BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Republic Wind, LLC, for a Certificate to Site Wind Powered Electric Generating Facilities in Seneca and Sandusky Counties, Ohio.	: : : :	Case No. 17-2295-EL-BGN

MOTION TO REOPEN THE PROCEEDING

Pursuant to Ohio Adm.Code 4906-2-31, the Staff of the Ohio Power Siting Board ("Staff") moves the Ohio Power Siting Board ("Board") to reopen this proceeding for the limited purpose of permitting the parties to supplement the record with additional aviation-related evidence. This Motion to Reopen the Proceeding is for good cause shown as discussed in the attached memorandum in support. The additional evidence could not have been presented earlier in the proceeding, as it was not available until after the record in this case was closed. The evidence Staff intends to present via an updated staff report will assist the Board in this proceeding.

Respectfully submitted,

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Ohio Attorney General

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/s/ Jodi J. Bair
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On Behalf of the Staff of
The Ohio Power Siting Board

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Republic Wind, LLC for a Certificate to Site Wind-Powered Electric Generation Facilities in Seneca and Sandusky Counties, Ohio.	:	Case No. 17-2295-EL-BGN

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 2, 2018, as amended on March 27, 2018, December 26, 2018, and June 28, 2019, Republic Wind, LLC, ("Republic") filed an application with the Board for a certificate of environmental compatibility and public need to construct between 44 and 47 wind turbine generators, depending on the final turbine model selected. The total generating capacity of the facility will not exceed 200 MW. A local public hearing was held on September 12, 2019 and an adjudicatory hearing began on October 2, 2019 and concluded on November 25, 2019. Parties filed initial post-hearing briefs on December 23, 2019 and reply briefs on January 13, 2020.

Staff, in furtherance of its investigatory function pursuant to R.C. 4906.07(C), consulted with the Ohio Department of Transportation – Office of Aviation ("ODOT") under R.C. 4906.10(A)(5). Initially, as described in the Staff Report of Investigation ("Staff Report") filed on July 25, 2019, ODOT had issued two letters prior to the issuance

of the Staff Report. Relevant to the Staff Report, ODOT had issued a July 18, 2019 recommendation ("July 2019 Letter") following receipt of the Federal Aviation Administration's ("FAA") determination of no hazard ("DNH"). Staff, relying on ODOT and FAA, recommended that certain aviation-related conditions become part of any certificate issued for the proposed facility.

In September 2019, ODOT issued a second recommendation ("September 2019 Letter") in this case stating that the proposed wind turbines will be "obstructions" according to 14 CFR Part 77 and have been determined by the FAA to have an adverse effect on the safe and efficient use of navigable airspace by aircraft. In its September 2019 Letter, ODOT updated its July 2019 Letter as a result of having received written concerns from Fostoria Metropolitan Airport and receiving clarification of the objections of the wind turbines from Seneca County Airport. Staff, after receiving ODOT's recommendation, issued a Supplement to the Staff Report of Investigation ("Supplement") on October 18, 2019. Staff, again relying on ODOT's September 2019 Letter, and acknowledging the FAA's DNH, recommended that two additional conditions become part of any certificate issued for the proposed facility.

However, in a March 10, 2020 letter to the Board ("March 2020 Letter"), ODOT stated that it is modifying its earlier recommendations regarding the Republic Project because of a recent Franklin County Court of Common Pleas decision in *One Energy Enterprises LLC, et al., v. Ohio Dept. of Transp.* (*One Energy*).[1] ODOT's March 2020

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[1] *One Energy Enterprises LLC, et al., v. Ohio Dept. of Transp.,* Franklin C.P. No. 17 CV 005513 (March 2, 2020).

Letter stated that its determination is limited by statute to include only the impacts to the clear zone, horizontal, conical, primary, approach, and transitional surfaces of airports that have been issued a commercial operating certificate. Due to the court's decision, ODOT believes that none of the proposed wind turbine structures impact the surfaces subject to ODOT's determination. Beyond determinations related to these six surfaces, the court held that ODOT had no jurisdiction to make a permitting decision according to R.C. 4561.32(A).[2]

On March 12, 2020, Republic filed a notice of additional authority, attaching the *One Energy* decision from the Franklin County Court of Common Pleas. Staff believes the March 2020 Letter in combination with the *One Energy* decision necessitates the reopening of the proceeding, as the *One Energy* decision was not available when the parties filed briefs in this case. Specifically, Staff consulted both with ODOT, pursuant to R.C. 4906.10(A)(5), and with the FAA to ensure consideration of its nationwide focus and assessments. In considering the recommendations of both of these entities with subject matter expertise, Staff deferred to the more stringent recommendations between the two. However, recent events which occurred following the close of the proceeding in this case require Staff to rely only upon the FAA's recommendations, which would require Staff to update the evidence in this case, including the removal of and modification to proposed conditions in the Staff Report and Supplement as well as the addition of a new condition.

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[2] R.C. 4561.32 is referenced in the Ohio Power Siting Board statute R.C. 4906.10(A)(5).

II. STAFF'S MOTION SHOULD BE GRANTED

A. Legal Standard

The standard for reopening Board proceedings can be found in Ohio Adm.Code 4906-2-31:

> (A) The board or the administrative law judge may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.
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> (B) A motion to reopen a proceeding shall specifically set forth the nature and purpose. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe the nature and purpose of the requested reopening of such evidence and shall set forth facts showing why such evidence could not with reasonable diligence have been presented earlier in the proceeding.

Staff's motion meets the standards set forth in Ohio Adm.Code 4906-2-31 and should be granted.

B. Staff's Motion to Reopen meets the two standards of Ohio Adm.Code 4906-2-31(A).

Staff's motion satisfies the first requirement in Ohio Adm.Code 4906-2-31(A) because Staff makes this motion before there has been a final order issued. Staff also shows good cause to reopen this proceeding. R.C. 4906.10 requires that before the Board may issue a power siting certificate, it must make a finding and determination with regards to a number of issues. These issues include, but are not limited to, whether the facility represents the minimum adverse environmental impact,[3] whether the facility will

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[3] See R.C. 4906.10(A)(3).

serve the public interest, convenience, and necessity,[4] and whether the facility, after consultation with ODOT, will comply with certain aviation-related regulations.[5]

In furtherance of and compliance with these statutory standards, Staff consulted with ODOT with regards to this project. ODOT's recommendation in its September 2019 Letter referenced above, directly impacted specific conclusions reached in the Staff Report, specific certificate conditions proposed in the Staff Report, certain aviation-related testimony, as well as evidence presented at hearing and addressed in briefs. The *One Energy* decision and ODOT's March 2020 Letter, which were both issued after the hearing concluded and briefs were filed, may directly alter the above-mentioned conclusions, conditions, and evidence as they relate to Staff's investigation pursuant to R.C. 4906.07 and correspondingly the criteria in R.C. 4906.10. Reopening the proceeding to allow the parties to supplement the record with additional aviation-related evidence, will ensure that a full investigation has been conducted on this issue of public importance, allow for due process, and ensure that the Board has an accurate and complete record before it in which to make a decision. Specifically, Staff proposes to reopen the proceeding and introduce an update to the Staff Report and Supplement, which proposes the removal of conditions and the addition of a new condition to ensure the Board can make a determination pursuant to the criteria in R.C. 4906.10. (See **Exhibit A**.) Therefore, good cause exists to reopen the proceeding for this limited purpose.

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[4] See R.C. 4906.10(A)(6).

[5] See R.C. 4906.10(A)(5).

C. Staff's Motion to Reopen meets the two standards of Ohio Adm.Code 4906-2-31(B).

The first standard in Ohio Adm.Code 4906-2-31(B) is that the movant must "specifically describe the nature and purpose of such evidence" for supplementing. As described above, Staff seeks to reopen the record for the specific and limited purpose of providing additional evidence on the aviation issues in the proceeding. Aviation conditions were addressed in the Staff Report and Supplement in Conditions 52, 56, 57, and 59. In addition, Staff witness Conway addresses these conditions in his prefiled testimony and was cross-examined on these conditions at hearing. Also, ODOT witness Mr. Stains provided prefiled testimony regarding the aviation issues and was cross-examined on those issues. Staff and other parties should be allowed to offer supplemental evidence on these aviation issues in light of the *One Energy* decision and ODOT's March 2020 Letter. As stated above, this is the only way to ensure that the Board has a complete and accurate record before it and that parties are given a full and fair opportunity to be heard and present evidence that could not with reasonable diligence have been presented earlier. Additionally, Staff desires to fully investigate this application and all information received, pursuant to its duty under R.C. 4906.07, giving appropriate weight and consideration to the opining of ODOT and FAA. Staff proposes to present its analysis through a second supplemental staff report filing, attached hereto as **Exhibit A**.

Ohio Adm.Code 4906-2-31(B) requires a movant to show that the supplemental information could not have been presented earlier with reasonable diligence. Historically, this standard has focused on whether the party seeking to reopen the record had a fair

opportunity to present the information at hearing.[6] At the time of the hearing and at the time that initial and reply briefs were filed – reply briefs were filed on January 13, 2020 – the *One Energy* decision had not yet been issued. The date of the court decision was March 2, 2020. ODOT's March 2020 Letter, and its modified recommendation on the aviation issues in this proceeding, also postdated the hearing and briefing stage. Therefore, supplemental information concerning the March 2020 Letter and the court's decision regarding the aviation issues could not have been presented earlier in the proceeding.

III. CONCLUSION

Two events germane to the proposed project occurred after the record closed in this proceeding: (1) *One Energy* held that ODOT's jurisdiction did not extend to all the aviation issues contemplated in this case; and (2) ODOT issued a revised recommendation on the aviation issues in this case. To protect the public, allow for due process for all parties, and ensure that the Board has an accurate and complete record before it in which to make a well-informed decision, the Board should reopen the proceeding for the limited purpose of taking additional evidence on aviation-related issues.

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[6] See *In the Matter of the Petition of Numerous Subscribers of the Seven Mile Exchange of Cincinnati Bell Telephone Company, Complainants, v. Cincinnati Bell Telephone Company, Respondent, Relative to a Request for Two-way, Nonoptional, Extended Area Service Between the Seven Mile and Cincinnati Exchanges of Cincinnati Bell Telephone Company*, Case No. 90-1522-TP-PEX, Entry on Rehearing at 2 (May 20, 1992).

Respectfully submitted,

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On Behalf of the Staff of
The Ohio Power Siting Board

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Motion to Reopen the Proceeding**, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail upon the following parties of record, this 4th day of May, 2020.

/s/ *Jodi J. Bair*
Jodi J. Bair
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EXHIBIT A

Second Supplement to the Staff Report of Investigation

Republic Wind Farm
Republic Wind, LLC

Case No. 17-2295-EL-BGN

May 4, 2020

Ohio | Power Siting Board

Mike DeWine, Governor | **Sam Randazzo,** Chairman

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**

Second Supplement to the Staff Report of Investigation

Submitted to the
OHIO POWER SITING BOARD

BEFORE THE POWER SITING BOARD OF THE STATE OF OHIO

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**

Chairman, Public Utilities Commission	Director, Department of Natural Resources
Director, Department of Agriculture	Public Member
Director, Development Services Agency	Ohio House of Representatives
Director, Environmental Protection Agency	Ohio Senate
Director, Department of Health	

To the Honorable Power Siting Board:

In accordance with the Ohio Revised Code (R.C.) 4906.07(C) and rules of the Ohio Power Siting Board (Board), the staff of the Public Utilities Commission of Ohio (Staff) completed its investigation in the above matter and submitted its findings and recommendations in its Staff Report on July 25, 2019 and Supplement to the Staff Report on October 18, 2019, for consideration by the Board. Since that time, new information regarding impacts from aviation have compelled the Staff to supplement that Staff Report.

The findings and recommendations contained in this Second Supplement to the Staff Report include the results of Staff coordination with the Ohio Department of Transportation – Office of Aviation (ODOT-OA).

In accordance with R.C. 4906.07(C) and Ohio Administrative Code (Ohio Adm.Code) 4906-2-05(A), copies of this Second Supplement to the Staff Report have been filed with the Docketing Division of the Public Utilities Commission of Ohio and served upon the Applicant or its authorized representative, the parties of record, and pursuant to Ohio Adm. Code 4906-3-06(C)(5), placed in the main public libraries of the political subdivisions in the project area.

This Second Supplement to the Staff Report presents the results of Staff's investigation conducted in accordance with R.C. Chapter 4906 and the rules of the Board, and does not purport to reflect the views of the Board nor should any party to the instant proceeding consider the Board in any manner constrained by the findings and recommendations set forth herein.

Respectfully submitted,

/s/ Theresa White
Theresa White
Executive Director
Ohio Power Siting Board

Background and Purpose

The Board commenced an adjudicatory hearing regarding the Application of Republic Wind, LLC (Republic or Applicant) on November 4, 2019 and concluded the hearing on November 25, 2019. During that adjudicatory hearing, the Staff Report, Supplement to the Staff Report, and prior ODOT-OA determination letters were admitted into the record. Parties filed initial post-hearing briefs on December 23, 2019 and reply briefs on January 13, 2020. Since that time, new information regarding impacts from aviation have compelled the Staff to submit a second supplement to its Staff Report of Investigation (Second Supplement) to modify and update aviation related conditions.

Notably, on March 2, 2020, the Franklin County Court of Common Pleas issued a decision in *One Energy Enterprises LLC, et al., v. Ohio Depart. of Transp.*, No. 17-CV-005513 (Franklin C.P. March 2, 2020) (*One Energy Decision*). Subsequent to that decision, on March 10, 2020, ODOT-OA issued a modified determination letter pursuant to R.C. 4561.341, which Staff filed with the Board on March 11, 2020.

The purpose of this Second Supplement is to provide Staff's analysis on the aviation related issues and to modify staff's previous recommendations where appropriate.

Staff Investigation

Staff contacted the ODOT-OA during the review of this application (in accordance with R.C. 4906.10(A)(5) and 4561.32) to coordinate review of potential impacts of the facility to airspace navigation.

On March 10, 2020, ODOT-OA issued a modified determination letter pursuant to R.C. 4561.341, which Staff filed with the Board on March 11, 2020. In that letter, ODOT-OA stated that, following the March 2, 2020 *One Energy Decision*, its determination is limited by statute to include only impacts to the clear zone, horizontal, conical, primary, approach and transitional surfaces of airports that have been issued a commercial operating certificate. These surfaces are outlined in 14 CFR Part 77.19 and 77.21 and are clearance areas or perimeters around airports. In its March 10 letter, ODOT-OA advises that none of the proposed wind turbine structures would impact these surfaces.

The Federal Aviation Administration (FAA), after performing its aeronautical study, concluded that: "the proposed construction would not have a substantial adverse effect on the safe and efficient use of the navigable airspace by aircraft or on any air navigation facility and would not be a hazard to air navigation provided the conditions set forth in this determination are met."[1] The FAA has issued determination of no hazard letters for all 50 wind turbine structures with requirements in those letters. Generally, the requirements included proper marking and lighting of the turbines, construction notifications, and alterations to various flight procedures and fight altitudes.

Staff examined the proposed aviation conditions in light of the recently modified determination of ODOT-OA and concluded that certain revisions should be made to the conditions in the original Staff Report of Investigation and Supplemental Staff Report as described below.

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[1] FAA Aeronautical Study No. 2018-WTE-11673-OE at 12 (June 26, 2019).

Modification to Condition 52
Staff finds that Condition 52 of the Staff Report should be revised as follows:

> (52) The Applicant shall meet all recommended and prescribed Federal Aviation Administration (FAA) requirements to construct an object that may affect navigable airspace.

Staff recommends this condition to assure the Board that the FAA has reviewed those wind turbines that have 14 CFR Part 77 impacts and that they will comply with related aviation regulations. The ODOT-OA has reviewed the wind farm project and advises that none of the proposed wind turbine structures impact the surfaces under its determination in R.C. 4561.341.

Removal of Condition 56
Staff finds that a tip height restriction on turbine location 3, to avoid interference with the non-directional beacon runway approach at Seneca County Airport, is no longer necessary. Staff has found that the non-directional beacon navigation system can continue to be utilized at Seneca County Airport, but at a higher altitude after installation of the wind farm project as currently proposed.[2] The ODOT-OA has reviewed the wind farm project and advises that none of the proposed wind turbine structures impact the surfaces under its determination. Staff recommends that Condition 56 of the Staff Report be removed.

Removal of Condition 57
The ODOT-OA has reviewed the current wind farm project and advises that none of the proposed wind turbine structures impact the surfaces under its determination. Staff recommends that Condition 57 of the Staff Report be removed.

Removal of Supplemental Report Condition 59
By letter dated August 1, 2019, the Fostoria Metropolitan Airport (Fostoria) manager petitioned the FAA to object to the determination of no hazard letters issued for 12 wind turbines proposed by Republic.[3] Specifically, the Fostoria manager objected that 12 wind turbines would impact the minimum vectoring altitudes for the runway 27 GPS instrument approach procedure, representing a loss of utility for that approach procedure. Fostoria also alleged that there would be a decrease in safety because increased altitude represents more time spent in icing conditions, particularly for Bowling Green State University (BGSU) flight center students.

Staff contacted the FAA and learned that the FAA had sent Fostoria two postcards to inform it of the FAA's public notice circularization process and its opportunity to provide comments to the FAA. The FAA's public notice of this aeronautical study was from 4/22/2019 to 5/29/2019. Fostoria did not submit its comments/objections during that period. The FAA determination of no hazard letters were issued on 6/26/2019 with a deadline of 7/26/2019 to file a petition with the FAA. Fostoria did not participate in the FAA public notice circularization process and late filed

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[2] Newman, Transcript, Vol. VI at 1242:15-23.

[3] "Public Comment of Dave Sniffen, Airport Manager, Fostoria Metropolitan Airport" Case No. 17-2295-EL-BGN, (August 15, 2019).

its petition letter. Fostoria's petition was examined by FAA and found not to meet the criteria in 14 CFR Part 77 and declared it to be an invalid petition. With regards to the icing issue raised in Fostoria's correspondence with the FAA, Benjamin Doyle, consultant with Capitol Airspace Group, testified that there would be no icing concerns. Specifically, the approach altitude would be altered by plus or minus 100 feet. That altered flight path would not create a hazardous environment.[4]

Staff found that the FAA has addressed icing holistically and was aware of the potential safety risk to pilots. To address the matter, FAA previously published Advisory Circular 91-74B entitled "Pilot Guide: Flight in Icing Conditions."[5] This FAA Advisory Circular acknowledges that some aircraft are equipped with de-icing/anti-icing systems and some aircraft are certificated to fly in icing conditions. It also acknowledges that pilots have many tools to account for potential icing conditions such as flight planning, weather notification services, and pre-flight checklists. The Advisory Circular further states that: "If an aircraft is not certificated for flight in icing conditions, each flight should be planned carefully so that icing conditions are avoided."[6] It also confirms the Applicant's testimony that for an aircraft that is not certificated for flight in icing conditions that inadvertently encounters ice, the aircraft should exit the icing conditions and declare an emergency with air traffic control.[7,8]

Further, Staff contacted the BGSU flight center and found that BGSU flight students receive a flight handbook which details all the rules and regulations on when the students can fly including adverse weather conditions. Staff learned that students review this handbook and brief with the Chief Flight Instructor at the beginning of the semester.

Staff recommends that Condition 59 of the Supplement to the Staff Report, filed on October 18, 2019, be removed.

New Recommended Condition 60

In order that the facility represents the minimum adverse environmental impact and assure that the facility will serve the public interest, convenience, and necessity, Staff recommends the following new condition, as Condition 60:

> (60) That at least 30 days prior to the preconstruction conference, the Applicant shall design and hold a training session to inform local aviation stakeholders (including but not limited to the Seneca County Airport, Sandusky County Regional Airport, and Fostoria Metropolitan Airport) of the changes to flight procedures and altitudes outlined in the Federal Aviation Administration (FAA) determination of no hazard letters.

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4 Transcript, Vol. IV at 899.

5 FAA Advisory Circular 91-74B, Pilot Guide: Flight in Icing Conditions (2015), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_91-74B.pdf" accessed 4/29/2020.

6 Id. at 6.

7 Id. at 40.

8 Doyle, Transcript, Vol. IV at 898.

Recommendation:

Following a review of the application filed by the Republic Wind LLC, and the record compiled to date in this proceeding, Staff recommends the removal of Conditions 56, 57, 59; modification of Condition 52; and the addition of Condition 60, as follows:

(52) The Applicant shall meet all recommended and prescribed Federal Aviation Administration (FAA) requirements to construct an object that may affect navigable airspace.

(60) That at least 30 days prior to the preconstruction conference, the Applicant shall design and hold a training session to inform local aviation stakeholders (including but not limited to the Seneca County Airport, Sandusky County Regional Airport, and Fostoria Metropolitan Airport) of the changes to flight procedures and altitudes outlined in the Federal Aviation Administration (FAA) determination of no hazard letters.

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

Summary: Motion to Reopen the Proceeding electronically filed by Mrs. Kimberly M Naeder on behalf of OPSB