THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF ICEBREAKER WINDPOWER, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR AN ELECTRIC GENERATING FACILITY IN CUYAHOGA COUNTY, OHIO.	**CASE NO. 16-1871-EL-BGN**

ORDER ON REHEARING

Entered in the Journal on October 8, 2020

I. SUMMARY

{¶ 1} In this Order on Rehearing, the Ohio Power Siting Board responds to the applications for rehearing filed by Icebreaker Windpower, Inc., Business Network for Offshore Wind, Inc., Indiana/Kentucky/Ohio Regional Council of Carpenters, intervening residents of the Village of Bratenahl, and jointly filed by Ohio Environmental Council and Sierra Club. The Board finds Icebreaker Windpower, Inc.'s application for rehearing should be granted, in part, and denied, in part, as discussed below. Regarding the other applications for rehearing, in some cases the applications for rehearing are legally deficient or raise issues beyond the Board's jurisdiction. In other cases, and for the reasons explained in more detail below, the Board rejects the alleged errors contained in the applications for rehearing.

II. PROCEDURAL HISTORY

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906. Further, R.C. 4906.20 provides that no person shall construct or operate an economically significant wind farm in the state without obtaining a certificate for the facility from the Board.

{¶ 3} Icebreaker Windpower, Inc. (Icebreaker) is a corporation and a person as defined in R.C. 4906.01(A).

{¶ 4} On February 1, 2017, Icebreaker filed its application for a certificate to construct a wind-powered electric generation facility in Cuyahoga County, Ohio, which it described as a six-turbine demonstration wind-powered electric generation facility located eight to ten miles off the shore of Cleveland, in Cuyahoga County, Ohio. The wind turbines are expected to have a nameplate capacity of 3.45 megawatts (MW) each, with a total generating capacity of 20.7 MW. Thereafter, the application was supplemented on July 20, 2017, August 18, 2017, and March 22, 2018.

{¶ 5} By Opinion, Order, and Certificate dated May 21, 2020 (May 21 Order), the Board approved and modified a revised joint stipulation and recommendation (Revised Stipulation) filed by Icebreaker, Staff, Ohio Environmental Council (OEC), the Indiana/Kentucky/Ohio Regional Council of Carpenters (Carpenters), Sierra Club, and Business Network for Offshore Wind, Inc. (BNOW) and issued a certificate of environmental compatibility and public need to Icebreaker for the construction, operation, and maintenance of a wind-powered electric generation facility in Cuyahoga County. As is common in certification proceedings, the May 21 Order set forth 33 conditions including conditions that must be satisfied before construction may commence.

{¶ 6} R.C. 4906.12 provides that R.C. 4903.02 to 4903.10 and R.C. 4903.20 to 4903.23 apply to any proceeding or order of the Board, as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 7} Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner, form, and circumstances set forth in R.C. 4903.10. R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission. R.C. 4903.10(B) also requires that applications for rehearing be in writing and must set forth specifically the ground or grounds on which the party seeking rehearing considers an order to be unreasonable or unlawful.

{¶ 8} On June 19, 2020, intervenors W. Susan Dempsey and Robert M. Maloney, (collectively, Bratenahl Residents) filed an application for rehearing of the May 21 Order. Thereafter, on June 22, 2020, applications for rehearing were filed by Icebreaker, Carpenters, BNOW, and jointly by OEC and Sierra Club (collectively, OEC/Sierra Club). Icebreaker's application asserts four points of error in the Board's May 21 Order; the alleged errors are focused on the Board's modifications to the Revised Stipulation. Carpenters' application adopts Icebreaker's application in its entirety. The claims advanced by OEC/Sierra Club and BNOW in, as discussed below, deficient applications for rehearing amount to arguments for rehearing that largely overlap with those in Icebreaker's application and will be addressed together where appropriate.

{¶ 9} On June 29, 2020, Icebreaker, OEC, Sierra Club, Carpenters, and BNOW jointly filed a memorandum contra the application for rehearing filed by Bratenahl Residents. On July 1, 2020, Bratenahl Residents filed a memorandum contra the applications for rehearing filed by the other intervening parties.

{¶ 10} By Entry issued July 17, 2020, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the administrative law judge (ALJ) granted rehearing for the limited purpose of affording the Board additional time to consider the issues and arguments raised in the applications for rehearing.

{¶ 11} On September 17, 2020, the Board convened and considered a proposed draft of a Second Entry on Rehearing. At the Board meeting, the Board voted to revise the May 21 Order and to remove certain modifications to the Revised Stipulation approved in the May 21 Order.

III. DISCUSSION

{¶ 12} In the May 21 Order, the Board authorized a certificate for the construction, operation, and maintenance of the proposed project as recommended in the Revised Stipulation, subject to limited modifications. The limited modifications required by the May

21 Order were, at the time, deemed necessary because of the incompleteness of work that, as acknowledged in the Revised Stipulation, must be completed to properly identify and mitigate the project's risk to bird and bat populations. More specifically, the Board found that the Revised Stipulation could be adopted but only if: (1) an interim bird and bat population risk mitigation protocol was added; and (2) a public and transparent Board process was substituted for the private and non-transparent process briefly described in the Revised Stipulation including incorporated memoranda. Among other things, the Board found that reliable data needed to be gathered and submitted regarding the flight patterns of birds and bats at the project site and particularly in the rotor-swept zone to better inform the Board on the nature and extent of the bird and bat population risk created by this first-of-its-kind project and what, if any, risk mitigation protocol might be safely substituted for the interim risk mitigation protocol adopted by the May 21 Order.

{¶ 13} The applications for rehearing filed by Icebreaker, Carpenters, OEC/Sierra Club, and BNOW claim that the Board erred in modifying the Revised Stipulation which was contested by Bratenahl Residents. Contrarily, Bratenahl Residents go further and claim that the May 21 Order is unreasonable and unlawful because Icebreaker failed to introduce sufficient evidence for the Board to make valid findings and determinations as to the nature of the probable environmental impact of the project, pursuant to R.C. 4906.10(A)(2), and to determine that the project represents the minimum adverse environmental impact, pursuant to R.C. 4906.10(A)(3), even after considering the Revised Stipulation modifications made by the Board. In their second assignment of error, Bratenahl Residents claim that the May 21 Order is also unreasonable and unlawful as the project does not serve the public interest, convenience, and necessity, pursuant to R.C. 4906.10(A)(6), because the granting of the certificate violates the Public Trust Doctrine.

{¶ 14} The Board has reviewed and considered all of the claims and arguments contained in the applications for rehearing. Any claim or argument contained in the applications for rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and is, unless otherwise specifically stated, denied.

A. Summary of the applications for rehearing from Icebreaker, Carpenters, OEC/Sierra Club, and BNOW

{¶ 15} Icebreaker's first claim contends that the Board's modifications to the Revised Stipulation are against the manifest weight of the evidence. OEC/Sierra Club and BNOW join Icebreaker in this regard. Icebreaker explains that its first claim arises because the Board modified and approved the Revised Stipulation to require the operation of the turbines be curtailed from dusk to dawn during the period running from March 1 through November 1 of each year following construction, until otherwise ordered by the Board. As already explained, the May 21 Order authorizes Icebreaker to seek to modify this interim bird and bat risk mitigation protocol after gathering and providing the data regarding the flight patterns of migratory birds and bats in the project area; the same data required by the Revised Stipulation. May 21 Order at ¶¶ 159-160. According to Icebreaker, the modification of the Revised Stipulation was unnecessary. Icebreaker asserts that the Revised Stipulation included numerous safeguards that will protect birds and bats and also allows the project to be financially viable. Icebreaker emphasizes that if the operation of the turbines are curtailed ("feathered") for the time period specified, on an interim basis, in the May 21 Order, the project will not be financeable, citing the testimony of Icebreaker President David Karpinski (Tr. Vol. 1 at 31-43). As described by Icebreaker, the Board's additional restrictions are thus redundant, overly broad, and pointless. BNOW agrees with Icebreaker, asserting that Conditions 18, 21, and 23 of the Revised Stipulation provide sufficient protections for birds and bats. BNOW notes that the Revised Stipulation requires Icebreaker to supply the necessary pre-construction radar data regarding birds and bats at the project site and requires Icebreaker to supply an impact mitigation plan that includes the necessary collision-detection technology. Continuing, BNOW explains that the Revised Stipulation already requires the facility to be feathered if the collision-detection technology fails and directs Icebreaker to report any significant mortality events. According to BNOW, the unmodified version of the contested Revised Stipulation provides the Board and its Staff with all necessary information and installs sufficient precautions to ensure the project minimally impacts migrating birds and bats. Icebreaker additionally lists evidence

admitted into the record that supports a finding that the Revised Stipulation complies with R.C. 4906.10(A)(2) and (A)(3). Icebreaker maintains that the cumulative amount of this evidence demonstrates that the Revised Stipulation should be approved without modification. OEC/Sierra Club submit that the Board recognized the large amount of evidence in the record that supports the Revised Stipulation. OEC/Sierra Club further aver that Staff witness Erin Hazelton, from the Ohio Department of Natural Resources (ODNR), testified that the conditions already in the Revised Stipulation ensure that the project will have the minimum adverse environment impact. The Board erred by ignoring the expertise of the ODNR, according to OEC/Sierra Club, as the ODNR is most qualified to understand the risks associated with the project and the ODNR would be providing ongoing monitoring of the project.

{¶ 16} Icebreaker and OEC/Sierra Club further contend that the Board reached its decision by considering evidence outside of the record. Icebreaker asserts the application before the Board only consisted of six turbines. According to Icebreaker, however, the Board misleadingly applied the application's acknowledgment of the facility as a demonstration project and wrongfully considered the project's larger scale implications. Icebreaker explains, misleadingly, that the application was explicit that there are no current plans regarding additional turbines and it was inappropriate for the Board to consider additional evidence not in the record. OEC/Sierra Club maintains that, pursuant to R.C. 4906.10, the Board can only consider the application as filed and that, here, the application only consisted of the six turbines. According to OEC/Sierra Club, a project of such a small scale satisfies the statutory requirements and the only way the Board could have found the project did not represent the minimum adverse environmental impact is if the Board considered future wind projects being built in Lake Erie.

{¶ 17} For its next alleged error, Icebreaker claims that the Board violated R.C. 4903.09 by failing to set forth the reason for its decision to modify the Revised Stipulation. According to Icebreaker, the Board's decision to modify the Revised Stipulation and require additional feathering was unsupported by the evidence. Apparently acknowledging record

evidence on the subject, Icebreaker avers that the only evidence the Board relied on was the testimony of Icebreaker witness Dr. Caleb Gordon. As this alleged error is further unpacked, Icebreaker contends that the Board failed to provide context for the portion of Dr. Gordon's testimony cited in the May 21 Order. Icebreaker argues that, while Dr. Gordon acknowledged feathering would provide greater protections for birds and bats, he emphasized that such protections were not necessary. Icebreaker claims that the testimony from Dr. Gordon relied on by the Board was in relation to the Initial Stipulation, not the Revised Stipulation. Evolving its alleged error, Icebreaker contends that testimony and evidence submitted in support of the Initial Stipulation is not relevant as that stipulation was not before the Board. Along those lines, Icebreaker notes that the Board unreasonably considered public testimony evidence from a witness from the National Audubon Society, who testified prior to the filing of the revised testimony. Similarly, Icebreaker argues that the Board wrongfully cited to testimony of Staff witness Hazelton and Bratenahl Residents witness Dr. Henry Streby, who were also testifying regarding the Initial Stipulation. OEC/Sierra Club agree with Icebreaker's allegation of error, asserting that the Board failed to justify the modifications to the Revised Stipulation and failed to properly cite to the record.

{¶ 18} In response, Bratenahl Residents state there was sufficient evidence to justify the Board's modifications. The Bratenahl Residents state that the Staff Report and Staff witness Hazelton's initial testimony support the Board's modification of the Revised Stipulation, citing Staff Exhibit 1 at 47-48 and Staff Exhibit 7 at 8-10. Bratenahl Residents assert that no facts changed from the Initial Stipulation to the Revised Stipulation. Specifically, as explained by Bratenahl Residents, Icebreaker has not provided pre-construction radar data sufficient to assess the risks to birds and bats and Icebreaker has not identified post-construction collision technology to determine the actual impacts to birds and bats. Bratenahl Residents, thus, conclude that the initial, sworn testimony of Staff witness Hazelton is part of the record evidence and remains relevant. In that testimony, Bratenahl Residents point out that witness Hazelton found that the initial application did

not represent the minimum adverse environmental impact and that the only way to ensure the project minimized risks to birds and bats was to feather the turbines from dusk to dawn, March 1 to January 1, citing Staff Exhibit 7 at 8-10.

{¶ 19} Next, Icebreaker and OEC/Sierra Club contend that the Board wrongfully applied the requirements of R.C. 4906.10(A)(3) to determine whether the facility represents the minimum adverse environmental impact. Icebreaker and OEC/Sierra Club creatively claim that the Board improperly required that the project have zero environmental impact. According to Icebreaker, R.C. 4906.10(A)(3) directs the Board to consider the state of the available technology and the economics of other alternatives when making its assessment regarding the environment impact. Additionally, Icebreaker states the General Assembly, in crafting the statute, considered that all projects will have some environmental impact. By modifying the Revised Stipulation to mitigate, on an interim basis, potential bird and bat population risks, Icebreaker and OEC/Sierra Club claim that the Board's May 21 Order requires the project to have zero environmental impacts on birds and bats.

{¶ 20} Bratenahl Residents counter that the feathering requirements were necessary because of Icebreaker's inability to collect and provide data for the Board to review. Bratenahl Residents observe that such information has been requested from Icebreaker since 2008. Due to this lack of critical data, Bratenahl Residents state that the Board was unable to determine whether the project represented the minimum adverse environmental impact. Bratenahl Residents thus affirm that the Board properly considered the state of available technology when assessing the environmental impact of the project.

{¶ 21} In its fourth assignment of error, Icebreaker claims that the Board violated R.C. 4906.10(A) by failing to render a decision on the record. Icebreaker then claims that, as explained by the Board's May 21 Order, the Board modified the Revised Stipulation to, in effect, require two Board decisions, one for construction and one for operation. Icebreaker maintains this is unlawful and unnecessary. Apparently acknowledging that the Revised Stipulation also required Icebreaker to successfully complete additional work to identify

and properly mitigate the project's risks to bird and bat populations, Icebreaker and OEC/Sierra Club, argue that the Board's Staff, which includes the ODNR, is more than capable of ensuring Icebreaker's compliance with the required risk identification and mitigation work that is, as all parties acknowledge, presently incomplete. Icebreaker continues by pointing out that the Board's rules allow the Board to rely on Staff to monitor certificate conditions and such practice has been approved by the Supreme Court of Ohio, citing *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 452, 2012-Ohio-878. OEC/Sierra Club state the Board should have relied on the expertise of Staff and the ODNR and should not have rendered its own judgement. Further, OEC/Sierra Club submit that the Board should not be the arbiter of whether lifting restrictions is permissible; instead such decisions should be left to experts of Staff and the ODNR. Both Icebreaker and OEC/Sierra Club maintain that the Board's decision to require a second hearing is unprecedented. Neither Icebreaker, BNOW, nor OEC/Sierra Club address the potential of the Revised Stipulation to place responsibility for determining compliance in the hands of mediators or courts rather than the Board Staff, cause compliance determinations to be made outside Board supervision and result in review of Board decisions by other than the Ohio Supreme Court which has exclusive jurisdiction to review Board decisions.

{¶ 22} Bratenahl Residents maintain that it was proper for the Board to require Icebreaker to come before the Board to request that the interim feathering restrictions be modified. Bratenahl Residents reiterate their argument from the initial briefs that allowing Staff and the ODNR to determine whether the turbines can be fully operational is an unlawful delegation of the Board's authority. Bratenahl Residents aver that, according to R.C. 4906.02(C), only the Board has the power to make such determinations. Additionally, according to Bratenahl Residents, a private determination by Staff deprives them and other interested parties from the ability to review information and an opportunity to be heard.

{¶ 23} In the final assignment of error, OEC/Sierra Club submit that the Board's decision is unlawful as it violates public policy by failing to act as quickly as possible to reduce climate change. OEC/Sierra Club evolve this claim by asserting that the

modifications to the Revised Stipulation render the project financially unviable and unable to go forward. Then, OEC/Sierra Club leap to assert that the Board has put forth a decision that will result in a long reliance on fossil fuels statewide. According to OEC/Sierra Club, the Board has an obligation to consider the impact of the project on climate change.

B. Summary of the applications for rehearing filed by the Bratenahl Residents

{¶ 24} As part of its first assignment of error, Bratenahl Residents contend that the May 21 Order is unreasonable and unlawful because it grants a certificate of environmental compatibility and public need to Icebreaker, despite Icebreaker having failed to introduce sufficient evidence for the Board to make valid findings and determinations as to the nature of the probable environmental impact. Specifically, Bratenahl Residents claim that Icebreaker and other Signatory Parties admitted that Icebreaker has yet to identify the radar monitoring technologies it intends to use to gather the necessary data to evaluate the potential impact on birds and bats, even though the ODNR and the U.S. Fish and Wildlife Service (USFWS) have been requesting that Icebreaker collect such data since 2008. According to Bratenahl Residents, Icebreaker's own application indicated that these state and federal agencies agreed that, while the permitting processes was allowed to proceed, Icebreaker was nonetheless required to conduct additional field surveys prior to construction in order to provide a direct comparison with post construction survey information as a means to assess the level of wildlife impact during the operational phase of the project (Icebreaker Ex. 1 at 90). In Staff's October 23, 2017 sustained motion to suspend the procedural schedule, Bratenahl Residents also argue Staff noted that this type of information regarding the viability and design of pre-and post-construction radar monitoring protocols would be necessary to measure the effect of the proposed turbines on birds and bats. In fact, Bratenahl Residents contend that the nature of the probable environmental impact cannot be determined unless and until Icebreaker submits sufficient evidence to show the number and density of birds and bats that fly through the project's rotor-swept zone, which evidence, according to Bratenahl Residents, Icebreaker acknowledged does not exist at this time (Tr. Vol. II at 317, 331). While Icebreaker alleges

that the Diehl Report should be considered as a response to these concerns, Bratenahl Residents contend that the report consists of nothing more than an evaluation of several different proposals for the radar monitoring technology to be used, all of which were subject to several deficiencies that would need to be evaluated and corrected to obtain credible data, especially in the event the avian radar technology would be deployed on a floating platform rather than a stationary platform (Icebreaker Ex. 37 at 1). May 21 Order at ¶ 154. As the requisite information regarding the risk associated with birds and bats has not been provided to date, particularly in relation to the admitted collision, avoidance, and attraction phenomena, Bratenahl Residents contend that the Board erred when it concluded it could determine the nature of the project's probable environmental impact (Staff Ex. 7 at 6).

{¶ 25} In response to Bratenahl Residents, Icebreaker, BNOW, Carpenters, Sierra Club, and OEC argue that the Board was correct in its determination regarding the nature of the probable environmental impact of the facility under R.C. 4906.10(A)(2). Initially, these parties claim that Bratenahl Residents do not contest the Board's determination in respect to a majority of the potential impacts considered by the Board, such as socioeconomic effects or impacts on aquatic species. Rather, Icebreaker, BNOW, Carpenters, Sierra Club, and OEC argue that Bratenahl Residents limit their argument to the fact that the May 21 Order does not contain sufficient documentation regarding the impact of the demonstration project on migrating birds and bats, despite the Board's acknowledgement of the "extensive evidence provided in order to evaluate the nature of the probable environmental impact of the project on birds and bats." May 21 Order at ¶ 103 [where the Board specifically listed documents supporting its ultimate conclusion regarding R.C. 4906.10(A)(2)]. After evaluating this evidence, as well as Dr. Gordon's review of 42 land-based wind farms and other studies, Icebreaker and the supporting parties argue, again, that the Board correctly concluded that the small scope of the one-of-a-kind project and the proposed project location will minimize the potential effects often associated with wind generation facilities, further noting that the demonstration project's main impact is expected to be on nocturnal migrating birds. May 21 Order at ¶ 108.

{¶ 26} Additionally, Icebreaker and the other supporting parties claim that the Revised Stipulation resolves all of the allegedly outdated issues regarding pre- and post-construction raised by Bratenahl Residents in their application for rehearing. In fact, these parties maintain that any concerns initially raised by USFWS regarding the project were addressed by the March 12, 2018 letter from USFWS to the ODNR, which included the agency's final findings and concluded the project has "limited direct risk to migratory birds and bats." Opinion, Order, and Certificate at ¶ 163. Moreover, pursuant to the terms laid out in the Revised Stipulation, Icebreaker, BNOW, Carpenters, Sierra Club, and OEC opine that Bratenahl Residents' insistence that the pre-construction radar studies be completed and the collision monitoring technology be selected prior to a certificate being issued are also misplaced. Specifically, these parties point to the requirements, among other commitments in the Revised Stipulation, to strictly comply with the terms of the Avian and Bat memorandum of understanding (MOU) and its associated pre-construction and post-construction monitoring plans, implement the avian and bat impact mitigation plan and collision monitoring plan prior to construction, ensure that the collision monitoring technology be fully functioning at the time the turbines commence operation, and maintain the strict reliability thresholds to verify the veracity and viability of the avian and bat radar data collected at the project site (Joint Ex. 2 at 5-9). Here, Icebreaker and the other supportive signatory parties, argue that the Board properly evaluated all of this evidence to conclude the expected risk associated with this demonstration project is low. In doing so, these parties acknowledge that there is a distinct difference between determining the probable environmental impact and the actual environmental impact of the facility once it is operational, noting the Board made this same distinction when it determined the purpose of the pre-construction radar studies to be completed is to provide the baseline to determine the actual environmental impact of the facility. May 21 Order at ¶ 103. As such, they contend that the completion of the required pre-construction and post-construction radar monitoring outlined in the Revised Stipulation is not required for the Board to ascertain the nature of the probable environmental impact, in accordance with R.C. 4906.10(A)(2).

{¶ 27} As their second of assignment of error, Bratenahl Residents claim the May 21 Order is unreasonable and unlawful because the facility does not serve the public interest, convenience, and necessity. More specifically, Bratenahl Residents assert that the Board cannot determine that the project serves the public interest under R.C. 4906.10(A)(6) if the project violates the Public Trust Doctrine, the doctrine prohibiting the state from using its title in public property for the benefit of a private party such as Icebreaker. Not only do Bratenahl Residents object to the notion that a valid determination regarding the Public Trust Doctrine lies outside of the Board's jurisdiction, they contend that the Board erroneously determined that "because the state is not relinquishing any interest in Lake Erie" the project was not in violation of the Public Trust Doctrine, citing to the fact that the project was planned to be constructed on the bed of Lake Erie on leased, submerged land off the coast of Cleveland, Ohio. May 21 Order at ¶ 35. Further, while the Bratenahl Residents claim the Board erroneously determined that the significance of relinquishing an interest of the title to Lake Erie to a private commercial enterprise should be minimized due to the fact that the turbines would be considered a demonstration project that may be informative for potential future larger-scale offshore wind farms in Lake Erie and other Great Lakes, Bratenahl Residents argue the Public Trust Doctrine is, nonetheless, violated. May 21 Order at ¶ 200. Accordingly, as Bratenahl Residents claim the May 21 Order violates the Public Trust Doctrine, they request that the Board find that the project is not in the public interest, a finding required by R.C. 4906.10(A)(6) before the Board can authorize a certificate.

{¶ 28} Icebreaker, BNOW, Carpenters, OEC, and Sierra Club contend that Bratenahl Residents are incorrect, noting that the submerged land lease between the state of Ohio and Icebreaker specifically requires Icebreaker to "respect * * * the public's right to the free and unrestricted use of the waters * * * and the project is subject to the public's right of navigation in and around the facility." May 21 Order at ¶ 200. Further, these parties argue that the Board examined the potential impact of the facility on certain recreational activities such as boating, fishing, and swimming, and found, due to the small scope of the project and its proposed location, the project is expected to have minimal impact on the public's enjoyment

of Lake Erie. Most importantly, according to these parties, the Board also explained that the state is in no way relinquishing its interest in Lake Erie. May 21 Order at ¶ 200. As detailed in the May 21 Order, these parties also note that the Board recognized the benefits associated with the project raised by several of the Signatory Parties, as well as those presenting testimony during the local public hearings, including added renewable generation to Ohio's generation mix, economic benefits garnered through job creation, and the opportunity to gain experience with an offshore freshwater wind generation project. May 21 Order at ¶ 190. As a final measure, Icebreaker, BNOW, Carpenters, OEC, and Sierra Club claim that Icebreaker submitted a complaint resolution plan as part of its application to ensure that any complaints about the facility construction or operation are adequately investigated and resolved. May 21 Order at ¶ 183. None of the parties seeking rehearing address the condition included in the Revised Stipulation, as adopted by the May 21 Order that requires Icebreaker to secure a new submerged land lease from the ODNR.

C. Board conclusion

{¶ 29} As an initial matter, R.C. 4903.10 states that applications for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Furthermore, pursuant to Ohio Adm.Code 4906-2-32, an application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing. No specific assignments of error are set forth in the applications for rehearing filed by Carpenters or OEC/Sierra Club. See *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case Nos. 16-481-EL-UNC, et al., Entry on Rehearing (Sept. 11, 2019) at ¶ 22. The Supreme Court of Ohio has previously refused to consider matters which were not set forth with adequate specificity, holding that an application for rehearing must include an allegation of the legal error the Board may have made or an allegation of the Board's incorrect factual finding in order to satisfy the statutory requirements applicable to applications for rehearing. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 374-375, 2007-Ohio-53, 859 N.E.2d 957; see also *The Conneaut Telephone Co. v. Pub. Util.*

Comm., 10 Ohio St.2d 269, 227 N.E.2d 409 (1967); *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 1994-Ohio-469, 638 N.E.2d 550; *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 376-378, 86 N.E.2d 10 (1949) (where the Court stated "[i]t may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question.") When solely evaluating the applications for rehearing, neither Carpenters nor OEC/Sierra Club state specifically the ground or grounds on which they consider the May 21 Order to be unreasonable or unlawful. In fact, Carpenters' application for rehearing consists of a sentence indicating it is merely adopting the application for rehearing submitted by Icebreaker. Thus, the Board finds that the applications for rehearing filed by Carpenters and OEC/Sierra Club fail to set forth specific grounds required by R.C. 4903.10(B) and, therefore, should be denied. Although these applications for rehearing should be denied due to this failure, we will, nonetheless, address their allegations as they largely overlap with those advanced by Icebreaker.

{¶ 30} As to Icebreaker's application for rehearing, consistent with our decision at the September 17, 2020 meeting, the Board finds it appropriate to grant, in part, Icebreaker's application for rehearing and to revise the May 21 Order. Upon additional review, as described below, the Board agrees that the default bird and bat risk mitigation protocol condition can be removed provided that, prior to any construction or operation of the Project, the Board shall address the bird and bat risk mitigation measures that shall apply to this project.

{¶ 31} Pursuant to R.C. 4906.10(A)(3), the proposed facility must represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, along with other pertinent considerations. In the May 21 Order, we discussed the additional precautions included in the Revised Stipulation that were not included in the Initial Stipulation: (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 now be installed and fully functioning prior to operation; (3) as dictated by the collision monitoring plan, ODNR and Staff will have the authority to direct mandatory feathering from March 1 through January 1, during all nighttime hours, in the event the collision-detection system does not accurately detect collisions; (4) the reliability threshold for avian radar data will be set at 75 percent viable data, with no exceptions; (5) the length of the radar monitoring seasons was extended to include all days from April 1 through November 15, which includes the summer residency period; and (6) the number of collisions before adaptive management is triggered has been lowered from up to 330 collisions, facility-wide, within a 24-hour period to up to 21 collisions, facility-wide, within a 24-hour period (Joint Ex. 2 at 6-9; Staff Ex. 14 at 4-6; Icebreaker Ex. 57 at 3). May 21 Order at ¶ 152.

{¶ 32} While the Board acknowledged the evidence of record and the safeguards in place in the May 21 Order, we expressed concern regarding the lack of data at the project site and the novel nature of this project. Accordingly, in the May 21 Order, the Board inserted additional risk mitigation protocols where the turbines were to be feathered during peak bird and bat migration periods, with the ability for those restrictions to be scaled back as more information becomes available. After further review, however, the Board determines that the default risk mitigation protocol is not necessary at this time. We observe that the May 21 Order approves a process which—both prior to construction and operation as well as during operation—ensures that the necessary information is provided and properly reviewed by the Board. For example, Condition 21 of the Revised Stipulation requires Icebreaker to acquire two years of radar data at the project site prior to construction. That information must meet the specific requirements outlined in the Revised Stipulation[1] and, pursuant to the May 21 Order, is subject to Board approval. Similarly, Condition 18 directs Icebreaker to submit an avian and bat mitigation plan, including the collision

[1] Among other requirements, the radar monitoring program must produce viable data at least 75 percent of the time; must be able to determine the flight altitude of birds and bats near and within the rotor-swept zone; and must be able to provide information that can be used to determine and quantify behavioral avoidance or attraction to turbines in the open water setting.

monitoring plan, at least 120 days prior to construction, which is also subject to Board approval. With this process, and the oversight that is involved, the Board is persuaded that the default risk mitigation protocol can be eliminated without distracting from the effort to establish the risk mitigation protocols that will apply to this project. Therefore, the May 21 Order should be revised to strike the default bird and bat mitigation protocol modification made in paragraph 160.

{¶ 33} In its application for rehearing, Icebreaker additionally contested the May 21 Order's directives that specific information be filed in the public docket for Board approval. In considering Icebreaker's argument, we must first analyze the Revised Stipulation, including the incorporated memoranda, which Icebreaker and other parties submitted to the Board and have urged the Board to adopt without modification. As described in Condition 21 of the Revised Stipulation, Icebreaker must complete two years of pre-construction radar at the project site. The accumulated radar data must meet certain qualification, including determining the flight altitude of birds and bats near and within the project's rotor swept zone. The Revised Stipulation called for the required pre-construction data to be shared with Staff and the ODNR before any construction could commence for the purpose of ensuring the information complied with the Revised Stipulation's requirements as they relate to the identification of risks to bird and bat populations and proper mitigation of such risks. Similarly, pursuant to Condition 18 and prior to the commencement of construction, the Revised Stipulation required Icebreaker to provide the ODNR with the bird and bat impact mitigation plan, which includes the collision monitoring plan. Thus the Revised Stipulation precluded Icebreaker from commencing construction (and therefor operation) until the bird and bat population risks were adequately identified and mitigated and Icebreaker secured the additional approvals required by the Revised Stipulation. Our May 21 Order did not change the scope of the work that Icebreaker must complete before construction can commence or the nature of the approvals that Icebreaker must secure prior to construction to ensure that the bird and bat population risks presented by this project are adequately identified and mitigated. Also, and as described in the Avian and Bat MOU

incorporated in the Revised Stipulation, any dispute as to interpretation or implementation of the MOU could be mediated by a third party and any resulting litigation could be commenced either at the Board or a Franklin County court. *See* Icebreaker Ex. 38. These dispute resolution clauses have the potential to circumvent the jurisdiction of the Board as well as the Ohio Supreme Court. Our limited modifications to the Revised Stipulation maintain the Board's oversight over compliance with the May 21 Order while providing for a public and transparent process that protects the rights of all the parties including Icebreaker.

{¶ 34} Icebreaker asserts the Board's rules and the Supreme Court of Ohio authorize Staff to oversee compliance with the conditions. As we stated in our May 21 Order, Staff is qualified to oversee Icebreaker's compliance. May 21 Order ¶ 199. As described in the Revised Stipulation largely adopted by the Board, Staff is tasked with overseeing much of Icebreaker's ongoing compliance with the other conditions attached to the certificate by the Revised Stipulation and the May 21 Order. Pursuant to R.C. 4906.02, the Board has the sole power to approve, deny, or modify and approve an application for a certificate, and, pursuant to R.C. 4906.10(A), the Board may condition such a certificate. While R.C. 4906.02 allows duties to be assigned to Staff, including the oversight of condition compliance, no such delegation is required. Here, in the case of a one-of-a-kind project and for a limited purpose, the Board established a transparent and public process that allows for thorough review by the Board Staff and the parties. The expertise of Staff and the ODNR has not been displaced by the May 21 Order; it will still be relied upon as appropriate. Further, we note that the decision encourages Icebreaker to proactively work with Staff and the ODNR. May 21 Order at ¶ 161.

{¶ 35} We additionally flatly reject the contentions of Icebreaker and OEC/Sierra Club that the Board erred by treating the project as a demonstration project. In our May 21 Order, we recognized that Icebreaker's application described the project's primary purpose as "exploring the viability of other, large-scale offshore wind facilities." May 21, Order at ¶ 151, citing Icebreaker Ex. 1 at 3. The May 21 Order continues, "The project constitutes a

novel undertaking, not only in the state of Ohio, but the entire country; as such, we must ensure that all necessary precautions have been taken and all necessary measures are in place to mitigate both projected and unanticipated risks associated with avian and bat migratory behavior." May 21 Order at ¶ 151. In our decision, the Board did consider the six turbines in the application, but, based on the representations of Icebreaker, we also recognize that this is a first-of-its-kind project that understandably carries with it both known and unknown risks. We also recognized that Icebreaker and the other parties supporting the Revised Stipulation frequently described the project as a demonstration project. Based on the facts and circumstances presented, the May 21 Order recognizes the significance of this project as that significance was represented to the Board by the parties supporting and contesting the Revised Stipulation. May 21 Order at ¶ 160.

{¶ 36} In removing the default bird and bat mitigation protocol, and partially granting Icebreaker's application for rehearing, the Board finds that any application for rehearing regarding the Board's addition of the default risk mitigation condition not expressly discussed above is thus moot and should be considered denied.

{¶ 37} Regarding the application for rehearing filed by the Bratenahl Residents, as noted in the May 21 Order, the Board concluded that the nature of the environmental impact can be determined only after considering the extensive amount of evidence presented regarding the potential impacts to birds and bats, including, but not limited to, various risk assessments, [2] acoustic surveys, aerial waterfowl reports, ODNR's 2009 Wind Turbine Placement Favorability Analysis, NEXRAD analyses, and Staff's review of mortality results from terrestrial wind energy projects in Ohio. May 21 Order at ¶¶ 103-104. Further, the Board determined that the project, as conditioned by the May 21 Order to include an interim default bird and bat risk mitigation protocol, represents the minimum adverse environmental impact, while recognizing, however, that there is a considerable unknown

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[2] Notably, the 2016 Risk Assessment and 2018 Risk Summary included an evaluation of 42 land-based wind projects in the Great Lakes region regarding bird migration patterns and 55 land-based projects in the Great Lakes region regarding bat fatalities.

risk associated with the number and density of birds and bats potentially migrating through the rotor-swept zone. The removal of this interim default risk mitigation protocol accompanied by the process discussed herein with regard to the identification of the bird and bat risk and an appropriate risk mitigation protocol will operate to ensure minimum adverse impact to bird and bat populations.

{¶ 38} We continue to find that Icebreaker holds the burden to identify appropriate technologies that will satisfy all of the conditions set forth in the May 21 Order. May 21 Order at ¶¶ 154-155, citing Staff Ex. 1 at 24; Staff Ex. 2 at 2-3; Joint Ex. 2 at 7-8; Icebreaker Ex. 32 at 6-7; Icebreaker Ex. 37 at 9; Tr. Vol. VIII at 1771, 1788). Similarly, the collision monitoring technology is not required to be identified prior to the issuance of a certificate, as suggested by Bratenahl Residents. Notably, Revised Stipulation Condition 18 requires that a collision monitoring plan, and the associated collision-monitoring technology, will be established through a public and transparent process prior to construction. As we explained in the May 21 Order, the mere fact the collision monitoring technology has not been chosen does not eliminate the requirements set forth in the Revised Stipulation as to how the technology will operate at the project site. May 21 Order at ¶ 163, citing Joint Ex. 2 at 6; Staff Ex. 14 at 4. As these arguments have already been thoroughly addressed by the Board, and Bratenahl Residents have failed to raise any additional arguments for our consideration, Bratenahl Residents' first assignment of error should be denied.

{¶ 39} The Board notes that Bratenahl Residents largely reiterate the arguments asserted in their post-hearing briefs. The Board thoroughly considered, and rejected those arguments, explaining its rationale in the May 21 Order at ¶¶ 151-157. We would, however, note that while Bratenahl Residents argue that the Board was incorrect to determine that the Board lacks jurisdiction to entertain the arguments regarding the Public Trust Doctrine, Bratenahl Residents provide no legal basis for such a conclusion. In any event, we were very clear in the May 21 Order that the determination of whether the project violates the Public Trust Doctrine is one of a judicial nature and, consequently, outside the Board's jurisdiction. May 21 Order at ¶ 200.

{¶ 40} Moreover, even if we were to accept that the Board does possess the requisite jurisdiction to make such a determination, which we do not, we would come to the same conclusion as that expressed in the May 21 Order. May 21 Order, ¶ 200.[3] Further, the Board has already examined the potential impact of the facility on certain recreational activities such as boating, fishing, and swimming, and found, due to the small scope of the project and its proposed location, the project is expected to have minimal impact on the public's enjoyment of Lake Erie. May 21 Order at ¶ 166.

{¶ 41} In summary, the Board finds that Icebreaker's application for rehearing should be granted, in part, as discussed above. Having found all other arguments discussed above to be without merit, the Board finds that the applications for rehearing filed by Bratenahl Residents, BNOW, Carpenters, and OEC/Sierra Club should be denied.

IV. ORDER

{¶ 42} It is, therefore,

{¶ 43} ORDERED, That the application for rehearing filed by Icebreaker be granted, in part, and denied, in part. It is, further,

{¶ 44} That the applications for rehearing filed by Bratenahl Residents, BNOW, Carpenters, and OEC/Sierra Club be denied. It is, further,

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3 We note that, pursuant to the Revised Stipulation, Icebreaker is required to execute a modified submerged land lease with the ODNR prior to the required preconstruction conference, as well as file it in the case docket (Joint Ex. 2 at 3, 5). As such, these arguments could also be found to be misplaced since the final lease agreement remains to be finalized.

{¶ 45} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:
Approving:

Sam Randazzo, Chairman
Public Utilities Commission of Ohio

Rachel Johanson, Designee for Lydia Mihalik, Director
Ohio Development Services Agency

Mary Mertz, Director
Ohio Department of Natural Resources

W. Gene Phillips, Designee for Lance Himes, Interim Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

Greg Murphy, Public Member

NJW/MJA/hac

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF ICEBREAKER WINDPOWER INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR AN ELECTRIC GENERATING FACILITY IN CUYAHOGA COUNTY, OHIO.	**CASE NO. 16-1871-EL-BGN**

CONCURRING OPINION OF CHAIRMAN SAM RANDAZZO

Entered in the Journal on October 8, 2020

Our May 21, 2020 order (Order) seems to have had the effect of accelerating the deployment of words and deeds that indicate the passions felt by stakeholders for and against this project. At times, the advocacy that accompanies this passion tends to resemble advice rooted in theology rather than policy or advice that is unhinged from controlling statutory requirements. Passion appears to also have motivated a member of the Ohio Power Siting Board (Board) to inappropriately and recklessly distribute, to the public, confidential materials provided to Board members exclusively for the purpose of facilitating their review and the Board meeting deliberations that take place in reaching a decision.

Not so long ago, similar passions were on display as a result of the potential exploration for and development of oil and natural gas resources that reside under Lake Erie. Governors Taft and Kasich ended, in succession, the opportunity for such exploration and development by issuing executive orders preventing the Ohio Department of Natural Resources (ODNR) from leasing land under Lake Erie for such purposes.

In any event, both current events and history tell us that when energy issues involve Lake Erie, passions are likely to run high.

But passion is no substitute for evidence or reasoning properly aligned with the facts and the law. Passion does not swing the burden of proof or persuasion away from the applicant and on to the opponents. Passion does not guarantee that a demonstration project will become a commercially successful venture. And, in an adversarial process guided by a

search for the public interest, being disagreeable does not enhance the value of the process or enhance the opportunity for reasoned decision making.

One of the central issues presented by the applications for rehearing comes from the claim by some stakeholders that the Board erred by not approving, as filed, the Second Joint Stipulation and Recommendation[1] submitted at the hearing as Joint Exhibit 2 (Recommendation). Through their advocacy, they essentially assert that their Recommendation left nothing for the Board to do but to approve it.[2] In other words, they campaign as though this demonstration project has nothing to demonstrate. As the Recommendation itself makes clear, the truth lies elsewhere.[3]

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[1] During the course of this proceeding, different settlements were filed. A settlement was filed on September 4, 2018 because the applicant and a few other parties opposed the shutdown condition in Staff Report of Investigation. Application For Rehearing of Icebreaker Windpower, Inc. at page 5. On May 15, 2019, the applicant and some of the parties submitted a Second Joint Stipulation and Recommendation (Joint Exhibit 2).

[2] In its application for rehearing, the applicant makes claims about the motivation of parties to enter or resume negotiations. Application For Rehearing of Icebreaker Windpower, Inc. at page 5. The Business Network for Offshore Wind, Inc. moves in a similar direction. Application for Rehearing of Business Network for Offshore Wind, Inc. at page 6. Such claims are inappropriate whether made in pleadings or otherwise. Opponents of the project were not permitted to pursue a similar line of inquiry during the hearing. Tr. Vol, VIII at pages 1760 and 1761. Settlements must speak for themselves. Claims by one party about what may have motivated other parties to engage in settlement negotiations are inappropriate, period. But once they are made in circumstances where parties were precluded from conducting cross examination on the settlement process, the proceeding should, in fairness and when requested, be reopened to ensure that opponents have appropriate cross examination latitude.

[3] Page 11 of the Application for Rehearing submitted by Icebreaker Windpower, Inc. erroneously characterized the Recommendation as follows:

> … the Revised Stipulation [Recommendation] includes Tactical Feathering, where the starting point/default is operating the turbines 24/7, unless a proven collision detection technology (which must be fully functioning prior to operation) fails to perform in accordance with the Collision Monitoring Plan.

This erroneous description of the Recommendation tellingly comes with no citation to the record. Numbered paragraph 15 at page 5 of the Recommendation clearly states that the applicant must comply with all terms in Avian and Bat Memorandum of Understanding (MOU) as well as any other protocols or documents resulting from this MOU. The same paragraph states that the required monitoring plans must be finalized and accepted in writing by ODNR ***prior to construction*** and will remain "living documents" allowing further modifications by this same mostly-mysterious process. The claim that the Recommendation sanctioned operating the turbines 24/7 presumes an outcome that was, by the terms of the Recommendation, neither stated nor certain. And if the claim were true, it would help to explain why

The Recommendation and its incorporated memoranda of understanding (MOU) clearly and repeatedly reveal that the Board's adoption, as filed, would have ***precluded***[4] ***any construction and operation of the wind turbine generators until the unquantified risks***[5] ***to avian and bat***[6] ***populations are adequately identified and mitigated***.[7] Our initial order landed in the same place except that it explicitly included a default mitigation remedy which controls in the meantime. This explicit interim requirement was certainly one of the outcomes within the range of potential risk mitigation remedies allowable by the terms of the Recommendation. Thus and to the extent that our initial order might have been fairly (or unfairly) characterized as delivering a "poison pill", the applicant and the other Recommendation signatory parties wrote the prescription.

Our Order also recognized an unlawful and unreasonable deficiency contained in the Recommendation. More specifically, the Recommendation did not identify a lawful and reasonable process by which the open and significant issues associated with the identification and mitigation of the risks to avian and bat populations would be resolved. Instead it offered an agreement to either try to agree, agree or disagree accompanied by attributes that suggest that both procedural and substantive outcomes could be determined by mediation or litigation operating outside the supervision of the Board, outside public

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the Recommendation was not accepted by the Board without modification. Allowing a default 24x7 operation of the turbines given the, at best, incomplete work on the identification of avian and bat risks and necessary mitigation protocols unacceptably degrades the very purpose of the work that the applicant is required to perform both by the terms of the Recommendation and the Board's Order and transforms the required statutory findings into window dressing.

4 Tr. Vol VIII at pages 1757-1761. Recommendation, Joint Exhibit 2, paragraph 19, pages 6 and 7.

5 Tr. Vol VIII at page 1753.

6 As evident from the list of issues and concerns submitted by the parties, the effect of this project on avian and bat populations were a main focus of the proceeding. See Ohio Environmental Council and Sierra Club's List of Issues and Concerns for Cross Examination, July 10, 2018.

7 The evidence shows that …"there are hundreds of thousands of birds that regularly cross Lake Erie". Tr. Vol VIII at page 1773.

view and outside the exclusive right of review vested in the Supreme Court of Ohio.[8] At a time when the public and public officials are pushing for more transparency and public access, the Recommendation asked the Board to do the opposite. Instead, the Board determined that these issues must be addressed, if at all, through a public and transparent process that respects the Board's jurisdiction and statutory responsibilities, preserves the due process rights of the applicant and other parties, operates in the sunshine and respects the Ohio Supreme Court's exclusive right of review.[9]

The Recommendation was contested and, as a matter of law, no settlement, contested or uncontested, rises to become more than a recommendation to the Board on how the Board might, if the law and evidence allow, resolve issues of law and fact. The Board carefully considers contested settlements and did so here. But, as any experienced Board practitioner will quickly confirm, the Board has no duty to accept a Recommendation, , contested or uncontested. These are not new or novel positions. This is and has been the law for decades.

Accordingly, no person can rightly claim surprise as a result of the Board exercising its lawful authority to modify the Recommendation or to impose additional conditions. In fact, Section C of the Recommendation, at page 15, spelled out the rights of the signatory parties (including the applicant) in the event the Board rejected, materially modified or added additional conditions to their Recommendation. The content of the Recommendation itself shows that the signatory parties contemplated the outcome they contest through the rehearing process while claiming to be surprised or "stunned".[10] Passion offers no license for being disingenuous.

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8 Recommendation, Avian and Bat MOU, Section L.8 at pages 5-6.

9 Tr. Vol VIII at page 1779. As witness Hazelton correctly testified, the Board had and has the option to modify the Recommendation. Representative Crossman's proposed modifications to the Boards May 21, 2020 Order include elimination of the public and transparent process for the assessment and establishment of a bird and bat risk mitigation protocol. "Comments received from State Representative Jeff Crossman," docketed September 17, 2020.

10 Application For Rehearing of Icebreaker Windpower, Inc. at page 4.

From a bigger picture perspective and the beginning of this proceeding, hindsight brings a number of red flags into view.

For example, the initial application was deficient thereby delaying its acceptance.

The applicant made repeated requests to modify and delay the procedural schedule to allow it more time to attempt to address issues and questions that were in play from the get go.

The applicant was unwilling or unable to timely pay a Board invoice thereby resulting in additional delay.

The Bird and Bat MOU (including the Icebreaker Wind Avian and Bat Monitoring Plan incorporated in the Recommendation) called for the applicant's expert to determine if vessel-based collection of pre-construction radar data at the project site is feasible and will achieve study objectives plus provide a recommendation on viability and precise design of any pre-construction radar by the Fall of 2017.[11] If this determination was made and the precise design finalized, these facts are missing from the record.

In its application for rehearing, Icebreaker alleges that the Board's Order is unlawful because it results in a bifurcation of construction and operation determinations. However, the Recommendation urged upon the Board by Icebreaker calls for the same bifurcation. Thus, if the Board's Order was unlawful for the reason advanced by Icebreaker, the Board would be obligated to reject the Recommendation as a matter of law.

The same MOU commits the applicant to develop a Bird and Bat Conservation Strategy (BBCS) to conduct thorough post-construction monitoring of proposed project impacts and to undertake adaptive management measures if necessary. It also states that the BBCS would be submitted during the certification process and would be finalized well

[11] Recommendation, Joint Exhibit 2, Icebreaker Wind Avian and Bat Monitoring Plan at pages 12-13.

before construction. Yet, the BBCS, if finalized, was not submitted during the certification process.

The applicant has, at times, claimed that it is seeking certification of a demonstration project[12] and, at other times, argued as though there is nothing to demonstrate.

The applicant has alleged that the Board's Order made it more difficult for the applicant to secure financing. The assertion ignores the fact that the terms and conditions of the Recommendation urged upon us by the applicant (with no mention of negative financing implications), ***precluded construction and operation*** unless and until risks to avian and bat populations are adequately identified and mitigated. Had the Board approved the Recommendation, as filed, what assumptions could potential creditors or equity investors prudently make about when construction might commence, when construction might be completed, when commercial operation might commence or what operating limitations might be attached through the deferred and non-transparent issue resolution approach already described?

None of these red flags were considered for purposes of casting my vote. But, based on real world demands that reside on the implementation side of the Board's order, I take this opportunity to remind the applicant and its many supporters that passion is also a poor and very risky substitute for due diligence.

In the foregoing Order on Rehearing, the Board finds that the interim default bird and bat risk mitigation condition should be removed. This removal works to eliminate any hours during which the six turbines may be able to operate without securing further Board authorization. While this is what the applicant and others sought through their rehearing advocacy, it seems to me that this outcome is worse for the applicant than an undisturbed Order. With the Order on Rehearing, no construction or operation can commence unless and until the Board authorizes, through a public and transparent process, a bird and bat risk

[12] Recommendation at page 2

mitigation protocol. Thus, potential creditors or equity investors now have zero guidance on when construction might commence, when construction might be completed, when commercial operation might commence or what operating limitations may be attached as the required bird and bat mitigation protocol is sorted out.

When I began my concurring opinion, I offered some thoughts about the role and place of passion in this or any other Board proceeding. I will end where I began. Sometimes, passion unleashed on a problem can make the problem worse.

With regard to the foregoing Order on Rehearing, I concur.

THE OHIO POWER SITING BOARD

/s/Sam Randazzo

By: Sam Randazzo
Chairman

Summary: Entry Order on Rehearing responding to the applications for rehearing and concurring opinion of Sam Randazzo. electronically filed by Ms. Mary E Fischer on behalf of Ohio Power Siting Board