

**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)	

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

I. INTRODUCTION

Icebreaker Windpower, Inc.’s (“Icebreaker”) opposition (the “Memo Contra”) to the Petition To Intervene (the “Bratenahl Residents’ Petition”) of Bratenahl Residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blazezy, Jr. (the “Bratenahl Residents”) is nothing more than a further attempt to quash any voice of opposition to its Application in this proceeding. Icebreaker seeks to turn the adjudicatory process in this case into a “whitewash” in favor of its Application by silencing all dissenting views. Icebreaker’s attempt to prevent the submission of evidence and arguments contrary to that submitted by itself and its allies is antithetical to the cornerstone principle of American jurisprudence that an independent tribunal can best make an informed decision when interested parties on both sides of a dispute present their positions for adjudication. See *Greenlaw v. United States*, 554 U.S. 237 at 243 (2008) (“In our adversary system, in both civil and criminal cases, . . . we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign courts the role of neutral arbiter of matters the parties present.”); *Laurent v. Laurent*, Third Dist. App. No. 92-LW-4677 (3rd Dist.), 1992 WL 293061 (October 16, 1992) at *3 (“ . . . The adversarial system works best when there are two adversaries. Trial courts and courts of appeal alike benefit from the informed argument of counsel.”).

Were this Board to deny the Bratenahl Residents' and the Cuyahoga County Residents' petitions to intervene¹ in this proceeding, the adjudicatory hearing in this case will consist of nothing more than a one-sided parade of testimony and evidence in favor of Icebreaker's Application, a sham that would mock the fundamental principle requiring an open hearing on the evidence of parties both for and against Icebreaker's project (the "Project") to ensure that the Board can arrive at the truth concerning the critical issues in dispute and make decisions that serve the best interests of the citizens of Ohio.

Moreover, the Board's staff has acknowledged that Icebreaker's proposed Project is "precedent-setting"—if constructed, it would be the first wind turbine project permitted in any of the Great Lakes. The decisions made by the Board in this proceeding are likely to be far-reaching, affecting future wind turbine construction in *all* of the Great Lakes. Thus, it is especially alarming that Icebreaker is attempting to manipulate this precedent-setting proceeding to prevent an open, informed debate of the important issues here, as the OPSB's resolution of these issues will have ramifications across the country.

Icebreaker's motivation in attempting to quash any opposition to its application is evidenced by the fact that it has opposed the only two the petitions to intervene filed by parties opposed to the Project, the Cuyahoga County and Bratenahl Residents. Icebreaker has not opposed the other four (4) petitions to intervene,² all of which were filed by parties supporting

¹Icebreaker previously vigorously opposed the petition to intervene of Cuyahoga County Residents Vicci Weeks, Caryn Good Seward, and Steven Seward. That petition to intervene remains pending before the Board.

²Incredibly, Icebreaker asserts as a basis for denying the Bratenahl Residents' Petition to Intervene that "petitioners only served the Applicant and the Board's staff, thereby prejudicing the other parties to the case (the Ohio Environmental Council ["OEC"], the Sierra Club, etc.), and violating established Board regulations and protocol." Memo Contra at 3. See also Memo Contra at 11. Icebreaker thus acknowledges that it was served with a courtesy copy of the

the Project: the Sierra Club, the Ohio Environmental Council (the “Environmental Council”), the Indiana/Kentucky/Ohio Regional Council of Carpenters (the “Carpenters”), and The Business Network For Offshore Wind, Inc. (the “Offshore Wind Business Network”).³

Like the Cuyahoga County Residents’ Petition, the Bratenahl Residents’ Petition differs sharply from the petitions of these other, supporting, intervenors. The Bratenahl Residents’ Petition sets forth in detail the pervasive defects and scientific short-comings in Icebreaker’s required pre-construction and post-construction studies concerning the adverse environmental effects that its Project will have on birds and bats. *See* R.C. 4906.10(A)(2) & (3). None of the other intervenors even mentioned these critical Application defects—defects that directly affect

Petition to Intervene and was not, therefore, prejudiced by an alleged failure of service. Icebreaker lacks standing to assert that other parties were prejudiced by an alleged failure to serve the Petition on them.

Moreover, as Icebreaker should be—but apparently is not—aware, O.A.C. § 4906-2-05(B) provides that “[i]f an e-filing is accepted by the docketing division, an email notice of the filing will be sent by the docketing division’s e-filing system to all persons who have electronically subscribed to the case. *The email notice will constitute service of the document upon the recipient.*” (Emphasis added). The Certificate of Service on the Bratenahl Residents’ Petition clearly provided that “[t]he 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.” Accordingly, contrary to Icebreakers’ unfounded assertion, all parties were properly served with the Bratenahl Residents’ Petition to Intervene.

³Icebreaker has publicly announced the support of the Sierra Club and the Environmental Council for its Project—making Icebreaker’s assertion that the Bratenahl Residents’ interests “will be adequately represented by parties like OEC and the Sierra Club,” Memo Contra at 17, patently absurd. Similarly, the Carpenters support the Project, stating in their petition that “the nature and extent of the [Carpenters’] interest is basically synonymous with the pending application.” Carpenters’ Petition to Intervene at 5. Likewise, the Offshore Wind Business Network admits in its petition that it “has been an advocate, directly advancing and building an offshore wind industry in the United States.” Offshore Wind Petition to Intervene at 3.

the Bratenahl Residents, who enjoy observing the abundant birds while they recreate at the Lake.⁴

Significantly, on July 23, 2017, the OPSB found that Icebreaker's supplemented Application "has been found to comply with Chapters 4906-01, *et seq.* of the Ohio Administrative Code (OAC)." Yet after the Cuyahoga County Residents filed their Petition to Intervene on October 16, 2017, detailing the pervasive defects in Icebreaker's bird and bat studies, the OPSB staff filed (on October 23, 2017) a Motion to Suspend the Procedural Schedule in this case, clearly reacting to the numerous defects in Icebreaker's bird and bat studies that were detailed in the Resident's Petition. Motion to Suspend at 1-2 ("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 that Applicant intends to utilize at the project for determining project impacts The information is necessary to measure the effect of off-shore turbines on birds and bats . . ."). But for the Cuyahoga County Residents' Petition, and now, the Bratenahl Residents' Petition, the pervasive and substantial defects in Icebreaker's Application would not have been placed on the record in this case.

Icebreaker attempts to divert attention from its effort to squelch all opposition by protesting that it has a "strong commitment to public outreach and involvement," citing "over 400 meetings" at which it has spoken, and asserting that its outreach "has resulted in over 600 comments being filed with the Ohio Power Siting Board." Memo Contra at 2. Those activities constitute little more than public relations efforts by Icebreaker to attempt to build support for the Project and tamp-down objections, efforts which appear to have been largely unsuccessful.

⁴Indeed, Keith Dimoff, the Environmental Council's executive director, was quoted in the March 19, 2014 Cleveland *Plain Dealer* erroneously asserting that "LEEDCo has completed comprehensive studies, which demonstrate that Icebreaker will deliver cleaner air *while avoiding harm to wildlife.*" (Emphasis added).

A 2014 *Plain Dealer* survey revealed that 57.87% of respondents opposed Icebreaker's Project, while 39.89% supported the Project and 2.24% had no opinion.

Finally, there is good reason that, to date, there has been no construction of wind turbines in any of the Great Lakes. 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

146 U.S. at 452-453 (emphasis added). *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, the Sierra Club, the Environmental Council, or Maryland-based Offshore Wind Business Network.

As set forth below, Bratenahl Residents have real and substantial interests to protect in this proceeding. Their opposition interests are not represented by any other party to this proceeding. They are, therefore, entitled to intervene.

II. ARGUMENT

A. The Cuyahoga County Residents Possess Real And Substantial Interests To Be Protected In This Proceeding

Intervention “is generally liberally construed *in favor of intervention.*” *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995), quoted in *Ohio Consumers Counsel v. P.U.C.O.*, 111 Ohio St.3d 384, 387 (2006) (emphasis added). The Bratenahl Residents’ Petition establishes that they possess the requisite “real and substantial” interests to be protected in this proceeding. Icebreaker’s Memo Contra does nothing to diminish the Bratenahl Residents’ real and substantial interests entitling them to intervention.

1. The Bratenahl Residents Have Real and Substantial Interests In Protecting Lake Erie Birds

The Bratenahl Residents devote a substantial portion of their Petition setting forth, in extensive detail, their real and substantial interests in protecting Lake Erie birds—and to exposing the utter failure of Icebreaker’s Application to meet applicable statutory requirements to (1) explain the adverse environmental impacts its Project will have on those species, and (2) demonstrate that its Project represents the minimum adverse environmental impact on those species. Bratenahl Residents’ Petition at 8-12.

Icebreaker cannot plausibly argue that the Bratenahl Residents’ interest in protecting Lake Erie birds is not a legally-cognizable interest because R.C. 4906.10(A)(2) and (3) explicitly require the Board to protect that interest. Indeed, Icebreaker acknowledges that “both the Sierra Club and OEC will adequately represent such interests.” Memo Contra at 18. Given its admission that the protection of Lake Erie birds is a “real and substantial” interest justifying intervention in this case—at least for the Sierra Club and the Environmental Council—Icebreaker fails to explain why that protectable interest justifies intervention for Project-

supporters, but does not justify intervention for Project-opposers such as the Bratenahl Residents. Icebreaker can provide no principled distinction. Instead, Icebreaker simply is left to arbitrarily and subjectively declare, without any legal or factual authority, that “it is evident that Petitioners’ environmental interests are indirect and tangential to [their] Petition and should not be viewed as valid particularized environmental ‘interests.’” Memo Contra at 15.

By what legal or factual standard is it “evident” that the Bratenahl Residents’ interest in protecting Lake Erie birds is “indirect” or “tangential,” while the Sierra Club’s and the Environmental Council’s interest in protecting those same birds is, by Icebreaker’s admission, “real and substantial?” In fact, the “real and substantial” interest here is possessed by the Bratenahl Residents, not by these organizations. The Bratenahl Residents are actual residents of areas along Lake Erie, who actually recreate at Lake Erie, and actually enjoy observing the Lake Erie birds they are attempting to protect. In stark contrast, any interest the Sierra Club or Environmental Council organizations may possess are merely derivative from the actual interests of their members. And, neither organization has identified a single member who, like the Bratenahl Residents, is a resident of an area abutting Lake Erie, actually recreates at Lake Erie, and actually enjoys observing Lake Erie birds. The Bratenahl Residents possess a direct, real, and substantial interest in protecting Lake Erie birds—not simply the derivative interest that Icebreaker admits justifies intervention by the Sierra Club, the Environmental Council, the Carpenters, or the Offshore Wind Business Network.⁵

⁵Icebreaker also argues that the Bratenahl Residents should not be permitted to intervene because their “properties are not adjacent to the Project and by our calculations sit over 10-12 miles away from the nearest wind turbine.” Memo Contra at 13. No Ohio resident’s home is situated at the Project site, 8-10 miles out in Lake Erie. By Icebreaker’s logic, no resident of Ohio would have a cognizable interest in protecting Lake Erie wildlife. This position is in direct contravention of the Public Trust Doctrine holding Lake Erie in trust for the benefit of these very residents. Acceptance of Icebreaker’s argument would produce a particularly ironic outcome in

2. The Bratenahl Residents' Additional Interests

The Bratenahl Residents' Petition identifies numerous other real and substantial interests they seek to protect from the adverse effects of the Project: damages to fresh water species' habitats (R.C. 4906.10(A)(2) and (3)), the irregularly intermittency of electricity generation from the Project (R.C. 4906.10(A)—electric system economy and reliability), subsidies to an out-of-state producer (R.C. 4906.10(A)(6)—public interest, convenience, and necessity), and damage to infrastructure (R.C. 4906.10(A)(6)). Other than denying their existence, these additional interests are not substantively addressed in Icebreaker's Memo Contra. The Bratenahl Residents' right to protect these real and substantial interests is addressed in detail in Residents' Petition. That analysis will not be repeated here.

B. Good Cause Exists for Failure to Timely Seek Intervention

Most of Icebreakers' Memo Contra is devoted to chastising the Bratenahl Residents for not more timely seeking intervention in this proceeding. The Bratenahl Residents maintain that good cause exists for seeking intervention after the Board-imposed deadline for intervention, and that, in any event, Icebreaker will not be prejudiced by the Bratenahl Residents' intervention.

As explained in their Petition, 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.

this proceeding, where a specially-created entity for Norwegian corporation Fred Olsen Renewables is seeking permission from the State of Ohio to be the first developer to construct wind turbines in the Great Lakes, enabling benefits from the Project ultimately to inure to Norwegian interests in complete disregard of the interests of all Ohioans.

Icebreaker now claims that it “has no plans to file a subsequent application with the Board requesting a certificate to build additional turbines beyond the 6 proposed for the Icebreaker Project.” Memo Contra at 8. This assertion is completely at odds with the Board’s understanding of the Project, see Staff Motion to Suspend Procedural Schedule at 2 (the project is “precedent-setting”), with Icebreakers’ prior statements, see Application at 3 (the project is designed to gather information for “future larger-scale offshore wind farms in Lake Erie and the other Great Lakes”), and even with other statements in Icebreakers’ Memo Contra, see Memo Contra at 5 (“The intent is for the facility to be a demonstration-scale project.”).

Moreover, the Board has acknowledged that Icebreaker failed to provide valid pre- and post-construction radar monitoring studies necessary for the Board to determine the probable environmental impact of the Project on birds and bats when it “direct[ed] Icebreaker to supplement the record with additional information on the radar technology monitoring protocol it selected for this project and whether it can reliably measure the effect of offshore turbines on birds and bats and inform of the risk levels for future development projects in Lake Erie.” *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 2, ¶5 (Oct. 23, 2017). See also Staff Motion to Suspend at 2-3.

Despite the request that Icebreaker supply the Board with very specific additional information, the so-called “Diehl Report” was the only document supplied in response to the Board’s directive. The Diehl Report, however, fails to supply the information requested by Staff and the Board. That report was nothing more than Mr. Diehl’s evaluation of the various vendor proposals submitted to Applicant in response to Applicant’s request for information. See Diehl Report at 1. It does not contain the information necessary for the Staff’s evaluation of the Applicant’s proposal, and, in fact, acknowledges that there were “perceived shortcomings of

vendor responses” Diehl Report at 1. Diehl further candidly acknowledges that he is “in a poor position to evaluation certain claims made by vendors about their software capabilities” because the vendors often treat information as trade secrets. Diehl Report at 3. Finally, Diehl notes that all of the vendors proposed to deploy radar “on a floating barge,” rather than a fixed platform mounted “to a stabilizing gimbal fastened to the barge,” presumably because of the costs of such proposals, but that “an evaluation of the costs and benefits of adopting this approach is beyond the scope of this evaluation.” Diehl Report at 9-10.

Indeed, while Diehl identifies the proposal submitted by “Vendor A” as “the approach most likely to succeed,” Diehl Report at 1, “Vendor A’s approach is not without concern, particularly over the ability to track targets in an offshore setting where sea clutter will likely pose a persistent problem that is magnified by a rolling and pitching barge.” *Id.* Diehl therefore “suggest[s] numerous modifications to Vendor A’s approach,” *id.*, and “wonders what radar configurations might be available from other vendors and whether they might represent more suitable solutions.” Diehl Report at 2. Although the Diehl Report evaluates the various proposals submitted to Applicant, it does not definitively indicate whether the proposal evaluated as “the approach most likely to succeed” by Diehl, Diehl Report at 1, has been “selected” as “the pre- and post-construction radar monitoring protocol that Applicant intends to utilize on the project site for determining project impacts,” Staff Motion to Suspend at 1-2, or whether Applicant has agreed to Diehl’s suggested modifications.

The Bratenahl Residents maintain that, unless and until the Staff reviews Applicant’s “supplemental information” and determines whether that information was completely responsive to the Board’s directive, this case remains at a standstill. Given that this case is currently stalled,

the late intervention of four individuals residing near Lake Erie will in no way slow these proceedings or in any way prejudice Icebreaker.

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

Without any foundation in law or fact, Icebreaker maintains that allowing the Bratenahl Residents to intervene would unduly delay these proceedings. As noted above, however, these proceedings are currently stalled, and the resulting delay can in no way be attributed to the Bratenahl Residents.

Instead, any blame for delay in the consideration of the Application, however, is appropriately laid at Icebreaker's feet. In the Board's October 23, 2017 Entry, it noted that Applicant had indicated that it would file "additional information . . . *in the fall of 2017.*" *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 1, ¶4 (Oct. 23, 2017) (emphasis added). Indeed, Staff anticipated that the "radar report" would be "made available to the Staff within a month [of the Board's Entry]" Staff Memorandum in Support at 2. Yet, the Diehl Report was not completed until sometime in December, 2017, and was not filed with the Board until January 24, 2018. Clearly, the delay in submitting supplemental information is not the result of any action of the Board or Staff, and in no way connected with Icebreaker. It is clear that none of the delay in these proceedings is the result of anything other than Applicant's failure to timely supply sufficient information to enable Staff to complete its investigation.

Given that the proceedings have been stalled, intervention of the Bratenahl Residents at this juncture would in no way further delay these proceeding nor unjustly prejudice any existing party. The Bratenahl Residents have committed to this Board that they will abide by all Board deadlines and present their evidence in a clear and concise manner.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Petition to Intervene, the Bratenahl Residents request the Board to grant their 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 courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 13th day of February, 2018.

/s/ John F. Stock

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