

**BEFORE
THE OHIO POWER SITING BOARD**

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

**APPLICATION FOR REHEARING OF
ICEBREAKER WINDPOWER, INC.
REGARDING OHIO POWER SITING BOARD’S
MAY 21, 2020 OPINION, ORDER, AND CERTIFICATE**

I. INTRODUCTION

Pursuant to Ohio Revised Code (“R.C.”) 4906.12 and 4903.10,¹ and Ohio Administrative Code (“O.A.C.”) Rule 4906-2-32, Icebreaker Windpower, Inc. (“Icebreaker” or “Applicant”) requests rehearing of the May 21, 2020 Opinion, Order, and Certificate (“Order”) issued by the Ohio Power Siting Board (“Board”) in the above-captioned matter.

For the reasons set forth below and detailed in the accompanying Memorandum in Support attached hereto and incorporated herein, Icebreaker respectfully requests rehearing of the Board’s Order. The grounds on which Icebreaker considers the Order to be unjust, unreasonable, and/or unlawful are as follows:

- A. The Board’s modification to the Revised Stipulation mandating that the turbines shut down (“Shutdown Mandate”) during nighttime hours for eight months of the year unless and until the Board allows otherwise in order to mitigate wildlife impacts disregards the support in the record for Icebreaker to tactically feather the turbines in response to real time data (“Tactical Feathering”) and is against the manifest weight of the evidence.

¹ In accordance with R.C. 4906.12, R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23 apply “to any proceedings or order of the [Board] under Chapter 4906. of the Revised Code, in the same manner as if the [B]oard were the public utilities commission under such sections.”

- B. The Board's Order violates R.C. 4903.09, through application of R.C. 4906.12, which requires that "...the [Board] shall file, with the records of such cases, findings of fact and written opinions *setting forth the reasons prompting the decisions arrived at, based upon such findings of fact.*" (Emphasis added).
- C. The Board's Shutdown Mandate exceeds its authority and contravenes R.C. 4906.10(A)(3), which requires the Board determine that the "facility represents the *minimum* adverse environmental impact, considering the *state of available technology and the nature and economics of various alternatives*, and other pertinent considerations." (Emphasis added).
- D. The Board's bifurcation of this decision into a construction versus operation phase and invention of an extra-statutory second permitting process in which the Applicant must return to the Board for a new stakeholder-intervention process in order to scale back the Shutdown Mandate exceeds its statutory authority and contravenes both R.C. 4906.10(A), which requires the Board to "render a decision upon the record" either granting, denying, or granting with modification the application, and the post-certification process required in R.C. 4906.97 and 4906.98.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support. Icebreaker respectfully requests that the Board grant rehearing, and modify its Order, as discussed herein.

Respectfully Submitted,

/s/ Christine M.T. Pirik

Christine M.T. Pirik (0029759)

(Counsel of Record)

Terrence O' Donnell (0074213)

William V. Vorys (0093479)

Jonathan R. Secrest (0075445)

Sara H. Jodka (0076289)

Dickinson Wright PLLC

150 East Gay Street, Suite 2400

Columbus, Ohio 43215

Phone: (614) 591-5461

Attorneys for Icebreaker Windpower Inc.

June 22, 2022

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EXHIBIT A

**MEMORANDUM IN SUPPORT
OF THE APPLICATION FOR REHEARING OF
ICEBREAKER WINDPOWER, INC.
REGARDING OHIO POWER SITING BOARD’S
MAY 21, 2020 OPINION, ORDER, AND CERTIFICATE**

I. INTRODUCTION

“The language in [Icebreaker’s] collision monitoring plan **ensures the minimal adverse environmental impact**, because the Applicant’s operations will be restricted in the event its technology is not operating as outlined in the plan to adequately detect collisions... It ensures swift action to and communications between the company and ODNR to identify a solution ...”² (Emphasis Added).

Ms. Erin Hazleton, M.S., Ohio Department of Natural Resources (“ODNR”) Division of Wildlife, offering her sworn professional opinion concluding Icebreaker represents minimal adverse environmental impact and explaining why the technical experts concluded Tactical Feathering in response to real time data makes a Shutdown Mandate unnecessary. This opinion is shared by experts from the United States Fish and Wildlife Service (“USFWS”) (which issued a “Finding of No Significant Impact”), the Ohio Environmental Council (“OEC”), and Sierra Club.

Applicant moves for Rehearing because, after years of study and negotiation with Ohio’s wildlife experts at the Ohio Power Siting Board and Ohio Department of Natural Resources, as well as federal regulators at USFWS, it was stunned to read the Board’s Order overruling the technical staff and mandating a full shut-down of wind farm operations every night for eight months of the year. Unless revised, the Order renders Icebreaker commercially un-financeable

² Staff Ex. 14 at 5-6.

and deals a regulatory deathblow to the Project and to Cleveland's foray into the international growth opportunity represented by offshore wind.

II. HISTORY

On February 1, 2017, Icebreaker filed an application with the Board for a Certificate of Public Environmental Compatibility and Public Need to construct the proposed 6-turbine, 20.7 megawatt ("MW") Project ("Application").

On July 3, 2018, the Board's Staff ("Staff") filed its Staff Report of Investigation ("Staff Report"). The Staff Report contained a recommendation that the Project be shut down at night for most of the year.

Unable to accept that condition, on September 4, 2018, Icebreaker, Business Network for Offshore Wind, Inc. ("Business Network"), the Sierra Club, Indiana/Kentucky/Ohio Regional Council of Carpenters ("Carpenters' Council"), and OEC filed a Joint Stipulation and Recommendation ("9/4 Stipulation") that Staff did not join. On September 24, 2018, the Board commenced a seven-day hearing on the 9/4 Stipulation. Post-hearing, further enlightened by the proceedings, the parties (including Staff) agreed to go back to the negotiating table to attempt to resolve their outstanding differences over wildlife mitigation measures. The discussions proved fruitful.

On May 15, 2019, Icebreaker, Staff, Business Network, the Sierra Club, the Carpenters' Council, and OEC ("Signatory Parties") filed the Revised Joint Stipulation ("Revised Stipulation") that superseded and replaced the 9/4 Stipulation. The Revised Stipulation included additional safeguards for wildlife monitoring, including Tactical Feathering based on wildlife impacts observed in real time and strict agency oversight. The staffs of the Board and ODNR were now supportive and in agreement the fatal Shutdown Mandate was not necessary. The hearing

recommenced on August 20, 2019, for the sole purpose of considering the Revised Stipulation. The experts for the staffs of the Board and ODNR revised their testimony and superseded their earlier testimony based on the additional clarity and wildlife protections added in the Revised Stipulation.³

It was this carefully-negotiated Revised Stipulation and its Tactical Feathering provision that the Board's Order (paragraphs 160 and 161) upended through a surprise re-insertion of the fatal Shutdown Mandate and an unprecedented second regulatory process by which the Board must approve any scaling back of the Shutdown Mandate.

Faced with the prospect of abandoning the Project, forfeiting a \$50 million competitive federal grant, and canceling the signed power purchase agreements for much of Icebreaker's power, the Applicant now asks the Board to reconsider its Order and strike paragraphs 160 and 161.

III. ARGUMENT

- A. The Board's modification to the Revised Stipulation mandating that the turbines shut down ("Shutdown Mandate") during nighttime hours for eight months of the year unless and until the Board allows otherwise in order to mitigate wildlife impacts disregards the support in the record for Icebreaker to tactically feather the turbines in response to real time data ("Tactical Feathering") and is against the manifest weight of the evidence.**

The manifest weight of the evidence in this case, as acknowledged by the Board, supports a determination that the Revised Stipulation ensures that the facility will have minimum environmental impact as required by R.C. 4906.10(A)(3). Therefore, the Revised Stipulation should be approved by the Board without modification.

³ Staff Ex. 13 at 2; Staff Ex. 14 at 2.

The expert witnesses from Staff, ODNR, and the Applicant agree that the conditions in the Revised Stipulation, including Conditions 18 and 23, coupled with the commitment in the Collision Monitoring Plan that provide for Tactical Feathering, make the need for the Shutdown Mandate as initially proposed in the Staff Report and resurrected by the Board in the Order unnecessary.

1. Order Internally Inconsistent

Notably the Order's modification contradicts not only the manifest weight of the evidence, but the Board's own conclusion in the Order. The Board acknowledged "the extensive evidence provided in order to evaluate the nature of the probable environmental impact of the project on birds and bats."⁴ In its Order, the Board accepted the experts' findings and testimony and reached the conclusion that the facility represents the minimum adverse impact, concluding that the risk to birds is no greater than existing terrestrial projects and maybe even less, stating:

"No evidence was presented to suggest that an offshore wind facility would have more impact to birds than a terrestrial facility...

evidence demonstrated that an offshore facility may have less impact on nocturnal migrating birds than land-based wind projects...

bat activity near the Icebreaker project area is significantly greater onshore than offshore."⁵

The significance of this cannot be overstated. The Board found the impacts on an offshore project are no greater than onshore, and Icebreaker is a far smaller project than many wind farms already certificated by the Board, and those larger farms do not have a Shutdown Mandate. This simple fact destroys any justification for the draconian Shutdown Mandate.

⁴ Order at 39 ¶103.

⁵ *Id.* at 40 ¶105.

Significantly, the Board cited to Applicant's expert Dr. Caleb Gordon's review of 42 terrestrial wind farms and noted, "[a] review of these other wind projects produces a consistent impact on migrating birds."⁶ Once that finding has been accepted, then *ipso facto* the Board cannot then conclude that the Shutdown Mandate (never applied to any of the far larger onshore wind farms) is required.

The record in this case is voluminous and there is a considerable amount of detailed material regarding the safeguards in place to ensure the minimum adverse environmental impact on birds and bats. Thus, Exhibit A, attached hereto and incorporated herein, provides a chronological account of how and why Revised Stipulation Condition 18 came to be, and why the Tactical Feathering condition is superior to the Shutdown Mandate.

2. Extensive Safeguards in Revised Stipulation

The bottom line is all of the state's technical experts and those of the Applicant agree that the Revised Stipulation satisfies the statutory criteria for "minimum adverse impact" in R.C. 4906.10(A)(3). The agreed-upon (extensive) measures that led to this conclusion include:

- (1) The collision-detection technology must be demonstrated to ODNR's satisfaction through lab and field testing prior to start of construction.
- (2) The collision-detection technology must be installed and fully functioning prior to operation.
- (3) Tactical Feathering: The Collision Monitoring Plan provides that ODNR and Staff will have the authority to direct mandatory feathering from March 1 through January 1, during nighttime hours, in the event the collision-detection system ceases to perform as set forth in the Collision Monitoring Plan.
- (4) The reliability threshold for avian radar data will be set at 75 percent viable data, with no exceptions.

⁶ *Id.*

- (5) The length of the radar monitoring seasons includes all days from April 1 through November 15.
- (6) The number of collisions before adaptive management is triggered is 21, facility-wide, within a 24-hour period.⁷

In fact, the Order acknowledged that these extensive measures set forth in the Revised Stipulation will “bolster the protection of various wildlife species that may be impacted by the project.”⁸

The Applicant is perplexed that, on one hand, the Order readily acknowledges that the Revised Stipulation bolsters the protection of wildlife species through these very measures, but on the other hand, re-imposes the Shutdown Mandate. What is the point of these agreed-upon measures (including collision monitoring, Tactical Feathering, and bird and bat thresholds) intended to replace the Shutdown Mandate if the Project cannot even operate much of the time? The whole point of the measures in the Revised Stipulation was to obviate the need for the Shutdown Mandate, not layer them on top of it.

The Applicant has agreed with Staff to notify the regulators immediately upon a taking of less than two dozen birds-plus-bats in a one-day period—a number painstakingly negotiated among career wildlife technical experts over a period of months. Thus, when the collision detection shows an adverse impact such as this, the agency regulatory powers are immediately triggered. The Shutdown Mandate is, therefore, a redundant, overly broad regulatory axe evidently intended to do the job that the state’s wildlife experts believe can be managed with a scalpel.

In addition to the evidence above supporting approval of the Revised Stipulation, the evidence of record reflects the following additional safeguards:

- (1) The Avian and Bat Impact Mitigation Plan (“IMP”) must include a Collision Monitoring Plan and adaptive management strategies, and

⁷ Order at 73 ¶152.

⁸ *Id.*

remains in place through the life of the Project (Revised Stipulation Condition 18).

- (2) The collision-detection technology must continue to function in accordance with the Collision Monitoring Plan (Revised Stipulation Condition 18).
- (3) The Applicant must comply with all terms of the Avian and Bat Memorandum of Understanding (“MOU”), as well as the Avian and Bat Monitoring Plan, which is attached to the MOU, and any other protocols or documents resulting from the MOU, and shall file the annual and final reports in the docket (Revised Stipulation Conditions 15 and 24).
- (4) Prior to commencement of construction, the required avian and bat plans prepared under the Revised Stipulation, including the Collision Monitoring Plan, must be reviewed and accepted through written communications from ODNR (Revised Stipulation Conditions 15, 18, 20, 23).
- (5) Prior to commencement of construction, the pre-construction radar study and the bat activity study must be completed (Revised Stipulation Condition 21).
- (6) If construction is delayed beyond 5 years, certain wildlife surveys may need to be updated (Revised Stipulation Condition 25).⁹

With the numerous safeguards and, as the Order puts it, the “vast amount of information... provided on the record in support of the project,”¹⁰ including “the extensive amount of information that has been provided by Icebreaker regarding the various risk assessments and analyses undertaken to identify the risk and the various protocols and measures adopted by the Applicant in order to sufficiently respond to those risks,”¹¹ it is shocking that the Board would mandate shutting down the facility every night for eight months.

⁹ Jt. Ex. 2.

¹⁰ Order at 71 ¶149.

¹¹ *Id.*

3. Shutdown Mandate is Radical Departure from Revised Stipulation

The Order states that the Shutdown Mandate is “consistent with what the Applicant agreed to in the Fifth Supplement”¹² This is false. In fact, a comparison of the Fifth Supplement (Tactical Feathering)¹³ and the Order (Shutdown Mandate) show two glaring inconsistencies.

First, the Shutdown Mandate is the starting point/default where the facility cannot operate at nighttime eight months out of the year - with no rational basis for the complete shut down. The Shutdown Mandate is open-ended and lacks any definitive process for determining how the need for on-going feathering would be evaluated by the Board in the future, and whether and when it could be removed. Conversely, the Revised Stipulation includes Tactical Feathering, where the starting point/default is operating the turbines 24/7 year-round, unless the proven collision-detection technology (which must be fully functioning prior to operation) fails to perform in accordance with the Collision Monitoring Plan. The Revised Stipulation contains predictable thresholds known at the outset and clear parameters for when and how regulatory action would be taken.

Second, as discussed in further detail below, the Order also takes the unprecedented step of requiring a second full-blown regulatory review and approval phase to the Board’s decision on

¹² Order at 78 ¶160.

¹³ App. Ex. 57. The Fifth Supplement reflects Icebreaker’s commitment that the following language, which was approved by ODNr, would be included in the Avian and Bat IMP and the Collision Monitoring Plan (both of these plans are required to be completed and accepted by ODNr prior to construction pursuant to Revised Stipulation Condition 18):

“...if ODNr and Staff determine, once operation commences, that the technology is not working as set forth in the collision monitoring plan such that there is a defect preventing accurate detection of collisions, ODNr and Staff may require turbines be feathered, either partially or completely, until the technology has been demonstrated to work as set forth in the collision monitoring plan. If feathering is required, it would be limited to nighttime hours...and would only be applicable during...migration periods (March 1 through January 1). However, based on the totality of the circumstances, ODNr and Staff may require less- restrictive times or periods....” (Tactical Feathering).

the subject, akin to a second certification. The Shutdown Mandate is most definitely not “consistent with what Applicant agreed to.”¹⁴

As Icebreaker’s President David Karpinski testified on the record in the first hearing, the Shutdown Mandate makes the Project impossible to finance; thus, the certificate is of no value. The Order is a functional denial of the certificate - a denial counter to the manifest weight of the evidence.

4. Record Replete with Data Supporting Revised Stipulation

Substantial documentation throughout the record supports a finding that, considering the “nature of the probable impact” of the facility, the Revised Stipulation “represents the minimum adverse environmental impact, *considering the state of available technology and the nature and economics of the various alternatives, and other pertinent factors*”¹⁵ (Emphasis added), with regard to the impact to birds and bats and the mitigation responsibilities. Specifically, the facts underlying the Revised Stipulation that are supported by substantial documentation and testimony¹⁶ (as acknowledged by the Board)¹⁷ throughout the record, include, but are not limited to, the following documents:

- (1) 2016 Icebreaker Wind: Summary of Risks to Birds and Bats.¹⁸
- (2) March 20, 2018 Risk Assessment Summary.¹⁹
- (3) January 2017 NEXRAD Analysis.²⁰
- (4) Avian and Bat MOU.²¹

¹⁴ Order at 78 ¶160.

¹⁵ R.C. 4906.10(A)(2) and (3).

¹⁶ *See e.g.*, Staff Ex. 14.

¹⁷ Order at 39 ¶103.

¹⁸ App. Ex. 1, Ex. J.

¹⁹ App. Ex. 6, Att. 2.

²⁰ App. Ex. 1, Att. J.

²¹ App. Ex. 38.

- (5) Avian and Bat Monitoring Plan.²²
- (6) Aerial Waterfowl and Waterbird Study Plan.²³
- (7) Aerial Waterfowl and Waterbird Survey Report.²⁴
- (8) 2017 Bird and Bat Monitoring Annual Report dated February 22, 2018.²⁵
- (9) Final Bat Activity Monitoring Report dated February 15, 2018.²⁶
- (10) Avian and Bat IMP.²⁷
- (11) Radar Monitoring Protocol Draft.²⁸
- (12) March 12, 2018 USFWS Letter.²⁹

Therefore, it is more than evident that the manifest weight of the evidence on the record in this case supports a determination that the Revised Stipulation complies with R.C. 4906.10(A)(3) and ensures that the facility represents the minimum adverse environmental impact.

5. Basis Cited for Shutdown Mandate Unlawfully Outside Record

In an effort to justify the Shutdown Mandate, the Order surmises that the “primary purpose”³⁰ and “greater goal”³¹ of this small 6-turbine Project is to assess the viability of future larger-scale offshore wind facilities in the Great Lakes.³² To support these statements, the Order misleadingly cites the Application. The Order, citing the Application, states that “[the Board]

²² App. Ex. 3.

²³ App. Ex. 5.

²⁴ App. Ex. 6, Att. 4, App. B.

²⁵ *Id.*, Att. 4.

²⁶ *Id.*, App. A.

²⁷ App. Ex. 31, Att. REG-2.

²⁸ App. Ex. 32, Att. TJM-2.

²⁹ App. Ex. 6, Att. 6.

³⁰ Order at 72 ¶151.

³¹ *Id.* at 78 ¶160.

³² The Board’s misunderstanding of the purpose of the Icebreaker Project is further evidenced by the statement from ODNR Director Mertz at the Board meeting that “[t]his project has sort of an inherent tension between – it’s a small project so some of the less desirable impacts are ok because it’s small but on the other hand its put forth as a demonstration project which may someday lead to a larger one.” (May 21, 2020 Board Meeting).

observe[s] that the application describes this undertaking as a demonstration project, where a primary purpose is exploring the viability of other, larger-scale offshore wind facilities in the Great Lakes region.”³³ In addition, the Order states “[the Board] acknowledge[s] that the primary purpose of this project is to gather data about the impacts of offshore wind facilities, with a greater goal of assessing the viability [of] other, larger potential offshore wind projects in the Great Lakes region.”³⁴ However, the Order ignores that, the Application states that “while this [f]acility is meant to be a demonstration-scale project to help assess the potential success for future larger-scale offshore wind farms in Lake Erie and other Great Lakes, the Applicant does not currently have future plans with respect to this point of interconnection.”³⁵ (Emphasis added).

Thus, the Order purports to address a grander vision of Ohio offshore wind than is actually before the Board in this case. This is a tacit acknowledgment of what the experts at ODNR and USFWS have found: that “the small scale of the project, which will consist of only six turbines,”³⁶ means it is inherently low risk. Essentially, while acknowledging the Applicant seeks a certificate for a small-scale, 6-turbine project, the Board went outside the record to speculate about future projects with larger environmental impacts. Indeed one of the Board members stated explicitly at the Board meeting that the Shutdown Mandate was needed because, while Icebreaker is a small project, it could “someday lead to a larger one.”

Moreover, the Revised Stipulation addresses this topic very specifically. It states that it “has been entered into *only for the purpose of this proceeding*...[the Revised] Stipulation [carries] *no factual or legal precedent on any issue.*”³⁷ (Emphasis added). The Board’s concerns about

³³ Order at 72 ¶151.

³⁴ *Id.* at 78 ¶160.

³⁵ App. Ex. 1 at 3.

³⁶ Order at 40 ¶106.

³⁷ Jt. Ex. 2 at 15.

Icebreaker serving as a precedent for future projects is baseless. The Board's own rationale for the Shutdown Mandate (potential future projects) is both unlawful as outside the record and entirely unfounded based on the explicit language of the Revised Stipulation itself.

Indeed, the record reflects that the scientific information obtained from this Project may be beneficial for many various purposes, including the study of aquatic life around the turbines. The benefits of these studies support issuance of the certificate and approval of the Revised Stipulation as filed, not the other way around. By analogy, could the Board require a coal plant to only run a fraction of the time because speculative, future coal plants might also apply for certification and contribute vastly greater amounts of carbon and other harmful emissions to the environment? The Shutdown Mandate would suggest so.

The bottom line is the only facility at issue in this case is a 6-turbine, 20.7 MW wind-powered electric generation facility. If another applicant in the future decides to pursue another wind project in Lake Erie, the Board will require independent supporting studies and information, appropriately so. It is unjust and unreasonable for the Board to penalize Icebreaker based on a hypothetical, potential future project that is nowhere to be found in the record. The manifest weight of the evidence in this case supports the adoption of the Revised Stipulation without modification.

- B. The Board's Order violates R.C. 4903.09, through application of R.C. 4906.12,³⁸ which requires that "...the [Board] shall file, with the records of such cases, findings of fact and written opinions *setting forth the reasons prompting the decisions arrived at, based upon such findings of fact.*" (Emphasis added).**

³⁸ In accordance with R.C. 4906.12, R.C. 4903.09 applies "to any proceedings or order of the [Board] under Chapter 4906. Of the Revised Code, in the same manner as if the [B]oard were the public utilities commission under such sections."

1. Lack of Rationale for Shutdown Mandate Based on Record

The Board must show the facts in the record upon which the Order is based - the Board abuses its discretion if it renders an opinion on an issue without record support.³⁹ Just because the Order states that “any evidence not specifically addressed herein has nevertheless been considered and weighed by the Board in reaching its final determination”⁴⁰ does not negate the fact that it fails to cite or explain any rationale for the Shutdown Mandate that is supported by the record.

The closest the Board comes to a rationale is actually a mischaracterization of Applicant witness Dr. Gordon’s testimony regarding the 9/4 Stipulation as compared to the original Staff Report’s Shutdown Mandate. The Order points out that, when asked on cross-examination whether Staff Report Condition 19 is “more protective” than the 9/4 Stipulation language, Dr. Gordon accepted that “full curtailment and shut down” would offer greater protection.⁴¹ However, he qualified that statement as follows:

“This is hitting a watch with a sledgehammer...[i]t’s an excessive and unnecessary amount of additional curtailment relative to [the 9/4] Stipulation Condition 19 given the vanishingly small level of impact that this project is certain to generate.”⁴²

The Order inexplicably omits this critical qualification.

2. Wrong Stipulation

Furthermore, the Order ignores that this question was posed by Staff to Dr. Gordon as it relates to the now superseded and replaced 9/4 Stipulation. Since that cross-examination, the

³⁹ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990. (“We have also held that ‘in order to meet the requirements of R.C. 4903.90,...the PUCO’s order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion,’”) quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1995); *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 1999-Ohio-206 (remanding order of PUCO for failure to make complete record of all proceedings in connection with its approval of merger of gas utility companies).

⁴⁰ Order at 6 ¶36.

⁴¹ Tr. II at 482-483.

⁴² *Id.*

parties (including Staff) agreed to the Revised Stipulation with its Tactical Feathering and the Stipulating Parties' testimony was revised to reflect support for the Revised Stipulation.

With respect to the Revised Stipulation, Staff witness Hazelton (ODNR) supported Condition 18 stating that the "language in the collision monitoring plan ensures the minimal adverse environmental impact, because the Applicant's operations will be restricted in the event its collision monitoring technology is not operating as outlined in the collision monitoring plan to accurately detect collisions."⁴³ Ms. Hazelton further supported the language from the Fifth Supplement that is in the Collision Monitoring Plan (Tactical Feathering) by stating that Revised Stipulation Condition 23 "ensures swift action and communications between the company and ODNR to identify a solution for the significant mortality event...[a] prompt response is essential to minimizing collision risk to migrating birds and bats...."⁴⁴ This is an endorsement of the Tactical Feathering provision over a Shutdown Mandate.

Likewise, the Order refers to a statement at the public hearing from a representative of the National Audubon Society offering support for the Staff Report noting the option to "schedule curtailment of the turbines under certain condition[s] to protect our bird[s]."⁴⁵ However, it is unreasonable for the Board to base its decision to reject the Icebreaker Project on a single witness at the local hearing who similarly did not have the benefit of considering the Revised Stipulation Conditions 18 and 23, which include the Tactical Feathering provision set forth in the Collision Monitoring Plan.⁴⁶ To the extent the Order cites to the record to justify the Shutdown Mandate, it

⁴³ Staff Ex. 14 at 5-6.

⁴⁴ *Id.* at 12.

⁴⁵ July 29, 2019 Tr. at 53-54; Order at 79 ¶161.

⁴⁶ It is noteworthy that the Collision Monitoring Plan, as required in the Revised Stipulation, provides for the exact condition the man from the National Audubon Society was looking for an option to "schedule curtailment of the turbines under certain condition[s] to protect our bird[s]." July 29, 2019 Tr. at 53-54.

is citing to the prior 9/4 Stipulation, which was superseded; the changes in the Revised Stipulation were certainly material, leading Staff to sign on.

Instead, the Order makes the unsubstantiated statement that “the Revised Stipulation may not be sufficient to minimize impacts on these species” pointing to the testimony of Resident witness Streby and Staff witness Hazelton that there is not enough data from the Project site indicating the number of birds and bats that may migrate through the rotor swept zone.”⁴⁷ However, again, the testimony of these witnesses were addressing the superseded 9/4 Stipulation, not the Revised Stipulation that is the only agreement before the Board for consideration in this case.

Consequently, the Order sets forth no evidence to support the Shutdown Mandate. Reason being, there is no evidence on the record that refutes the experts from Staff, ODNR, and the Applicant (as agreed to by OEC, the Sierra Club, the Business Network, and the Carpenters’ Council) that the Revised Stipulation ensures the minimum adverse environmental impact.

C. The Board’s Shutdown Mandate exceeds its authority and contravenes R.C. 4906.10(A)(3), which requires the Board determine that the “facility represents the *minimum* adverse environmental impact, considering the *state of available technology and the nature and economics of various alternatives*, and other pertinent considerations.” (Emphasis added).

R.C. 4906.10(A) sets forth the Board’s authority to review an application for construction, operation, and maintenance and issue a decision either granting, denying, or granting with “terms, conditions, or modifications” the application.⁴⁸ For a generation facility such as Icebreaker, R.C. 4906.10(A) sets forth seven criteria the Board must review in making its determination whether to

⁴⁷ Order at 77 ¶159.

⁴⁸ The Icebreaker facility is an economically significant wind farm as defined in R.C. 4906.13. R.C. 4906.20 provides that an economically significant wind farm must obtain a certificate from the Board and the process is identical to the process applicable to major utility facilities under R.C. Section 4906.10 et al.

grant a certificate – one of which is that the “facility represents the *minimum* adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations.” (Emphasis added).

It is evident that the General Assembly recognized in this code provision that energy facilities were not going to be constructed and operated without some impact on the environment. However, understanding that it is important to reduce any adverse impact, the law tasks the Board with determining that the impacts are “minimum.” In addition, the statute requires the Board to consider that technology is constantly evolving, that the economics of the Project need to be taken into consideration, and that there are other pertinent factors that need to be weighed. The statute does not give the Board the authority to approve projects to be constructed but disallow them to operate. Yet, that is exactly what the Shutdown Mandate does.

The Shutdown Mandate appears to require *zero* impact every night for eight months of the year, regardless of the evidence of record, the Board’s very own statements in the Order supporting the determination that the facility represents the minimum impact,⁴⁹ or the Revised Stipulation’s Collision Monitoring Plan provisions for targeted feathering when impacts are detected.⁵⁰

The Order itself considered the “probable environmental impact” as required by R.C. 4906.10(A)(2) and found that:

- “The small scope of the demonstration project and the proposed location minimize many potential effects often associated with wind generation.”⁵¹

⁴⁹ As stated above in Section III.A.1, the Board: acknowledged “the extensive evidence provided in order to evaluate the nature of the probable environmental impact of the project on birds and bats.” (Emphasis added); accepted the experts’ findings and testimony; and reached the conclusion that the facility represents the minimum adverse impact, stating that the risk to birds is no greater than existing terrestrial projects and maybe even less, stating “[n]o evidence was presented to suggest that an offshore wind facility would have more impact to birds than a terrestrial facility.” (Order at 39-40 ¶¶103, 105).

⁵⁰ Jt. Ex. 2, Conditions 18 and 23; App. Ex. 57.

⁵¹ Order at 42 ¶108.

- The “project’s location in Lake Erie naturally limits the ecological impact on vegetation and animals.”⁵²
- “While birds and bats will be affected by the project, the offshore location limits the impact.”⁵³
- Eagles, other raptors, and waterfowl are not expected to frequent the Project, and bat activity is more frequent on the shoreline.⁵⁴
- “No evidence was presented to suggest that an offshore wind facility would have more impacts on birds than a terrestrial facility.”⁵⁵
- The main impact is expected to be on nocturnal migrating birds. While most birds fly above the rotor swept zone, those that fly through it will experience, collision, attraction, and avoidance.⁵⁶
- “Some evidence demonstrated that an offshore facility may have less impact on nocturnal migrating birds than land-based projects.”⁵⁷

From the Order’s own findings, it is difficult to decipher why the Board found it necessary to add the Shutdown Mandate. Equally mystifying, the Order spends 40 pages discussing minimum adverse impact criteria and concludes:

- “The projected risk to avian and bat species associated with this small demonstration project is expected to be low.”⁵⁸
- “An extensive amount of information has been provided by Icebreaker regarding the various risk assessments and analyses undertaken to identify the risk and the various protocols and measures adopted by the Applicant in order to sufficiently respond to those risks,” and goes on to list ten of the documents listed in Section III.A.4. above. The Order notes that this information goes “above and beyond the documents assessing risk and the testimony....”⁵⁹
- Recognized that impacts might occur.⁶⁰

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Order at 41 ¶105.

⁵⁶ Order at 42 ¶108.

⁵⁷ Order at 41 ¶105.

⁵⁸ Order at 70 ¶148.

⁵⁹ Order at 71 ¶149.

⁶⁰ Order at 72 ¶151.

- Agreed “with prior ODNR guidance conceding that it is **unreasonable to expect wind turbines in Ohio to have no impact on wildlife.**”⁶¹ (Emphasis added).
- Noted that the Board has “significant experience in certificating terrestrial wind energy projects and [the Board realizes] that **[it] is an unreasonable standard [to expect wind turbines in Ohio to have no impact on wildlife] ... and inconsistent with the applicable statutory criteria, which dictates that the facility represent the minimum adverse environmental impact** considering the state of available technology and the nature and economics of various alternative, and other pertinent consideration.”⁶² (Emphasis added).

From a review of this evidence and the Board’s own conclusions in the Order, it is clear that the Shutdown Mandate exceeds the Board’s statutory authority to determine the “minimum” adverse environmental impact of the facility and has essentially mandated that the facility have zero evening impact.

The Board concluded that it must take “all necessary measures” to mitigate both projected and unanticipated risks associated with avian and bat migratory behavior. That is exactly what the Revised Stipulation provides.

In accordance with the requirements of R.C. 4906.10(A)(3), Revised Stipulation Condition 18 requires that the collision-detection technology be fully functioning before the turbines can commence operation. Moreover, the Collision Monitoring Plan requires that, if at any time the collision-detection technology is not functioning as required by the Collision Monitoring Plan, “ODNR and Staff may require the turbines be feathered, either partially or completely.”⁶³ (Tactical Feathering). Of course, the very statute under which the Board issues its Order requires the Board

⁶¹ *Id.*

⁶² *Id.*

⁶³ Revised Stipulation Condition 18 requires that the Avian and Bat IMP include a Collision Monitoring Plan. The Tactical Feathering provision was agreed to by the Stipulating Parties and the Fifth Supplement memorializes that this provision will be part of the Collision Monitoring Plan.

to consider the state of available technology, inviting just the sort of innovation embraced in the Revised Stipulation.

The Revised Stipulation has to be viewed as a whole – no one Condition stands alone - the conditions are intertwined and create a total package. Thus, Revised Conditions 18 and 23 together, along with the language in the Fifth Supplement that composes important feathering language that is found in the Collision Monitoring Plan (Tactical Feathering), provide that the Project will have the minimum adverse impact on the environment and provide the necessary tools for ODNR and Staff to ensure that the Applicant complies.

While the Board was hesitant to agree with the fact that the turbine above the water in an offshore facility is no different than the turbine above the ground in a land-based facility⁶⁴ – this fact is undisputed on the record.⁶⁵ Thus, the Board’s review of the Icebreaker facility from the water up should be the same as any other land-based project – the same review and the same application of the statutory criteria. The only thing new about the Icebreaker Project is that it is located in water, rather than on land. Land-based projects monitor wildlife impact by searching for carcasses on the ground; Icebreaker will do so through the use of sensor and camera technology (collision-detection technology). The result is the same making the disparate regulatory treatment in the Order unreasonable and unjustified.

In accordance with R.C. 4906.10(A)(3), the Board is to determine “[t]hat the facility represents the *minimum* adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” (Emphasis added). However, it is clear that the Board did not consider the

⁶⁴ Order at 72 ¶151.

⁶⁵ In fact, as reflected in the record, the Icebreaker Project has less impact than any land-based project. App. Ex. 1, Ex. J.; App. Ex. 30, CEG-7; Diehl, et al., 2003, Radar Observations of Bird Migration Over the Great Lakes.

economics of the Project as the statute requires or the other pertinent evidence on the record that supports the Revised Stipulation. The record clearly reflects how the Shutdown Mandate would impact the viability of the Icebreaker Project.⁶⁶

D. The Board’s bifurcation of this decision into a construction versus operation phase and invention of an extra-statutory second permitting process in which the Applicant must return to the Board for a new stakeholder-intervention process in order to scale back the Shutdown Mandate exceeds its statutory authority and contravenes both R.C. 4906.10(A), which requires the Board to “render a decision upon the record” either granting, denying, or granting with modification the application, and the post-certification process required in R.C. 4906.97 and 4906.98.

The Board has the authority to “render a decision” regarding an application to construct, operate, and maintain a major utility facility, by either granting, denying, or granting with terms, conditions, or modifications the application under R.C. 4906.10. Nowhere in the statute does the Board have the authority to render two decisions – one for construction and then one down the road to decide if the facility should be allowed to actually operate. The certificate to construct is the same as to operate.⁶⁷

This Order, however, unlawfully bifurcates the certificate between construction and operation. The Order requires that:

“[r]ather than provide the [Avian and Bat IMP and Collision Monitoring Plan] only to Staff and ODNR for acceptance [to demonstrate proof of compliance with the Revised Stipulation conditions] we direct the Applicant to file the ...compliance information...in the record before the Board for review and approval...[o]nce actual monitoring information is collected...the Applicant may subsequently request less restrictive operating limits...[f]iling the required information...provides Staff, ODNR, and other interested parties an opportunity to provide

⁶⁶ See App. Ex. at 11-14, referring specifically to the Shutdown Mandate in Staff Report.

⁶⁷ Notably, in Board’s current review of its administrative rules, it has circulated a document for stakeholder discussion asking whether certificates should be bifurcated into a construction versus operations phase. But, to date, no such rule has been adopted and the Board cannot simply impose it by fiat.

recommendations or comments on the request to reduce the feathering requirements.”⁶⁸

If the Applicant must return to the Board for a full-blown regulatory proceeding, complete with stakeholder intervention and a future Board vote, the Applicant does not really have a certificate at all. While the Board may view this as a mere “condition,” the Applicant contends that a condition preventing substantial operations unless and until a new regulatory process is successfully completed is no condition at all and is beyond the scope of the statute.

Moreover, it is unnecessary for the Board to implement a totally new bifurcated process for this small demonstration Project. The Board’s rules provide that Staff is responsible for monitoring the certificate conditions on behalf of the Board.⁶⁹ Such delegation of responsibility is necessary and appropriate for purposes of ensuring that applicants comply with the Board’s mandates. For almost 50 years, the Board has issued certificates for the siting of energy projects in the state of Ohio and has, in accordance with the statute, relied upon the expertise of the Staff and ODNR to monitor developers’ progress on the projects and ensure that all provisions of the conditions are strictly met. Consistent with this statutory language, the Ohio Supreme Court, in considering the Board’s issuance of a certificate for an onshore wind facility, recognized the Board’s authority to delegate the monitoring of implementation of certificate conditions issued under R.C. Section 4906.10 in *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 452, 2012-Ohio-878. *Buckeye* explained that the Ohio siting statutes:

“authorize a dynamic process that does not end with the issuance of a construction certificate. The General Assembly vested the board with authority to allow its staff to monitor . . . compliance with conditions that the board has set, conditions upon which the [project opponents] already had the chance to be heard.”⁷⁰

⁶⁸ Order at 79 ¶161.

⁶⁹ See O.A.C. Chapter 4906-7.

⁷⁰ *Buckeye* at ¶¶ 16-17.

The Order's directive in paragraph 161 for a new proceeding not only circumvents the statute by creating a second phase for the decision process, but it ignores the statutory construct that calls for Staff to monitor the Applicant's condition compliance and to report any noncompliance to the Board for possible enforcement action under R.C. 4906.97.

As pointed out by the Board in the Order "Staff's involvement will be able to calculate the specific, actual environmental impact in compliance with the certificate conditions as the project is constructed and begins operation."⁷¹ The Order goes on to note that "Staff and ODNR have experience monitoring the development of Ohio's terrestrial wind generation projects and they are eminently qualified to oversee Icebreaker's compliance with the order."⁷² This is the process that has been supported by statute and rules and implemented in all previous cases before the Board.⁷³

Once a certificate is issued, R.C. 4906.97 and 4906.98 provide a process for the review and enforcement of the certificate conditions. The bifurcated process created by the Board for separate Board approval for construction and then full operation for the Icebreaker Project circumvents the processes set forth in R.C. 4906.97 and 4906.98. The statute does not give the Board authority to create an extra-statutory second phase of the permitting process.

This extraordinary regulatory expansion is unprecedented, singling out Icebreaker, which has been found by the experts at the state and federal wildlife agencies to present minimal risk. The Applicant can find no case where a project was required to come back to the Board for a

⁷¹ Order at 96 ¶199.

⁷² *Id.*

⁷³ See e.g., *In re Application of Buckeye Wind, LLC*, Case No. 08-666-EL-BGN, Order (Mar. 22, 2010); *In re Application of Hog Creek Wind Farm, LLC*, Case No. 09-277-EL-BGN, Order (Mar. 22, 2010); *In re Application of Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN, Order (Jan. 23, 2012) ; *In re Application of Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Order (May 28, 2013); *In re Application of Paulding Wind Farm IV, LLC*, Case NO. 18-91-EL-BGN, Order (Feb. 21, 2019); *In re Application of Clean Energy Future-Oregon, LLC*, Case No. 17-530-EL-BGN, Order (Dec. 7, 2017); *In re Application of Nestlewood Solar I, LLC*, Case No. 18-1546-EL-BGN, Order (Apr. 16, 2020).

second approval (presumably to a second round of judicial review) between construction and operation of the facility as laid out in its Application.

IV. CONCLUSION

Therefore, Icebreaker respectfully requests that the Board grant rehearing and reconsider its Order with respect to the above-cited provisions.

The record supports the ultimate resolution of the issues in the case that are memorialized in the Revised Stipulation. The chronology of this case and the evidence submitted on the record supports approval of the Revised Stipulation, without the modification imposed by the Board. The Applicant now asks the Board to reconsider its Order and strike paragraphs 160 and 161

Respectfully Submitted,

/s/ Christine M.T. Pirik

Christine M.T. Pirik (0029759)

(Counsel of Record)

Terrence O' Donnell (0074213)

William V. Vorys (0093479)

Jonathan R. Secrest (0075445)

Sara H. Jodka (0076289)

Dickinson Wright PLLC

150 East Gay Street, Suite 2400

Columbus, Ohio 43215

Phone: (614) 591-5461

Email: cpirik@dickinsonwright.com

todonnell@dickinsonwright.com

wvorys@dickinsonwright.com

jsecrest@dickinsonwright.com

sjodka@dickinsonwright.com

Attorneys for Icebreaker Windpower Inc.

EXHIBIT A

Chronology Supporting Experts' Revised Stipulation Agreement With No Modification

The following chronological account of how and why Revised Stipulation Condition 18 came to be and how it satisfies the statutory criteria in R.C. 4906.10(A)(3) will clarify for the Board the grave situation created by the modification in the Order. In fact, the following summary shows that the Order resurrected the Shutdown Mandate in the Staff Report that took months of detailed discussions by experts to resolve – in other words, the Order blew up the Revised Stipulation and started at ground zero:

1. July 3, 2018 - Staff issued its Staff Report recommending that the Board adopt the Shutdown Mandate in Condition 19.¹ Staff Report Condition 19 required that:

[t]urbines shall be feathered completely from dusk to dawn from March 1 through January 1 until the Applicant has demonstrated that the post-construction avian and bat collision monitoring plan is sufficient, as determined by the ODNR in consultation with Staff.²
2. September 4, 2018 - The Applicant and all parties to this case, with the exception of Staff and the Residents submitted the 9/4 Stipulation. Condition 19 in the 9/4 Stipulation, required the Applicant to “demonstrate that, considering the state of available technology, the [post-construction avian and bat collision monitoring] plan is sufficient either prior to construction through lab and field testing, or during operation.” Compliance with this condition was to be monitored by ODNR and Staff and if they found that the plan was not sufficient, they “may require the turbines be feathered up to 30 minutes prior to sunset and 30 minutes after sunrise during peak spring and fall migration periods when cloud ceiling are low.”³
3. September 24, 2018 - The evidentiary hearing commenced. At the hearing, unrefuted evidence on the record reflected that the Shutdown Mandate in Staff

¹ Condition 19 in the Staff Report is replaced by Condition 18 in the Revised Stipulation.

² Staff Ex. 1 at 47-48. Note: Condition 19 in the Staff Report is the same condition as the one imposed by the Board in the Order. With two differences: the turbines must be feathered/shut down at nighttime 8 months rather than 10 months; and the Order requires a second phase to certification, rather than the recommendation in the Staff Report that Staff and ODNR ensure that Applicant comply with the condition.

³ Jt. Ex. 1 at 6. The rationale for this proposed condition was that birds typically fly well above the turbines, but when the cloud ceiling is low they may fly at lower altitudes.

Report Condition 19 posed serious, fatal, threats to the viability of the Icebreaker Project, including the concern that the Applicant would “not be able to secure financing to build the project and the certificate itself loses value.”⁴ The record reflects that the Shutdown Mandate in Staff Report Condition 19 was not warranted in order to reasonably protect birds and bats.

4. October 2018 through mid-May 2019 – After reviewing all of the evidence at the hearing, it was clear that, with further settlement discussions, the experts may be able to reach agreement on the most effective way to ensure minimum adverse impact to birds and bats. Thus, the ALJs agreed to delay the briefing schedule in order to allow the parties an opportunity to discuss possible settlement of the issues.
5. May 14, 2019 - The Applicant filed the Fifth Supplement that reflects Icebreaker’s commitment that the following language, which was approved by ODNR, would be included in the Avian and Bat IMP and the Collision Monitoring Plan (both of these plans are required to be completed and accepted by ODNR prior to construction pursuant to Revised Stipulation Condition 18):

...if ODNR and Staff determine, once operation commences, that the technology is not working as set forth in the collision monitoring plan such that there is a defect preventing accurate detection of collisions, ODNR and Staff may require turbines be feathered, either partially or completely, until the technology has been demonstrated to work as set forth in the collision monitoring plan. If feathering is required, it would be limited to nighttime hours...and would only be applicable during...migration periods (March 1 through January 1). However, based on the totality of the circumstances, ODNR and Staff may require less- restrictive times or periods....⁵ (Tactical Feathering).

6. May 15, 2019 - After over 7 months of negotiations, the Applicant and the parties in the case (including Staff), with the exception of the Residents, submitted the Revised Stipulation. Condition 18 of the Revised Stipulation⁶ provides that:

At least 120 days prior to commencement of construction, the Applicant shall submit an avian and bat [IMP] to the ODNR and Staff for review to confirm compliance with this condition that implementation of the plans would be effective in avoiding significant impacts to avian and bat species. The avian and bat [IMP] shall ... include a collision monitoring plan,⁷ which will include a description of the collision detection technology selected

⁴ App. Ex. 25 at 12-15.

⁵ App. Ex. 57.

⁶ Condition 18 in the Revised Stipulation replaces Condition 19 in the Staff Report.

⁷ Note: The Collision Monitoring Plan includes the Tactical Feathering provision agreed to by the Signatory Parties and filed on May 14, 2019.

by the Applicant in consultation with the ODNR and Staff, the results of lab and field testing of the collision detection technology, and adaptive management strategies. The collision detection technology shall be installed and fully functioning at the time the turbines commence operation and shall continue to function in accordance with the collision monitoring plan. Operation of the collision detection technology is subject to audits by ODNR or its third-party consultant. Prior to the commencement of construction, the impact mitigation plan must be finalized and accepted through written communications from the ODNR. The Applicant shall also provide the impact mitigation plan to, and seek consultation with, the U.S. Fish and Wildlife Service (“USFWS”). The Applicant shall update the impact mitigation plan as new information is attained through surveys. Any proposed modifications to the impact mitigation plan shall be submitted to the ODNR and Staff for review to confirm compliance with this condition and shall be finalized and accepted through written communications from the ODNR. The impact mitigation plan (including the collision monitoring plan) shall survive the MOU and shall remain in place for the life of the project.

In addition to Condition 18, the Revised Stipulation sets forth the following “catchall” Condition 23, which ensures that:

...The Applicant will immediately report a significant mortality event (21 or more detected collisions at the facility within a 24-hour period based on a facility-wide detection probability of 59%) to the ODNR.... If there is a significant mortality event, the Applicant will modify operation activities that could adversely affect the identified animals to minimize risk as described in the impact mitigation plan⁸ within 24 hours and follow the process for significant mortality events set forth in the impact mitigation plan. If a significant mortality event recurs, the ODNR may require the Applicant to submit a revised adaptive management strategy for the impact mitigation plan to the ODNR....⁹

7. August 20, 2019 - The evidentiary hearing was reconvened to consider the Fifth Supplement and the Revised Stipulation. Evidence presented at the hearing supported the determination that the Revised Stipulation ensured that the facility represented the minimum adverse environmental impact, no evidence was presented to refute this determination.¹⁰

⁸ Note: In accordance with the Revised Stipulation, the Avian and Bat IMP, includes the Collision Monitoring Plan that provides for the Tactical Feathering provision.

⁹ Jt. Ex. 2 at 9.

¹⁰ Staff Ex. 14 at 2.

8. May 21, 2020 - The Board issued its Order rejecting the agreement between the signatory parties that the experts, including ODNR's witness, agreed ensures the minimum adverse environmental impact of the facility. The Order required that:

...the turbines remain completely feathered during nighttime hours, from dusk to dawn, from March through November..., until or unless the Board directs otherwise.¹¹

The Order establishes a second phase for certification where the Board would "review and approve" the Avian and Bat Impact Mitigation Plan, after giving "interested parties an opportunity to provide recommendations or comment on any request to reduce the feathering requirements."¹²

A comparison between where the condition addressing feathering began in number 1 above and where it ended in number 8 above reveals that the Order reverts back to the beginning where the Staff Report started and prior to the record that fully supports the Revised Stipulation.

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¹¹ Order at 78 ¶160.

¹² Order at 79 ¶161.

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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 22nd day of June, 2020.

/s/ Christine M.T. Pirik

Christine M.T. Pirik (0029759)

Counsel:

john.jones@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org
jstock@beneschlaw.com
ocollier@beneschlaw.com
mjsettineri@vorys.com
glpetrucci@vorys.com
paul@ptblaw.com

Administrative Law Judges:

megan.addison@puco.ohio.gov
nicholas.walstra@puco.ohio.gov

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Case No(s). 16-1871-EL-BGN

Summary: Application for Rehearing of Icebreaker Windpower, Inc. regarding Ohio Power Siting Board's May 21, 2020 Opinion, Order, and Certificate electronically filed by Christine M. T. Pirik on behalf of Icebreaker Windpower Inc.