

**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 in                    )     Case No: 16-1871-EL-BGN  
Cuyahoga County, Ohio.    )

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**MEMORANDUM CONTRA OF ICEBREAKER WINDPOWER, INC., OHIO  
ENVIRONMENTAL COUNCIL, SIERRA CLUB, INDIANA/KENTUCKY/OHIO  
REGIONAL COUNCIL OF CARPENTERS, AND BUSINESS NETWORK FOR  
OFFSHORE WIND, INC., TO APPLICATION FOR REHEARING OF THE  
OCTOBER 8, 2020 ORDER ON REHEARING FILED BY BRATENAHL RESIDENTS**

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**November 16, 2020**

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In the Matter of the Application of Icebreaker                     )  
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APPLICATION FOR REHEARING  
OF THE OCTOBER 8, 2020 ORDER ON REHEARING  
FILED BY BRATENAHL RESIDENTS**

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**I. INTRODUCTION**

Pursuant to Ohio Administrative Code (“O.A.C.”) 4906-2-32, Icebreaker Windpower, Inc. (“Applicant” or “Icebreaker”), the Ohio Environmental Council (“OEC”), the Sierra Club, Indiana/Kentucky/Ohio Regional Council of Carpenters (“Carpenters’ Council”), and the Business Network for Offshore Wind, Inc. (“Business Network”) (jointly referred to herein as “Parties”), jointly submit this memorandum contra to the November 5, 2020 Application for Rehearing of the Ohio Power Siting Board’s (“Board”) October 8, 2020 Order on Rehearing (“Order on Rehearing”) filed by the Bratenahl Residents.<sup>1</sup>

On May 21, 2020, the Board issued its Opinion, Order, and Certificate (“Order”) in the above-captioned matter adopting the Revised Joint Stipulation (“Revised Stipulation”) filed by the Parties and the Board’s Staff (“Staff”),<sup>2</sup> with modification.<sup>3</sup> On June 19, 2020, the Bratenahl Residents filed an application for rehearing of the Order (“Residents’ First Rehearing Application”). On June 22, 2020, Icebreaker, OEC, the Sierra Club, the Carpenters’ Council, and

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<sup>1</sup> Intervenor W. Susan Dempsey and Robert M. Maloney.

<sup>2</sup> Jt. Ex. 2.

<sup>3</sup> Order at 77-80, ¶¶160-161.

the Business Network, while supporting the Board's adoption of the Revised Stipulation, individually filed applications for rehearing of the Board's modification to the Revised Stipulation. On October 8, 2020, the Board, considering the applications for rehearing of the Order and the subsequent memorandum contra filed by the parties, issued its Order on Rehearing granting, in part, and denying, in part, Icebreaker's application for rehearing, and denying all other parties' applications for rehearing.

In their current application for rehearing of the Board's Order on Rehearing, the Bratenahl Residents made three claims. For the first two claims the Bratenahl Residents reiterated their objections set forth in the Residents' First Rehearing Application claiming that the Order on Rehearing is unreasonable and unlawful because the Board denied the Residents' First Rehearing Application and did not: (1) make valid findings and determinations as to the nature of the probable environmental impact pursuant to Ohio Revised Code ("R.C.") 4906.10(A)(2) or to determine that the Project represents the minimum adverse environmental impact pursuant to R.C. 4906.10(A)(3); and (2) find that the Project does not serve the public interest, convenience, and necessity and violates the Public Trust Doctrine. These first two claims for rehearing by the Bratenahl Residents are inappropriate requests for rehearing of issues that were thoroughly reviewed and decided by the Board in the Order and were then denied by the Board in the Order on Rehearing. For the Bratenahl Residents to now come and assert a second rehearing on issues that have already been decided and reheard is procedurally improper.

In their third claim for rehearing, the Bratenahl Residents assert that the Order on Rehearing is unreasonable and unlawful because it granted Icebreaker's application for rehearing, in part, and removed the provision that required the turbines to be shutdown during nighttime hours for eight months of the year ("Shutdown Mandate"). The Parties submit that the Board

appropriately and thoroughly addressed this third issue in its Order on Rehearing, as evidenced by the Board's decision to grant the Applicant's application for rehearing of the Order. Therefore, the Parties respectfully request that the Board deny the Bratenahl Residents' application for rehearing of the Order on Rehearing.

## **II. ARGUMENT**

### **A. The Bratenahl Residents' first two grounds for rehearing are improper and should be denied.**

In their first two grounds for rehearing, the Bratenahl Residents reiterated their objections set forth in the Residents' First Rehearing Application, claiming that the Order on Rehearing is unreasonable and unlawful because the Board denied the Residents' First Rehearing Application and did not: (1) make valid findings and determinations as to the nature of the probable environmental impact or as to the determination of whether the Project represents the minimum adverse environmental impact; and (2) find that the Project does not serve the public interest, convenience, and necessity and violates the Public Trust Doctrine. These first two claims for rehearing by the Bratenahl Residents are inappropriate and procedurally improper as the Board has already thoroughly reviewed and analyzed these issues, and denied the Residents' First Rehearing Application in its Order on Rehearing. In other words, the Board already allowed the Bratenahl Residents an opportunity to make these claims, has already heard and considered all of the applicable arguments, and has already ruled on them. However, in the event the Board determines that it will rehear these issues for a second time in their consideration of the Bratenahl Residents' current request for rehearing, the Parties incorporate by reference herein all of the arguments in opposition to these claims by the Bratenahl Residents set forth in the Parties' June 29, 2020 Memorandum Contra the Residents' First Rehearing Application.

**B. The Board’s Order on Rehearing granting, in part, the Applicant’s application for rehearing and removing the Shutdown Mandate is reasonable and lawful and supported by the record in this case.**

In its Order on Rehearing, the Board determined that, “[u]pon additional review...the Board agrees that the default bird and bat risk mitigation protocol condition [“Shutdown Mandate”] 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.”<sup>4</sup>

In arriving at its decision on rehearing, the Board noted that, in the Order, while the Board recognized the additional precautions and safeguards required by the Revised Stipulation, the Board inserted the Shutdown Mandate in light of its concern regarding lack of data from the Project site and the novel nature of the Project. However, the Board found on rehearing that, after further review, the Shutdown Mandate was not necessary at this time in light of the process approved in the Order that “ensures that the necessary information is provided and properly reviewed by the Board.”<sup>5</sup> The Board noted, for example, Revised Stipulation Condition 21 that requires two years of data at the Project site before commencement of construction, and Revised Stipulation Condition 18 that requires Icebreaker to submit an avian and bat mitigation plan, including a collision monitoring plan.<sup>6</sup>

Through its Order, as affirmed the Order on Rehearing, the Board has properly acknowledged “the extensive evidence provided in order to evaluate the nature of the probable environmental impact of the project on birds and bats.”<sup>7</sup> The Board accepted the experts’ findings and testimony and reached the conclusion that the facility represents the minimum adverse impact,

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<sup>4</sup> Order on Rehearing at 15 ¶30.

<sup>5</sup> *Id.* at 16 ¶32.

<sup>6</sup> *Id.* at 16-17 ¶32.

<sup>7</sup> Order at 39 ¶103.

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.”<sup>8</sup>

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. As confirmed by the Board, the manifest weight of the evidence in this case supports a determination that the Revised Stipulation ensures that the facility will have minimum environmental impact.

Contrary to the assertions of the Bratenahl Residents’, 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. 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

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<sup>8</sup> *Id.* at 40 ¶105.

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.
- (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.<sup>9</sup>

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.”<sup>10</sup>

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’s regulatory powers are immediately triggered.

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 remain 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

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<sup>9</sup> Order at 73 ¶152.

<sup>10</sup> *Id.*

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).<sup>11</sup>

The Bratenahl Residents inappropriately cite information on the record that was superseded and updated with the signing of the Revised Stipulation and the record evidence supporting it, all approved by the Board.<sup>12</sup> Contrary to the claims of the Bratenahl Residents, 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*”<sup>13</sup> (Emphasis added), with regard to the impact to birds and bats and the mitigation responsibilities. Specifically, the facts underlying the Revised Stipulation are supported by substantial documentation and testimony<sup>14</sup> (as acknowledged by the Board)<sup>15</sup> throughout the record, including, but not limited to, the following documents:

- (1) 2016 Icebreaker Wind: Summary of Risks to Birds and Bats.<sup>16</sup>
- (2) March 20, 2018 Risk Assessment Summary.<sup>17</sup>

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<sup>11</sup> Jt. Ex. 2.

<sup>12</sup> Residents’ App. for Reh. Oct. 8, 2020 Order at 9-13, 16-22.

<sup>13</sup> R.C. 4906.10(A)(2) and (3).

<sup>14</sup> See e.g., Staff Ex. 14.

<sup>15</sup> Order at 39 ¶103.

<sup>16</sup> App. Ex. 1, Ex. J.

<sup>17</sup> App. Ex. 6, Att. 2.



- (3) January 2017 NEXRAD Analysis.<sup>18</sup>
- (4) Avian and Bat MOU.<sup>19</sup>
- (5) Avian and Bat Monitoring Plan.<sup>20</sup>
- (6) Aerial Waterfowl and Waterbird Study Plan.<sup>21</sup>
- (7) Aerial Waterfowl and Waterbird Survey Report.<sup>22</sup>
- (8) 2017 Bird and Bat Monitoring Annual Report dated February 22, 2018.<sup>23</sup>
- (9) Final Bat Activity Monitoring Report dated February 15, 2018.<sup>24</sup>
- (10) Avian and Bat IMP.<sup>25</sup>
- (11) Radar Monitoring Protocol Draft.<sup>26</sup>
- (12) March 12, 2018 USFWS Letter.<sup>27</sup>

Therefore, it is more than evident that the manifest weight of the evidence on the record in this case supports the Board approval of the Revised Stipulation in accordance with the Order on Rehearing.

### III. CONCLUSION

As set forth above, the first two claims by the Bratenahl Residents wherein they reiterated their objections set forth in the Residents' First Rehearing Application should be denied in their entirety as improper. With regard to the final claim by the Bratenahl Residents, it is without merit and should be denied by the Board and the Board's Order on Rehearing should be affirmed.

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<sup>18</sup> App. Ex. 1, Att. J.

<sup>19</sup> App. Ex. 38.

<sup>20</sup> App. Ex. 3.

<sup>21</sup> App. Ex. 5.

<sup>22</sup> App. Ex. 6, Att. 4, App. B.

<sup>23</sup> *Id.*, Att. 4.

<sup>24</sup> *Id.*, App. A.

<sup>25</sup> App. Ex. 31, Att. REG-2.

<sup>26</sup> App. Ex. 32, Att. TJM-2.

<sup>27</sup> App. Ex. 6, Att. 6.

Therefore, the Parties respectfully request that the Board deny the application for rehearing filed by the Bratenahl Residents.

Respectfully submitted,

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