebreaker's attempt to use the *Touhy* regulations to exclude Dr. Gosse's testimony, therefore, "present[s] . . . a rather unusual situation in which a private litigant . . . is attempting to enforce [a federal department's] regulations in litigation in which [the department] is not a party and has no interest." *Fidelity and Deposit Co. of Md.,* 986 F.2d at 1118. In such cases, the private litigants seeking to exclude testimony pursuant to the *Touhy* regulations lack standing to raise the issue:

> [The movant] presents us with no other evidence that private enforcement of the [*Touhy*] regulations was intended by their enactment. Thus, regardless of whether [the witnesses] received permission to testify in strict accordance with the letter of the [department's *Touhy*] regulations, we believe that ***[the private movant] does not have standing to claim a violation*** based upon the provisions at issue.

Fidelity and Deposit Co. of Md., 986 F.2d at 1119 (emphasis added). See also *United States ex re. Liotine v. CDW Government, Inc., supra* at *6 ("Based upon these [*Touhy*] regulations, CDW-G maintains that Withycombe is prohibited from testifying as an expert witness on behalf

of relator because he has not obtained permission from the appropriate government entity to do so. Like in *Fidelity & Deposit Co. of Md.,* however, the Court finds that CDW-G, ***a private party, lacks standing to claim a violation of the [Touhy] regulations at issue***. CDW-G has provided the Court with nothing to persuade it that the regulations at issue here were intended to benefit private litigants, and not just the United States. Thus, ***CDW-G lacks standing to pursue this claim, and the motion to exclude the expert testimony of Withycombe is denied***.") (emphasis added) (citations omitted); *Halliwell v. A-T Solutions,* No. 13–CV–2014–H, 2014 WL 4472724 at *5 (D.Haw. Sept. 10, 2014) ("***A private party has no standing*** to enforce military regulations that require a witness to receive permission from the military before testifying.") (emphasis added). Because Icebreaker lacks standing to use *Touhy* regulations to prevent Dr. Gosse's testimony in a state administrative proceeding, its renewed request exclude Dr. Gosse's testimony must be denied.

2. *Touhy* Regulations Cannot Prevent a Former Employee from Testifying.

As noted above, Dr. Gosse has been retired from the FWS since March 2018; he is no longer an employee of that agency. Although the *Touhy* regulations purport to apply to both "employees" and "former employees" of federal agencies—by defining the term "employee" as "a current or former Department employee, including a contract or special government employee," 43 C.F.R. §2.280(b)—courts have uniformly held that such regulations "***are unlawful to the extent they apply to former employees***." *Koopmann v. United States Dep't of Transporation,* 335 F.Supp.3d 556, 558 (S.D.N.Y. 2018) (emphasis added).

> In short, the text, structure, and purpose of the Housekeeping Statute all compel the conclusion that ***the phrase "conduct of its employees" refers to current employees alone*** and, thus, that USDOT's regulations regulating when "employees" may testify ***are invalid to the extent they purport to apply to former employees***. Notably, the few courts to have considered the issue presented here

> have all reached the very same conclusion. See *La. Dep't of Transp. & Dev. v. United States Dep't of Transp.*, No. 15-CV-2638 (RGJ), 2015 WL 7313876 (W.D.La. Nov. 20, 2015); see also *Gulf Oil Corp. v. Schlesinger,* 465 F.Supp. 913, 917 (E.D. Pa. 1979) * * *; *Gulf Grp. Gen. Enters. Co. W.L.L. v. United States,* 98 Fed.Cl. 639, 644 (2011) * * *.

Koopmann, 335 F.Supp.3d at 562. See also *Sherwood v. BNSF Railway Co., supra* at *2-3 (*Touhy* "regulations are invalid to the extent they purport to apply to former employees."). Accordingly, even if Icebreaker had standing to attempt to use *Touhy* to prevent independent avian radar expert Dr. Gosse from testifying, the Department's regulations cannot be used to prevent Dr. Gosse, no longer an FWS employee, from submitting testimony in this matter.

3. Because the *Touhy* Regulations Govern Only the Internal Affairs of Federal Departments, Such Regulations Cannot be Construed to Exceed Congress's Express Statutory Restrictions—Set Forth in 18 U.S.C. §207—on the Testimony of Former Federal Employees

As noted above, the *Touhy* regulations are authorized by the federal Housekeeping Statute "to govern internal departmental affairs." *Chrysler Corp.,* 441 U.S. at 309. Such regulations are "'rules of agency organization, procedure or practice,' as opposed to 'substantive rules.'" *Chrysler Corp.,* 441 U.S. at 310. See also *In re Bankers Trust Co.,* 61 F.3d 465, 470 (6th Cir. 1995) ("Section 301, however, is nothing more than a general housekeeping statute and does not provide 'substantive' rules regulating disclosure of government information.") (citation omitted), *cert. dismissed,* 517 U.S. 1205 (1996); *Exxon Shipping Co.,* 34 F.3d at 777. Rather, the governing, substantive, restrictions controlling testimony of former federal employees are established by federal statute, in 18 U.S.C. §207.

> There is an existing, elaborate government construct to control future employment and activities of government personnel who leave government service. ***Post-employment restrictions are imposed on federal employees and former military officers * * * by 18 U.S.C. §207 (2006)***, titled "Restrictions on former officers, employees, and elected officials of the executive and legislative branches." The statute at 18 U.S.C. §207 is not a general housekeeping statute, but contains specific, substantive, prohibitions and penalties.

Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 98 Fed.Cl. 639, 645 (2011) (emphasis added). 18 U.S.C. §207 only prohibits former employees, in certain instances, from appearing "before any officer or employee of any department, agency, court, or court-martial ***of the United States or the District of Columbia*** on behalf of any other person . . . ." 18 U.S.C. §207(a)(1) & (b)(1) (emphasis added). There is no federal prohibition on a former federal employee testifying in a state court proceeding, much less in a state administrative proceeding. The limited prohibitions of 18 U.S.C. §207 are completely inapplicable Dr. Gosse's testimony before this Board.

4. Dr. Gosse's Testimony Was Not Unfairly Prejudicial to Icebreaker.

Finally, Icebreaker asserts that Dr. Gosse's testimony should have been excluded because it was unfairly prejudicial to Icebreaker because he "was privy to confidential information and internal USFWS discussions with the Applicant, the Ohio Department of Natural Resources ('ODNR'), and the Board." Icebreaker Brief at 16.[8] This argument is utterly without merit.

Dr. Gosse has been retired from FWS since March 2018. He has not been privy to any purported "confidential information" or "internal discussions" at FWS since that date. Significantly, because the Board limited the evidence for the August 20, 2019 hearing "to the fifth amendment to the application, modifications made between the September 4, 2018 stipulation and the [Revised] Stipulation, as well as any new, relevant information that has developed since . . . October 2, 2018 . . . ," *In re Icebreaker Windpower, Inc.,* No. 16-1871-EL-

[8]As evidence of the "unfair prejudice" that has yet to arrive, Icebreaker references two reports that Dr. Gosse authored with regard to radar studies related to the Great Lakes. Icebreaker Brief at 16 and n.41. Icebreaker fails to explain how Dr. Gosse's authorship of these reports—completely unrelated to its proposed Project—in any way prejudices (much less, unfairly prejudices) it in these proceedings. Moreover, Dr. Gosse's testimony does not substantively address either of those reports.

BGN, Entry at 2-3, ¶10 (June 17, 2019), and since Dr. Gosse's pre-filed testimony adhered to that restriction, Icebreaker's assertion of unfair prejudice is utterly without merit. Dr. Gosse has simply testified, based on Icebreaker's Application, the public record in this case, and the Revised Stipulation—all of which is in the public record, and is not confidential—that Icebreaker has failed to establish the probable environmental impact of the Project (R.C. 4906.10(A)(2)) or that the Project represents the minimum adverse environmental impact (R.C. 4906.10(A)(3)). Icebreaker's renewed request to exclude the testimony of independent avian radar expert Dr. Gosse has no more merit than its original, properly denied, request. It must be denied.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Post-Hearing Brief, the Bratenahl Residents respectfully urge the Board to reject the Revised Stipulation and to deny Icebreaker's Application for a Certificate of Environmental Compatibility & Public Need.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document also is being served upon the persons below via electronic mail on November 15, 2019.

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Summary: Brief BRATENAHL RESIDENTS' POST-HEARING REPLY BRIEF electronically filed by John F Stock on behalf of W. Susan Dempsey and Robert M. Maloney