

**BEFORE  
THE OHIO POWER SITING BOARD**

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

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**ICEBREAKER WINDPOWER INC.'S  
MOTION TO  
REESTABLISH THE PROCEDURAL SCHEDULE AND FOR  
WAIVER OF O.A.C. RULE 4906-3-09(A)(2), AND  
REQUEST FOR EXPEDITED RULING**

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Pursuant to Ohio Administrative Code (“O.A.C”) Rules 4906-2-27 and 4906-2-01(B), Icebreaker Windpower Inc. (“Icebreaker” or “Applicant”) respectfully moves the Ohio Power Siting Board (“Board”) or its Administrative Law Judge (“ALJ”) for a new procedural schedule in this proceeding and a waiver of O.A.C. Rule 4906-3-09(A)(2). Coincident with the filing of this motion, as requested by the Board’s Staff (“Staff”) and the ALJ’s entry issued on October 23, 2017, Icebreaker is filing the supplemental information relating to the radar technology monitoring (the “Diehl Report”) as requested by Staff in its motion and the ALJ entry. Accordingly, Icebreaker requests that the procedural schedule in this case be reinstated as expeditiously as possible.

The Applicant consulted with counsel for Staff, as well as counsel for the entities that have filed for intervention in this matter. The Applicant can certify that the Ohio Environmental Council, the Sierra Club, the Indiana/Kentucky/Ohio Regional Council of Carpenters, and the Business Network for Offshore Wind, Inc. do not object to an expedited ruling. However, the

Applicant is unable to certify the position of either the Staff or the other intervenors with regard to the request for an expedited ruling.

Therefore, Icebreaker submits that, for the reasons more fully set forth in the following memorandum in support, good cause exists to grant this motion on an expedited basis.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

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On February 1, 2017, as supplemented on March 13, 2017, Icebreaker filed an application for a certificate of environmental compatibility and public need for the Icebreaker Project to be located in Lake Erie eight miles off the shore of Cleveland, Ohio in Cuyahoga County (“Application”). On April 3, 2017, the Chairman of the Board notified Icebreaker that additional information was needed in order for the Application to be considered in compliance with O.A.C. Chapters 4906-01, et seq., and requested that, among other things, the Applicant file the memoranda of understanding (“MOU”) referenced in its Application pertaining to the pre-, during-, and post-construction monitoring studies for the impacts on birds and bats.

On July 20 and 24, 2017, Icebreaker filed a response to the Chairman’s April 3, 2017 letter and its Second Supplement to the Application, which, among other documents, contained the Avian and Bat MOU, which was entered into between the Applicant and the Ohio Department of Natural Resources (“ODNR”), and Exhibit A to the MOU, the Avian and Bat Monitoring Plan (“Plan”). On August 18, 2017, Icebreaker filed its Third Supplement to the Application, which consisted of the Aerial Waterfowl & Waterbird Study Plan, which is Exhibit 1 to the Plan.

By letter filed July 31, 2017, the Board notified Icebreaker that its Application was sufficiently complete to permit Staff to commence its review and investigation. Subsequently, the Applicant filed notice of service of the Application and submitted the Application fee in accordance with Ohio Revised Code (“R.C.”) Section 4906.06(B) and the O.A.C. requirements.

On August 15, 2017, the ALJ established the procedural schedule in this case, which, among other things, directed that Staff file its report of investigation (“Staff Report”) on or before October 23, 2017, and scheduled a local public hearing for November 8, 2017, and an adjudicatory hearing for November 17, 2017. . The Applicant fully complied with R.C. Section 4906.06(C), as well as O.A.C. Rule 4906-3-09(A)(1) by publishing and serving the public notice of this proceeding. In addition, the Applicant complied with O.A.C. Rule 4906-3-09(A)(2) by publishing and serving a second public notice of the proceeding.

On October 23, 2017, the day the Staff Report was due to be issued, Staff filed a motion to suspend the procedural schedule, with the exception of the local public hearing, stating that it would like the Applicant to provide information referenced in the Plan relating to pre-construction radar technology monitoring protocol, i.e., the Diehl Report. In the motion, Staff noted that the Plan makes reference to the fact that the Diehl Report would be provided to the Staff in the fall of 2017. The specific information requested by Staff was the “recommendation on the viability and precise design of any pre-construction radar” deployed on a large four-point vessel, which report was to be provided by Dr. Robb Diehl, an objective third-party radar expert with the United States (“U.S.”) Geological Survey who was selected by the Applicant and the U.S. Fish and Wildlife Service (“USFWS”) to determine the viability using a large vessel to collect radar data at the project site. Staff further stated that it:

...anticipates that the radar report will be made available to the Staff within a month, after which the Staff should be able to file the Staff Report shortly thereafter. Assuming the report is received by Staff when anticipated, Staff would anticipate that a new procedural schedule would be quickly issued and include new dates in January 2018 for scheduling a second public hearing and scheduling the evidentiary hearing. (emphasis added)

(Staff’s October 23, 2017 Motion at 2).

The ALJ granted Staff's motion on October 23, 2017. In granting Staff's motion to suspend the procedural schedule, the ALJ, in the October 23, 2017 entry, stated that a new procedural schedule and effective date of the Application would be set by subsequent entry once the supplemental information is filed. Icebreaker served and published notice of the change in the procedural schedule. The local public hearing was held, as scheduled, on November 8, 2017.

On January 24, 2018, in compliance with Staff's request and the October 23, 2017 entry, Icebreaker filed the Diehl Report issued on December 22, 2017, which includes the information requested by Staff and the ALJ, and evaluates the options for radar data collection at the project site on a large vessel.

The Diehl Report was provided to the Applicant, ODNR, and USFWS in December 2017. The Applicant is filing the Diehl Report with the Board today. With the filing of the Diehl Report, which is the only supplemental information requested, Icebreaker has fully complied with Staff's request and the ALJ's directive.

Accordingly, at this time, Icebreaker submits that it has provided all the information required for the Staff to complete its Staff Report, and requests that the procedural schedule in this matter be reestablished and that the Board now set an expeditious time frame for the processing of this matter.

With regard to publication and service of the new procedural schedule, the Applicant respectfully requests that the Board waive the second public notice requirement set forth in O.A.C. Rule 4906-3-09(A)(2). O.A.C. Rule 4906-2-01 provides that the Board may waive any requirement of the rules other than a requirement mandated by statute. The second notice contained in O.A.C. Rule 4906-3-09(A)(2) is not mandated by statute; therefore, it may be waived by the Board. Waiver of the rule is necessary so as to prevent additional prejudice to the

Applicant by adding additional unnecessary costs and delay to this proceeding. Once the new procedural schedule is established, the Applicant commits to publishing and serving notice of the schedule as required by the R.C. Section 4906.06(C), as well as O.A.C. Rule 4906-3-09(A)(1). Given the fact that the Applicant has both served and published notice of the Application numerous times and the Board has already held one local public hearing that was noticed twice in accordance with Board's regulations, one publication of the new procedural schedule and the second local public hearing is more than sufficient for purposes of this proceeding.

With this in mind, and consistent with the motion filed by Staff on October 23, 2017, as well as the ALJ's entry issued that same day, and the statute, Icebreaker requests that the Board issue an entry establishing the following procedural schedule as soon as possible:

- January 24, 2018 – effective date of Application
- January 31, 2018 (on or before) – entry reestablishing procedural schedule issued
- February 8, 2018 (on or before) – Icebreaker commits to serve and publish notice of the procedural schedule
- March 9, 2018 – Staff Report due
- March 16, 2018 – list of issues due
- March 26, 2018 – second local hearing held
- March 28, 2018 – Icebreaker testimony due
- April 4, 2018 – intervenor and Staff testimony due
- April 9, 2018 – evidentiary hearing commences

The Applicant emphasizes that adopting this proposed time line for this case is warranted for several reasons. Initially, Icebreaker notes that this proposed timeline is what was promised by Staff in its motion to suspend, i.e., the second public hearing would be held 60 days after the Diehl Report was filed. This reasoning is evidenced by the following:

- The motion to suspend was filed on October 23, 2017.
- In the motion, Staff anticipated that the Diehl Report would be filed one month later in November.
- As noted in Staff's motion, Staff would be able to file the Staff Report "shortly" after the Diehl Report was filed.
- In the motion, Staff went on to state that, "[a]ssuming the report is received by Staff when anticipated [November 2017], Staff would anticipate that a new procedural schedule would be quickly issued and include new dates in January 2018 [60 days after the filing of the report] for scheduling a second public hearing and scheduling the evidentiary hearing."

Furthermore, as noted above, the record in this case shows that the Board requested additional information for its investigation of the Application in this case in both April and October 2017, and Icebreaker responded appropriately to these requests by providing the requisite information in order to further assist Staff with its investigation and consideration of this Application. Further, even with the implementation of the proposed time frame, because of the delays in the schedule, it will be more than one year before the Applicant is given the opportunity to have its Application considered, which is well beyond the 60- to 90-day time frame mandated in R.C. Section 4906.06(A). Therefore, establishing a reasonable time frame as proposed by Icebreaker is the most appropriate and equitable way to move forward in this matter.

Accordingly, Icebreaker requests that it be granted a waiver of the second notice provisions set forth in O.A.C. Rule 4906-3-09(A)(2) and that the procedural schedule be reestablished as proposed herein. Furthermore, Icebreaker requests that an expedited ruling on this motion, pursuant to O.A.C. Rule 4906-2-27(C) be issued. Icebreaker notes that no party will be prejudiced by granting this motion and request for expedited ruling, as all parties have had more than ample time to review the Application and to conduct discovery, and they will have more than sufficient time to review the Diehl Report in the time permitted under the procedural

timeline proposed above. In fact, it is the Applicant and not the other parties that will be adversely affected if this proceeding is further delayed and a ruling is not issued on an expedited basis. If a reasonable time frame consistent with the one anticipated by Staff in its October 23, 2017 motion and proposed by Icebreaker in this motion is not followed, Icebreaker's right for a timely review and consideration of its Application will be jeopardized and substantial harm could come to the project.

Therefore, Icebreaker requests that this motion be granted on an expedited basis for good cause shown.

Respectfully Submitted,

/s/ Christine M.T. Pirik

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*Attorneys for Icebreaker Windpower, Inc.*

**January 24, 2018**



## CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 24th day of January, 2018.

/s/ Christine M.T. Pirik

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Summary: Motion to Reestablish the Procedural Schedule and for Waiver of O.A.C. Rule 4906-3-09(A)(2), and Request for Expedited Ruling electronically filed by Christine M.T. Pirik on behalf of Icebreaker Windpower Inc.