

**BEFORE  
THE OHIO POWER SITING BOARD**

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

**PETITION TO INTERVENE OF BRATENAHL RESIDENTS**  
**W. SUSAN DEMPSEY, ROBERT M. MALONEY, GREGORY BINFORD,**  
**AND LEON BLAZEY. JR.**

Pursuant to R.C. 4906.08(A)(3), R.C. 4906.08(B), and O.A.C. 4906-2-12(B) & (C), Cuyahoga County residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blaze, Jr. (together, the “Bratenahl Residents”), who live in the Village of Bratenahl, hereby petition the Ohio Power Siting Board for an order granting their intervention as parties in this proceeding.

Good cause exists for granting the Bratenahl Residents leave to intervene in this case after the 30-day period set forth in R.C. 4906.08(A)(3) and O.A.C. 4906-2-12(A)(2)(b). The Bratenahl Residents initially understood that the proposed project (the “Proposed Project”) would simply involve the installation to six (6) wind turbines in Lake Erie. They did not understand that the Proposed Project is likely to be a precursor to an additional 1000+ wind turbines being sited in Lake Erie. In addition, they did not realize the extent of the damage to birds and bats that is likely to be caused by the Proposed Project.

Moreover, pursuant to the October 23, 2017 Motion to Suspend the Procedural Schedule (the “Staff Motion to Suspend”) filed by the Ohio Power Siting Board (“OPSB”) staff, and the OPSB’s October 23, 2017 Entry granting that motion, the OPSB has stayed the procedural schedule in this case – requiring the scheduling of another public hearing and the adjudicatory

hearing at some future date, as yet undetermined. Thus, there will be no prejudice to the parties by the Bratenahl Residents' intervention in this case.

This Petition to Intervene is supported by the Memorandum In Support set forth below.

Respectfully submitted,

/s/ John F. Stock

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**MEMORANDUM IN SUPPORT OF**  
**PETITION TO INTERVENE**

**A. The Intervenor**

Intervenor W. Susan Dempsey is a life-long resident of Cuyahoga County. She grew up in Euclid, with a beach and Lake Erie at the end of her street. She learned to swim in Lake Erie before she could walk. The Dempsey family had a summer cottage in Eastlake, where Ms Dempsey and her six siblings spent summer vacations, swimming, boating, and fishing in Lake Erie. Later, Ms. Dempsey spent ten years "crewing" on racing sail boats throughout the Lake.

Ms. Dempsey attended college and graduate school in Cuyahoga County. She has always lived, worked, and paid taxes in Cuyahoga County. Currently, Ms. Dempsey owns a condominium in Bratenahl. From the ninth floor balcony of her condominium, she watches all varieties of birds, including geese, ducks, eagles, great blue herons, and sea gulls. She regularly enjoys sunsets on the Lake: the proposed wind turbines' killing of birds and bats and blot on the

aesthetic beauty of Lake Erie would directly affect her. The time and money that Cuyahoga County has invested in Applicant Icebreaker Windpower Incorporated's ("Applicant" or "Icebreaker") proposed six (6) turbine Lake Erie wind project (the "Proposed Project") have been funded with Ms. Dempsey's county tax dollars. Ms. Dempsey is a consumer of electricity distributed through the PJM grid in Cuyahoga County. She pays federal income taxes: the millions of federal grant dollars paid (and to be paid) for the Proposed Project have been funded with her federal tax dollars. Thus, Ms. Dempsey has numerous, direct interests to be protected in this proceeding.

Intervenor Robert Maloney has lived in Cuyahoga County for many years. He currently owns a condominium and resides in Bratenahl. He owns a boat, docked at Newport Harbor Boat Club, and regularly boats on Lake Erie. He's an avid fisherman and swimmer in the Lake. Mr. Maloney sometimes drinks water directly from the Lake while fishing. He also enjoys birding at the Lake Erie Nature Preserve, which teams with migratory birds and resident bald eagles. He visits the Lake Erie islands and uses the public beaches in Mentor and Cleveland, a 10-minute walk from Lake Erie. Mr. Maloney pays Cuyahoga County real estate taxes. He pays federal income taxes. Thus, Mr. Maloney has numerous, direct, personal interests to be protected in this proceeding.

Intervenor Gregory Binford has lived in Cuyahoga County for 65 years. He currently owns a condominium and resides in Bratenahl. He regularly boats on Lake Erie. He fishes and swims in the Lake. He also enjoys viewing birds at the Lake Erie Nature Preserve. He visits the Lake Erie islands and uses the public beaches in Mentor and Cleveland., a 10-minute walk from Lake Erie. Mr. Binford pays Cuyahoga County real estate taxes. He pays federal income taxes. Thus, Mr. Maloney has numerous, direct, personal interests to be protected in this proceeding..

Intervenor Leon Blazey, Jr. has lived in Cuyahoga County for many years. He currently owns property and resides in Bratenahl. He enjoys his beautiful viewshed out over the Lake. He enjoys feeding and watching Lake Erie birds.

The Bratenahl Residents possess legally-protectable interests that are endangered by Icebreaker's Proposed Project. And the existing parties to this proceeding cannot represent the Bratenahl Residents and will not protect their direct personal interests. The Bratenahl Residents are entitled to intervene in this proceeding pursuant to R.C. 4906.08(A)(3) and O.A.C. 4906-2-12.

**B. Statement of Good Cause for Intervention After 30-Day Period**

As noted, the Bratenahl Residents did not previously seek to intervene in this case to oppose the Proposed Project because they initially understood that the project would simply involve the installation to six (6) wind turbines in Lake Erie. They did not realize that the Proposed Project is likely to be a precursor to an additional 1000+ wind turbines being sited in Lake Erie. In addition, they did not realize the extent of the damage to birds and bats that is likely to be caused by the Proposed Project.

Moreover, the Staff Motion to Suspend: (1) acknowledges that the Proposed Project is "precedent-setting"; (2) acknowledges that Applicant has not provided to the OPSB valid pre- and post-construction radar monitoring studies necessary for the OPSB to determine the probable environmental impact of the Project on birds and bats; and (3) recommends that the date on which Applicant submits scientifically-valid studies to the OPSB serve as the new effective date of the Application:

. . . Staff believes it is necessary that Applicant provide it with additional supplemental information on the viability and design of the pre- and post-construction radar monitoring protocol that Applicant intends to utilize at the project site for determining project impacts. . . . *This information is necessary to measure*

*the effect of off-shore turbines on birds and bats as discussed further below. . . .* Staff would anticipate that a new procedural schedule would . . . include *new dates* for scheduling *a second public hearing* and *scheduling the evidentiary hearing*.

*. . . Staff proposes that the date the Applicant submits this supplemental information to Staff to serve as the Applicant's new effective date for its application,* so that a new procedural schedule, *including the scheduling of a second public hearing*, can be established in this case. (Emphasis added).

Staff Motion to Suspend at 1 – 3.

Similarly, the U.S. Fish And Wildlife Service (“FWS”) concludes that Applicant’s pre- and post-construction bird and bat studies, cited in the U.S. Department of Energy’s (“DOE”) draft Environmental Assessment (the “Draft EA”), are insufficient:

The conclusions reached in the [D]raft EA regarding potential impacts to birds and bats are based on available data *collected primarily outside of the project area. . . . Additional data on bird use of the airspace were generated using NEXRAD weather radar data from the Cleveland area which provides limited data about bird and bat use within the airspace that will be occupied by the turbines (the “rotor-swept zone.”). . . . Studies of bird and bat use of the specific project area have been recommended by the Service for several years . . . but are just starting to be implemented. . . . Data from these site-specific studies are not available for inclusion in the Draft EA.* (Emphasis added).

Thus, the conclusions in the Draft EA are based on assumptions that observations from other parts of Lake Erie are relevant to the project area, and that impacts at onshore wind facilities in the U.S. and Canada are relevant predictors of impacts to birds and bats at offshore wind developments in Lake Erie. *These assumptions may or may not be accurate.* Because of the potential risk of bird and bat mortality, and because this project is designed to be a demonstration project to evaluate offshore wind installation in the Great Lakes, pre-construction monitoring to inform risk and post-construction monitoring to assess actual impacts are necessary components of the project that must be implemented.

*. . . If per-turbine impacts are not accurately measured for this precedent-setting project, risk levels of larger future projects may be substantially underestimated.* (Emphasis added).

October 4, 2017 FWS Letter to DOE at 2 – 3 (filed with the OPSB on November 7, 2017).

Moreover, FWS not only concluded that Applicant's study data are insufficient, FWS also concluded that certain assertions made by Applicant concerning Lake Erie bird and bat data (parroted in DOE's Draft EA) are affirmatively misleading:

Section 3.4.1.3 of the Draft DA describes the Affected Environment relative to birds and bats. Pages 3-29 and 3-32 describe a NEXRAD weather radar analysis of bird and bat use of the project area . . . . Page 3-32 states, "Several recent studies employing marine radar in shoreline environments have demonstrated relatively high densities of nocturnal migrant birds along the shorelines of Lake Erie and Lake Ontario, *reinforcing the understanding that such migrants tend to concentrate along coastlines and avoid flying over large water bodies, such as Lake Erie, if possible* . . . . Page 3-51 includes a similar statement. *These statements are misleading . . . . These [cited] publications instead state that migrants concentrate on the shoreline during dawn and daytime when they land to rest and refuel. During the actual nocturnal migration, however, migrants commonly cross Lake Erie and all of the other Great Lakes.* . . . (Emphasis added).

*Id.* at 3.

This case is re-starting back at "square one." Applicant's Application is incomplete at this point; it will not be considered complete until after Applicant submits to the OPSB scientifically-valid pre-construction bird and bat studies that are necessary for the OPSB to make its statutorily-required findings and determinations of the probable environmental effects of the Proposed Project. If and when Applicant provides that scientifically-valid information to the OPSB – Applicant has not provided such information to date – the date of that submission will become the new effective date of the Application and the public hearing and adjudicatory hearing process will begin anew. These circumstances constitute good cause and extraordinary circumstances justifying leave for the Bratenahl Residents to intervene in this case at this time.

### **C. Intervenors' Protected Interests**

The Proposed Project is the first proposed freshwater offshore wind turbine facility to be located in North America and in the Great Lakes. The Proposed Project is not intended to be a commercially feasible, stand-alone electric generating facility. Over one hundred million dollars

will be invested to construct and operate six (6) wind turbines that, at best, will produce only a miniscule amount of electricity (no more than 20.7MW at theoretically full capacity). This makes absolutely no economic sense of itself. Rather, Applicant fully intends for the Proposed Project to be simply a loss-leader “icebreaker” – the first wind turbine project to be permitted for construction in the Great Lakes. Once the Proposed Project breaks the barrier against privately-owned wind turbine installations in the Great Lakes, Applicant fully intends to seek to obtain OPSB authorization to install an exponentially greater number of wind turbines in the Lake, capable of producing enough electricity, albeit uncompetitively-expensive electricity, to obtain some meaningful return on its enormous investment.

Applicant attempts to convince the OPSB that it should break the barrier against permitting a private commercial enterprise to install and operate wind turbines in the Great Lakes by urging that the Proposed Project will be a “demonstration” – that it will provide valuable information about the ecological effects of wind turbine projects in the Great Lakes and information about the financial viability of such projects that will assist regulatory agencies in forming sound public policy for “future larger-scale offshore wind farms in Lake Erie and the other Great Lakes.” Application at 3. As set forth in detail below, that assertion is nonsense. The construction and operation of the Proposed Project will provide no material information regarding environmental impacts or energy economics that cannot be obtained before, or without, construction of the project. Indeed, both the OPSB Staff and USFWS acknowledge that Applicant has failed to identify – much less implement – scientifically-sound methodologies for accurately assessing the probable environmental impacts of the Proposed Project on birds and bats. For that reason alone, the OPSB cannot grant a certificate to Applicant to build the project.

1. ***The State of Ohio Holds Lake Erie In Trust for the Benefit of Ohio's Citizens. Certification of Icebreaker's Proposed Project Would Violate that Public Trust.***

The State of Ohio's ownership of its portion of the land under Lake Erie is subject to the "Public Trust Doctrine." *Illinois Railroad Company v. Illinois*, 146 U.S. 387 (1892). The State of Ohio holds title to its portion of Lake Erie in trust for the benefit of the people of the State, not for the benefit of private-party Icebreaker. The State of Ohio's title in Lake Erie:

. . . is a title different in character from that which the state holds in lands intended for sale. ***It is a title held in trust for the people of the state***, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing on them, ***freed from the obstruction or interference of private parties***. . . . The trust devolving upon the state ***for the public***, and which can only be discharged by the management and control of the property ***in which the public has an interest***, cannot be relinquished by a transfer of the property. . . . (Emphasis added).

146 U.S. at 452-453. *See also State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 345-346 (1948), quoting *Illinois R. Co., supra*. The State of Ohio holds title in Lake Erie in trust for the benefit of the Bratenahl Residents, not for the benefit of Norwegian corporation Fred Olsen Renewables, not for the benefit of intervenor Sierra Club, not for the benefit of intervenor Environmental Council, and not for the benefit of Maryland-based intervenor Offshore Wind Business Network.

2. ***The Application Fails to Meet the Requirements of Ohio Law.***

The pending Application for a Siting Certificate fails to comply with the requirements of R.C. Chapter 4906, OAC Chapter 4906-4, and OAC Rule 4906-17-05. The Application must be denied.

Specifically, the Application is legally deficient for the following reasons.

a. The Application completely fails to establish "[t]he nature of the probable environmental impact" of the Proposed Project, much less that the Proposed Project "represents



the minimum adverse environmental impact,” as required by R.C. 4906.10(A)(2) and (3), respectively.

The Staff Motion to Suspend establishes that the Application, to date, utterly fails to establish the probable environmental impacts of the precedent-setting Proposed Project on birds and bats:

Construction and operation of off-shore wind turbines presents a very different set of challenges than land-based turbines in terms of wildlife impact measurement. *The Great Lakes has unique ecological properties compared to land installations. Due to the fact that this project is precedent-setting, since it is the first proposed off-shore wind facility in Lake Erie, Staff requires more information on the radar technology monitoring protocol it selected for this small demonstration project and whether it can reliably measure the effect of off-shore turbines on birds and bats and inform of the risk levels for future development projects in Lake Erie.* The pre-construction radar monitoring protocol is important to Staff’s investigation because it establishes baseline conditions using methodologies that will be duplicated during the operational phase to provide robust pre- vs. post-construction comparisons for impact assessment. (Emphasis added).

Motion to Suspend at 2- 3.

For example, the bird and bat risk studies and summaries that Applicant cites for the proposition that the Proposed Project presents “low risk” to birds and bats actually do nothing other than confirm that Applicant has absolutely no scientifically-sound basis to know whether the Proposed Project will kill significant numbers of birds and bats. Applicant does not even know the location of nocturnal migratory bird flight paths over Lake Erie, much less the number of birds that migrate across the lake or the altitude at which they cross the lake, *i.e.*, whether the millions of birds migrating across Lake Erie at night will fly through the turbines’ rotor swept zone (“RSZ”) – 65 feet (20 meters) to 479 feet (146 meters) above the water surface.<sup>1</sup>

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<sup>1</sup> However, the U.S. Fish and Wildlife Service’s Spring 2012 MERLIN avian radar (not NEXRAD weather radar) study of Lake Erie shows that up to 17,000 birds per hour fly over Lake Erie at night during peak pulses of Spring migration. Great Lakes Avian Radar Technical Report Lake Erie Shoreline: Erie County, Ohio and Erie County Pennsylvania, Spring 2012, Rebecca Horton, et al., at 18. Moreover, FWS’s radar study revealed that “*peak density [of birds] was found to occur between 50 – 150m [164 ft. – 492 ft.] above ground level.*” *Id.* at vi (emphasis added).

Since the inception of this Proposed Project, Applicant and its predecessors have been at odds with USFWS and ODNR over the proper pre-construction testing methodologies that must be deployed to obtain scientifically-valid data to determine the Proposed Project’s “probable environmental impact” on birds and bats – testing that must be completed during the spring and fall migration seasons before Applicant begins construction (proposed to commence in April 2018). And that disagreement has not been resolved. Indeed, in the July 20, 2017 Avian and Bat MOU between Applicant and ODNR and the accompanying July 17, 2017 Icebreaker Wind Avian And Bat Monitoring Plan, Lake Erie, Ohio (the “Monitoring Plan”) that Applicant has submitted to the OPSB, Applicant acknowledges that it has not yet reached agreement with ODNR regarding the scientifically-valid pre-construction methodologies that must be used by Applicant to determine the Proposed Project’s probable environmental impact on birds and bats:

Due to the unprecedented nature of this demonstration project, *protocols for determining potential impacts to birds and bats in an offshore environment have not previously been established for the Great Lakes. . . .*

\* \* \*

. . . With regard to radar monitoring, [the Monitoring Plan] articulates the [Applicant] project team’s *commitment to work with* ODNR, OPSB, and other agencies and stakeholders to retain an objective third party radar expert *to determine the feasibility and precise design of any pre- and post-construction radar monitoring surveys.* (Emphasis added).

Monitoring Plan at 1, 2.

Furthermore, post-construction monitoring for the Proposed Project will not enable Applicant to obtain scientifically-valid data as to the Project’s environmental impact (*e.g.*, collision deaths) upon birds and bats. Applicant has repeatedly acknowledged in its filings with the OPSB that it will be impossible to determine turbine-caused bird and bat fatalities for wind

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Thus, USFWS found that the greatest density of nocturnally migrating birds are located within the altitude of the Proposed Project’s Rotor Swept Zone, 65.62 ft. to 479.03 feet.

turbines that are located in water. Applicant's own avian experts admit that post-construction bird mortality studies for this offshore project will be "*extremely difficult, if not impossible*" to perform. Final Avian Risk Assessment, Kerlinger & Guarnaccia (October 2013), at 11 (emphasis added). Applicant repeats that admission in its Monitoring Plan:

[Applicant] recognizes that the potential for birds and/or bats to collide with Project infrastructure during the Project's operational phase *is of primary importance for the Project and for the Monitoring Plan*. [Applicant] also recognizes that the well-established methods for monitoring such impacts at land-based wind energy facilities cannot be performed at an offshore facility such as the Project. Although several promising technologies are under development, *no proven effective technologies to perform bird/bat collision monitoring at offshore wind energy facilities are currently available*; however, several emerging technologies appear promising. (Emphasis added).

Monitoring Plan at 12.

FWS has admonished DOE (and filed its comments with the OPSB) that Applicant's undefined, and/or deficient proposed post-construction monitoring will not provide any scientifically-valid information as to the environmental threat to birds and bats posed by future, larger wind turbine installations in the Great Lakes:

. . . *It will be difficult to detect carcasses struck by turbines in the open water environment*. Developing and validating methods for generating robust mortality estimates for bats and birds, and testing methods to collect and identify carcasses at offshore wind project is *critically important if this demonstration project is to inform future offshore wind development in the Great Lakes and elsewhere*. . . . However, in order to first test if these technologies would be effective, preferably in conjunction with each other, they need to be tested on land where traditional fatality monitoring could also be done for validation purposes. *To date these tests have not occurred*. The Service recommends that the [D]raft EA be revised to include a plan for effective fatality monitoring and that the techniques be validated using land-based facilities prior to funding construction and preferably prior to finalizing the EA. . . .

. . . *[G]iven the lack of defined robust pre- and post-construction studies, there is likely to be little more certainty of biological impacts after the project is constructed and operating than is currently available*. (Emphasis added).

October 4, 2017 FWS Letter to DOE at 8.

Thus, Applicant admits both that (1) bird and bat collision fatalities are an environmental impact of primary importance for the Project, and (2) its Application fails to identify for the OPSB any specific, scientifically-valid methodology it will employ to accurately assess that primary environmental impact and mitigate it, if possible. In short, Applicant has acknowledged that its Application fails to establish “the nature of the probable environmental impact” (R.C. 4906.10(A)(2)), much less that the Proposed Project “represents the minimum adverse environmental impact” (R.C. 4906.10(A)(3)). FWS’s analysis confirms that the Application is legally-deficient.

R.C. 4906.10(A) provides that “[t]he board *shall not grant a certificate for the construction, operation, and maintenance of a major utility facility . . . unless it finds and determines* all of the following: . . . (2) [t]he nature of the probable environmental impact; [and] (3) [t]hat the facility represents the minimum adverse environmental impact.” The Application does not even proffer to the OPSB any scientifically-valid means by which the OPSB may make its required findings and determinations as to the environmental impacts of the Proposed Project, and that the Proposed Project represents the minimum adverse environmental impact for birds and bats. The OPSB must deny the Application for these reasons.

2. The Application fails to establish that the Proposed Project will serve the interests of electric system economy and reliability as required by R.C. 4906.10(A)(4). Applicant admits that as a “demonstration” project, the Proposed Project is neither commercially feasible nor economically justified. The Proposed Project has a “nameplate” capacity of only 20.7 MW, and, according to Applicant, is expected to operate at only 41.4% of that modest capacity. Moreover, the Proposed Project is heavily dependent upon substantial public financial subsidies – including more than \$40 million in federal grants, federal investment tax and production tax credits, and

state property tax exemptions – with absolutely no showing that the project feasibly can lead to construction of a commercial-scale generation facility that would be efficient and economically competitive. The Proposed Project cannot compete in the wholesale electricity market. The April 2009 Great Lakes Wind Energy Center Final Feasibility Report shows that the Proposed Project would sell its small output at roughly three times wholesale electricity prices in the region.

Moreover, PJM Interconnection LLC currently assigns only a 17.6% capacity factor for new, onshore wind-powered generation facilities. This means, for example, that a new, commercial-scale 1000MW wind facility would have to be supported by 824 MW of additional fossil fuel-fired electric generation to power 1000MW of load growth. Under no circumstances will the Proposed Project, or any expansion of the Proposed Project to a commercial-scale size of 1,000 turbines or more, ever supplant PJM base load fossil fuel-fired electricity. The Proposed Project does not serve the interests of electric system economy or stability.

3. For the reasons set forth herein, the Application fails to establish that the Proposed Project will serve the public interest, convenience and necessity as required by R.C. 4906.10(A)(6). In sum, Applicant requests the OPSB to authorize construction of a privately-owned project that will visit currently-unknown, and potentially vast, environmental harms upon Lake Erie for no economic return – the Proposed Project will intermittently, and inefficiently, produce expensive electricity that will never displace fossil fuel-fired base load electricity for the PJM system. Ohio electric ratepayers “lose” with this project. Ohio taxpayers “lose” with this project. Migrating birds and bats, waterfowl, and other Lake Erie wildlife “lose” with this project. People enjoying the use of Lake Erie and its shores “lose” with this project. The only party that “wins” with this project is publicly-subsidized foreign investor Fred. Olsen

Renewables USA LLC. The Proposed Project does not serve the public interest of Ohioans. It violates the Public Trust Doctrine.

4. The Application has redacted from it required information concerning capital and intangible costs, operation and maintenance expenses, present worth and annualized expenditures for operating and maintenance costs, and monthly delay costs. *See* OAC Rule 4906-4-06.

5. The Application fails to adequately document total decommissioning costs under O.A.C. 4906-04-06(F)(5), and fails to offer substantive evidence as to enforceable decommissioning commitments or contracts, bonds or surety or other financial assurance.

6. The Application's construction schedule for the Proposed Project is unrealistic – especially in light of the OPSB's suspension of the procedural schedule in this case. Construction can occur only from mid-April to mid-October, thereby raising the specter of construction delays, adverse financial impacts, and possible risk to public funding grants. As noted above, Applicant has not even identified, much less implemented, any scientifically-valid pre-construction methodologies necessary to determine the probable environmental impacts of the Proposed Project. All of the following conditions must be met before Applicant can even begin construction of the Proposed Project: (a) Applicant must identify scientifically-sound pre- and post-construction methodologies for determining probable environmental impacts and submit the methodologies to the OPSB for approval – which FWS correctly acknowledges first must be tested on land-based turbines to be scientifically-validated; (b) the OPSB must approve the proffered, pre-validated methodologies; (c) the approved methodologies must be implemented; (d) resulting scientifically-sound data must be presented the OPSB; (e) the OPSB must review the data; and (f) the OPSB must make findings and determinations as to the environmental impacts of the Proposed Project and that the Proposed Project represents the minimum adverse

environmental impact pursuant to R.C. 4906.10(A)(2) and (3). None of these required events has occurred. The proposed construction schedule cannot be met.

7. The Application concedes there is little empirical evidence or knowledge as to how offshore wind turbine noise may impact aquatic wildlife and ecosystems, or how such noise can be mitigated. Applicant has failed to properly address these issues.

8. The Application acknowledges that there are risks to the structures of the Proposed Project from ice cover, ice loads, and the formation of ice ridges in Lake Erie and in the Proposed Project area. However, the Application does not provide sufficient data from which the OPSB can find and determine that the structures can withstand such risks.

**C. Intervention Standard**

The Intervenors meet all requirements for intervention in these proceedings as set forth in R.C. 4903.08(A) and O.A.C. 4906-2-12(B)(1). The Board may consider the following when determining petitions to intervene:

- (a) The nature and extent of the person's interest;
- (b) The extent to which the person's interest is represented by existing parties;
- (c) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and
- (d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

O.A.C. 4906-2-12(B)(1). See also *In the Matter of the Application of Clean Energy Future—Lordstown, LLC*, No. 14-2322-EL-BGN, slip op. at 2, ¶5 (Ohio Power Siting Bd. July 28, 2015) (setting forth factors the Board considers in resolving motions to intervene); *In the Matter of the Application of Columbus Southern Power Co.*, No. 01-2153-EL-BTX, slip op. at 3, ¶8 (Ohio Power Siting Bd. Jan. 29, 2004) (same).

The Ohio Supreme Court has interpreted this rule as providing that “[a]ll interested parties may intervene in [Board] proceedings upon a showing of good cause.” *State, ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St.3d 705, 708 (1995) (citation omitted). Accordingly, the Board has granted numerous petitions to intervene filed by property owners whose property would be affected by a proposed project. See *In the Matter of the Application of Buckeye Wind LLC*, No. 13-360-EL-BGA, slip op. at 5-6, ¶¶12-14 (Ohio Power Siting Bd. Nov. 21, 2013) (granting motion of proposed intervenors who claimed that the wind project would have “potential impacts” on “their residences, land, roads, and community”).<sup>2</sup>

**D. The Bratenahl Residents Are Entitled To Intervene**

**1. *The Intervenors Have Real And Substantial Interests In This Proceeding***

The Bratenahl Residents are long-time residents of Cuyahoga County. They have set forth above the important interests they are entitled to protect in this proceeding. Those interests are further delineated as follows:

- **Killing of Birds and Bats.** The wind turbines in the Proposed Project will kill substantial numbers of birds and bats. It is well established that wind farms cause large-scale kills of birds and bats, that risk assessments and post-construction mortality studies by wind industry-paid consultants systematically underestimate such bird and bat kills, and that Lake Erie is in the migratory path for hundreds of millions of birds. Applicant has not performed any scientifically-sound studies to justify its assertion that the risk to birds and bats is “low.” Furthermore, Applicant’s assertions of minimal environmental impacts ignore a considerable body of published research on migratory bird ecology

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<sup>2</sup>See also *In the Matter of the Application of Champaign Wind, LLC*, No. 12-160-EL-BGN, slip op. 3-6, ¶¶19-23, 25 (Ohio Power Siting Bd. Aug. 2, 2012) (granting motion to intervene of “property owners who own real estate and reside within the footprint of the” wind turbine project and who “have a direct and substantial interest in [the] matter, in light of the potential visual, aesthetic, safety, and nuisance impacts of the wind project on their residences, land, and community”); *In the Matter of the Application of American Transmission Systems, Inc.*, No. 12-1636-EL-BTX, slip op. at 1-2, ¶¶3-6 (Ohio Power Siting Bd. May 21, 2014) (granting motions to intervene of property owner along the possible alternate route of a proposed transmission line).



from the community scale (*e.g.*, birds cross Lake Erie in far greater numbers than suggested) to the individual bird scale (*e.g.*, birds change altitudes throughout migration, exposing individuals to the RSZ of the wind turbines, even if an individual bird's average migration height is above the RSZ). An important example of ignored critical research is recent research that establishes that the Kirtland's warbler (a federally-listed and Ohio-listed endangered species) passes over Lake Erie, including through the Proposed Project area, during every spring and fall migration – rebutting the Applicant's assertions to the contrary. Moreover, DOE's draft Environmental Assessment is inadequate in critical aspects of its analysis. And as USFWS has notified DOE, a full Environmental Impact Statement is required for the Proposed Project.

- **Environmental Degradation.** The wind turbines in the Proposed Project will cause an aesthetic blot on the views in and around of Lake Erie.
- **Freshwater Species Habitat:** Lake Erie's shallow depth provides a unique habitat for freshwater species. The Proposed Project will negatively impact that unique habitat. In addition, it is not fully known how noise associated with the Proposed Project will impact aquatic wildlife.
- **Irregular Intermittency.** A fundamental problem with wind power is irregular intermittency – wind turbines do not produce electricity when the wind is not blowing. The problem of irregular intermittency is exacerbated by the fact that wind farms do not have the capability to effectively store the electricity that has been generated so that it can be distributed when the wind is not blowing. For these reasons, wind energy (a) is not sufficiently reliable to meet the cyclical demands of Ohio consumers for electricity; (b) is not economically competitive with other methods of electricity generation; and (c) requires duplicative fossil fuel-fired generation capacity due to the appropriately low (17.6%) capacity ascribed to wind-powered electricity for the PJM grid.
- **Subsidies to Out-of-State Producers.** The 130th Ohio General Assembly's Sub.S.B. 310 eliminated the requirement of former R.C. 4928.64 that electric distribution companies and electric services companies purchase one-half of their renewable energy resources from facilities located in Ohio. With the elimination of that in-state requirement, the cost of electricity from renewable resources paid by Ohio consumers may include costs for the development and operation of such facilities outside the state of Ohio. In short, Ohio consumers would be subsidizing the cost of renewable energy resources in other states. Such subsidies are not in the best interest of Ohio consumers.

- **Interference with Recreation and Enjoyment.** The construction and operation of the Proposed Project will interfere with the Bratenahl Residents' enjoyment and use of the Lake Erie and its shoreline, including recreational fishing and boating, as well as enjoyment of the unobstructed view of the horizon.
- **Increased Cost of Electricity.** The cost of electricity generated by the Proposed Project will be higher than competitively-bid electricity sold to the PJM system from other generators, notwithstanding the use of taxpayer funds to subsidize construction of the Project. Legislative mandates requiring the retail distribution of this higher-cost electricity will increase electricity rates for all consumers. This market distortion harms all ratepayers, and is a misuse of taxpayer funds.

**2. *The Bratenahl Residents' Interests Are Not Already Adequately Represented.***

The Bratenahl Residents' interests are not adequately represented by the existing parties in this case. No existing party to this action has a direct interest in comprehensively addressing the effects that the Proposed Project will have with respect to: (1) preserving of affordable, reliable, safe, and fuel-secure electricity supplies for Ohio's consumers; (2) protecting birds and bats; (3) protecting the shallow-depth habitats for Lake Erie aquatic wildlife; and (4) preserving residents' enjoyment and recreation use of the Lake. Absent intervention, the Bratenahl Residents will have no effective means to protect their vital interests in this proceeding.

**3. *The Bratenahl Residents Will Contribute To A Just And Expeditious Resolution Of Issues***

The Bratenahl Residents' intervention will contribute to a just and expeditious resolution of the issues in this proceeding. They have unique, independent perspectives on the implicated environmental and energy issues to offer the Board. Their participation is crucial to an informed, balanced, and fair disposition of the interests of all parties who will be affected by the OPSB's findings and determinations in this proceeding.

**4. *The Bratenahl Residents' Intervention Will Neither Delay This Proceeding Nor Prejudice Parties***

The Bratenahl Residents' intervention will neither unduly delay this proceeding nor unjustly prejudice any existing party. They will abide by all OPSB deadlines and present their evidence in a clear and concise manner.

For the foregoing reasons, the Bratenahl request the OPSB to grant this Petition To Intervene.

Respectfully submitted,

/s/ John F. Stock

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### CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below via electronic mail this 22nd day of January, 2018.

/s/ John F. Stock

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Summary: Petition to Intervene of Bratenahl Residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blazey, Jr. electronically filed by John F Stock on behalf of W. Susan Dempsey and Robert M. Maloney and Gregory Binford and Leon Blazey, Jr.