

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of)
Firelands Wind, LLC for a Certificate)
of Environmental Compatibility and)
Public Need to Construct a Wind-Powered)
Electric Generation Facility in Huron and)
Erie Counties, Ohio)

Case No. 18-1607-EL-BGN

**MEMORANDUM OF THE LOCAL RESIDENTS AND THE BLACK SWAMP BIRD
OBSERVATORY CONTRA FIRELANDS WIND’S MOTIONS TO STRIKE**

Local Residents Patricia Didion, Jane Fox, Marvin Hay, Theresa Hay, Patricia Olsen, Sheila Poffenbaugh, Walt Poffenbaugh, Christina Popa, John Popa, Lori Riedy, Charles Rogers, Kenn Rospert, Dennis Schreiner, Sharon Schreiner, Donna Seaman, William Seaman, Deborah Weisenauer, Kenneth Weisenauer, and Gerard Wensink (“Residents”) and the Black Swamp Bird Observatory (“BSBO,” which together with the Residents will be referred to as the “Intervenors”) hereby file their memoranda contra the motion of Firelands Wind, LLC (“Firelands”) to strike the testimony of K. Shawn Smallwood and portions of the testimony of Dennis Schreiner and Mark Shieldcastle.

K. Shawn Smallwood’s Testimony

Firelands moves to strike all of the testimony of K. Shawn Smallwood, contending that the Local Residents and the BSBO did not disclose their intent to call Mr. Smallwood as an expert witness until his prefiled written testimony was filed on September 21, 2020. Firelands claims that it was “ambushed” with Mr. Smallwood’s testimony after Firelands filed its prefiled testimony on September 11 and thus did not have “an opportunity to rebut his testimony with Firelands’s own testimony” on September 11. Firelands argues that the Intervenors did not

include Mr. Smallwood's identity in the Intervenor's original disclosures contained in their interrogatory answers, and that they were required to supplement their interrogatory answers under OAC 4906-2-14(E) within five days after deciding to call Mr. Smallwood as a witness.

To the contrary, Firelands has known since March 16, 2020 that it would be facing an expert witness on bats, when the Residents served interrogatory answers on Firelands stating that Mark Shieldcastle would provide expert testimony on "birds, bats, and other wildlife issues." See Page 3, Answer 5 of the interrogatory answers attached to Firelands' motion to strike.¹ Firelands also had ample notice from the Intervenor's petitions to intervene that the Intervenor planned to challenge Firelands' studies and conclusions about the wind project's potential impacts on bats. By the time Firelands filed its prefiled testimony, it had known for more than six months that the Intervenor planned to offer expert testimony on bats. This knowledge is confirmed by the fact that Firelands provided prefiled testimony on bats from not just one, but two, witnesses (Rhett Good and Chris Leftwich).

On September 9, 2020, Mr. Smallwood was substituted for Mr. Shieldcastle as the expert witness on bats. This occurred only two days prior to Firelands' filing of its direct testimony, so disclosing Mr. Smallwood's substitution within five days afterwards under OAC 4906-2-14(E) would not have informed Firelands' earlier-filed testimony. However, Mr. Smallwood's identity and testimony were fully, and timely, disclosed by September 21, 2020 in compliance with the Board's scheduling order.

While Firelands complains that it did not have the opportunity to prefile testimony rebutting Mr. Smallwood's opinions, the Board's rules and scheduling order did not provide Firelands with any right to discover the substance and details of Mr. Smallwood's testimony

¹ Firelands attached an unsigned, undated copy of Gerry Wensink's interrogatory answers to its motion. The first Resident to serve interrogatory answers on Firelands did so on March 16, 2020.

before September 21, 2020. The Board's rule on this procedures provides that "[a]ny party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify." OAC 4906-2-14(C) (emphasis added). As so limited, this rule does not authorize the use of interrogatories to explore the contents of the experts' opinions. While the rule goes on to state that a party may conduct discovery of an expert's opinions, this discovery is conducted by deposition, not interrogatories. As practiced in Ohio's courts, these depositions are taken after the experts have prepared their opinions, which Intervenor's experts did by September 21, 2020 as required by the Board's scheduling order. Consistent with this practice, Firelands' counsel informed Intervenor's counsel by notice of deposition on August 3, 2020 that it planned to depose Intervenor's witnesses starting on September 23, 2020. On September 22, 2020, Intervenor's counsel provided Firelands' counsel with a list of dates on which Intervenor's witnesses were available for deposition, including Mr. Smallwood. While Firelands' counsel subsequently withdrew its request for these depositions, Intervenor not only complied with the schedule in the Board's scheduling order for disclosing the substance of their witnesses' testimony, but they also offered Firelands the opportunity to explore that testimony more fully in deposition prior to hearing.

Although OAC 4906-2-14(C) may provide that the experts' identity and the subject matter of their testimony may be discovered by interrogatory, the timing of that disclosure is governed by the Board's scheduling order. Such scheduling orders are commonly issued by Ohio's common pleas courts and the federal district courts, and in those cases the parties routinely disclose their experts and the experts' opinions in accordance with deadlines in the scheduling orders instead of civil rule 26 that is analogous to OAC 4906-2-14(C). The Board's

rules codify this practice, stating:

A discovery request under rules 4906-2-14 to 4906-2-22 of the Administrative Code may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the board in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.

OAC 4906-2-14(G). Accordingly, the Board's rules did not authorize Firelands to serve the interrogatories on Intervenors that Firelands now claims should have been supplemented.

Firelands argues that, in Ohio's courts, the civil rules are enforced to "eliminate surprise" and prevent "trial by ambush," citing a passage from *Bailey v. Bailey*, 2004-Ohio-6930, ¶ 31 (12th Dist). Another sentence from the same passage in *Bailey*, which is not quoted by Firelands, advises that this means that the "civil rules were designed to provide for full discovery of all pertinent nonprivileged evidence and to allow both parties to accurately assess the merits of their case prior to trial." *Id.* (emphasis added). The Board's scheduling was designed, *inter alia*, to provide all parties with an orderly process for providing this information prior to the hearing by scheduling deadlines for the disclosure of all witnesses and their testimony. Firelands also had the opportunity to depose Intervenors' witnesses prior to that hearing. Intervenors have complied with all of the Board's requirements with respect to expert witness disclosures in accordance with these procedures and Firelands cannot honestly claim to have been surprised by Mr. Smallwood's testimony at trial.

Moreover, even if Intervenors had committed a technical infringement of the Board's discovery procedures, a tribunal has no grounds to exclude evidence if the noncompliance did not prejudice the opposing party. *U.S. Bank Nat'l Ass'n v. Robinson*, 2020-Ohio-32, ¶ 28 (8th Dist.) (evidence not barred for failing to answer or supplement answers to interrogatories where not prejudicial to the opposing party); *Westfall v. Aultman Hosp.*, 2017-Ohio-1250, ¶¶ 79-81 (5th

Dist.) (expert witness testimony not excluded for failing to timely disclose the expert's identity where not prejudicial to the opposing party). In this case, Firelands has not been prejudiced in any way. A full half year before Fireland's deadline for filing its testimony, Firelands knew an Intervenor bat expert would testify. Knowing this information, Firelands filed bat testimony from two expert witnesses. Firelands would not have known the contents of Mr. Smallwood's testimony even if Mr. Smallwood's name had been identified, but this information was duly provided by his prefiled testimony in accordance with the Board's schedule. Without any prejudice to Firelands, the exclusion of Mr. Smallwood's testimony would be an abuse of discretion.

In the alternative, Firelands has moved for leave to file rebuttal testimony to rebut Mr. Smallwood's testimony. Intervenor's do not object to this alternative request, provided that this leave is limited to topics not already addressed in Firelands' prior testimony.

Dennis Schreiner's Testimony

Firelands moves to strike Answers 8 through 15 of Dennis Schreiner's testimony on two meritless premises.

Firelands argues that Mr. Schreiner's testimony about the failures and problems with wind power facilities is not relevant, because Mr. Schreiner does not mention the Emerson Creek wind project by name. However, this testimony explains that these failures and problems pertain to all wind facilities. For example, Answer 10 points out that wind turbines produce electricity intermittently only when the wind blows, and Answers 12 and 13 explain how intermittent energy source such as wind power harm the reliability of the electric grid. In this example, it is hardly necessary to make the obvious point that the Emerson Creek wind project, like every other wind project, relies on the wind to produce electricity and that the wind does not always

blow hard enough to produce power. The Application itself confirms these facts. E.g., see Applic. Exh. 1, pg. 11 (stating that no electricity is produced at wind speeds below three meters per second). Nate Pedder’s testimony on cross-examination admitted this fact, and also admitted that wind turbines cannot produce electricity at the highest wind speeds. Answer 13 further explains that electricity from wind power cannot be stored by such devices as batteries to be made available in the absence of sufficient of blowing wind, and Mr. Pedder admitted that the Emerson Creek wind project has no plans to store its electricity in batteries or anything else.²

If Firelands actually believed that the Emerson Creek wind project were any different than any other wind project with regard to the principles discussed by Mr. Schreiner, it is free to explore those differences on cross-examination. But it would be improper to strike Mr. Schreiner’s testimony just because he did not expressly mention the obvious – that Firelands’ project is no different with respect to these issues than any other wind project – when there is no indication that any difference could possibly exist and when Firelands’ own application and project manager (Mr. Pedder) confirm that no such differences exist.

Firelands also contends that Mr. Schreiner’s testimony is not relevant to any of the eight criteria listed in R.C. 4906.10. But then it admits that Mr. Schreiner’s testimony “might be relevant” to two of these criteria: “(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility

² Firelands also asserts that Mr. Schreiner was not identified as an expert witness and that he is not qualified to act as one. Actually, Mr. Schreiner is the only witness in this case who is qualified to testify about the subjects of his testimony. Unlike Mr. Pedder, who “sponsored” the portions of the application dealing with the wind project’s potential effects on the grid, Mr. Schreiner operated an energy production facility and dealt with the effects of ebbs and flows of power from other energy flows while interacting with the grid’s operators. Nor does Mr. Schreiner’s absence from Intervenor’s early expert witness list serve as a basis for excluding his testimony, as the decision to call him as a witness was made around the same time as Mr. Smallwood was retained and his testimony was timely filed by the deadline in the Board’s scheduling order.

will serve the interests of electric system economy and reliability;” and” (6) That the facility will serve the public interest, convenience, and necessity.” Obviously, Mr. Schreiner’s testimony is relevant to these two criteria. For example, if wind power sources such as Emerson Creek wind project impair the availability of electricity as explained in Answer 13, this does not “serve the interests of electric system economy and reliability” or the public interest and convenience as required by R.C. 4906.10(A)(4) and (6) respectively. The rest of Mr. Schreiner’s challenged testimony is similarly, and obviously, relevant to these criteria.

Firelands’ position is based on the premise that Mr. Schreiner must apply his facts to the legal statutory criteria in R.C. 4906.10(A) in order to be admissible. But the application of facts to law is not Mr. Schreiner’s duty; that role belongs to the administrative law judges, who make these determinations with the assistance of the legal arguments of the parties’ counsel. Mr. Schreiner’s testimony cannot be struck just because he made no legal arguments.

Mark Shieldcastle’s Testimony

Firelands’ attempts to exclude some of Mark Shieldcastle’s testimony on several meritless grounds.

First, Firelands argues that Mr. Shieldcastle’s testimony at Lines 11-13 on Page 5 is hearsay. Firelands’ position is curious, given that most of its application and most of its witnesses’ testimony are hearsay. For example, Mr. Pedder’s testimony was deemed sufficient to admit the shadow flicker report and the PJM grid study, even though he nothing to do with their preparation. As the Board knows, an administrative agency has considerable discretion to admit hearsay, and it should not discriminate against Intervenors by denying them the opportunity utilize hearsay information even while Firelands is engaged wholesale in that practice. Moreover, while Firelands contends that the name of the speaker of the contested

statement must be identified to demonstrate the statement's reliability, Mr. Shieldcastle's identification of the speaker as a former chief of the Ohio Division of Wildlife serves that purpose.

Firelands also challenges Answer 18 of Mr. Shieldcastle's testimony on the asserted grounds that it is irrelevant and that Mr. Shieldcastle is unqualified to discuss its topics. Firelands challenges Mr. Shieldcastle's observations about the health benefits, but fails to mention that these observations cover only five lines of his four-page answer (Pg. 33, Lines 8-12). And even those five lines pertain to health benefits that an officer of an organization devoted to birds and bird-related recreation are expected to know.

Firelands also criticizes Answer 18 for describing the importance of birds to the people residing in Huron County, Erie County, and the shore of Lake Erie to the north of these counties. Firelands flippantly, and misleading, refers to this answer as describing the "feelings and beliefs" of others. To the extent this answer does describe a person's reactions to seeing a bird, Mr. Shieldcastle is well within his experience as a lifelong birdwatcher to know how it feels to watch birds. Just as importantly, Answer 18 goes way beyond the emotional value of bird-related recreation to also discuss the economic, social, and ecological values of birds to the area. The BSBO, and Mr. Shieldcastle as one of its officers, are well qualified to provide this information. The BSBO is intimately involved in the protection and promotion of birdwatching in this area. As stated in Answer 18, BSBO initiated and sponsors a festival known as the "Biggest Week in American Birding" that draws 100,000 people to the area with an estimated economic benefit of \$40 million to \$90 million. See Lines 3-10 on Page 32 and Lines 15-18 on Page 34. BSBO, including Mr. Shieldcastle, are involved in offering the bird-related recreational services described in Lines 6-18 on Page 34 that serve the economic, recreational, and ecological benefits

of the area. BSBO, and Mr. Shieldcastle, are knowledgeable about the recreational, ecological, and economic importance of Magee Marsh and are familiar with its status as one of North America's premier bird habitats, as expressed in Lines 10-13 on Page 32 and Line 22 of Page 33 to Line 5 of Page 34. In fact, BSBO's headquarters is located at the entrance to the access road to Magee Marsh. Mr. Shieldcastle also knows, as expressed in Lines 11-12 on Page 32, that many of the birds seen at Magee Marsh fly through the airspace of Erie, Huron, and Seneca Counties to get to the marsh, i.e., many of them migrate through the project area where they will in the future be threatened by the Emerson Creek wind project if constructed. Mr. Shieldcastle knows why the birds concentrate along Lake Erie in this area, as explained in Lines 14-23 on Page 33. In summary, Mr. Shieldcastle is personally involved with and knowledgeable about the contents of Answer 18.

Firelands cannot seriously contend that the information in Answer 18 is irrelevant and inadmissible while simultaneously arguing that the economic conclusions of its JEDI model should be admitted. Firelands' motion to strike portions of Mr. Shieldcastle's testimony should be rejected.

Respectfully submitted,

/s/ Jack A. Van Kley

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CERTIFICATE OF SERVICE

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Summary: Memorandum contra Firelands' Motions to Strike electronically filed by Mr. Jack A Van Kley on behalf of Black Swamp Bird Observatory and Erie, Huron & Seneca County Residents