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**BEFORE
THE OHIO POWER SITING BOARD**

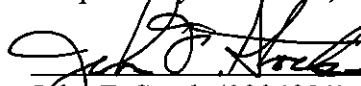
In the Matter of the Application of Icebreaker)
Windpower Inc., for a Certification to)
Construct a Wind-Powered Electric) Case No. 16-1871-EL-BGN
Generation Facility in Cuyahoga County,)
Ohio)

**MOTION FOR SUBPOENA DUCES TECUM TO COMPEL
THE TESTIMONY OF BETH A. NAGUSKY**

Pursuant to O.A.C. § 4906-2-23, Intervenors W. Susan Dempsey and Robert M. Mahoney (the "Intervenors") request the issuance of a subpoena duces tecum compelling Beth A. Nagusky, Director of Sustainable Energy for Lake Erie Development Corporation ("LEEDCo") to: (1) testify at the adjudicatory hearing before the Ohio Power Siting Board (the "Board") in this case, commencing on September 24, 2018 in hearing room 11-A at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793; and (2) produce at the hearing those documents and emails identified on Schedule 1 attached to the subpoena duces tecum.

A memorandum in support is set forth below.

Respectfully submitted,



John F. Stock (0004921)
Mark D. Tucker (0036855)
BENESCH FRIEDLANDER COPLAN
& ARONOFF LLP
41 S. High St., 26th Floor
Columbus, Ohio 43215
(614) 223-9300

Attorneys for Intervenors

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MEMORANDUM IN SUPPORT

As confirmed in the written testimony of Icebreaker Windpower, Inc. ("Icebreaker") witness David P. Karpinski, filed with the Board on September 6, LEEDCo has been acting on behalf of Applicant Icebreaker in connection with the certification and permitting of the Project that is the subject of the case.¹ And Ms. Nagusky, personally, has been a primary actor, acting on behalf of LEEDCo and Icebreaker, in communicating and negotiating with FWS, ODNR, and Staff regarding the certification process in this case. Moreover, a document relied upon by Icebreaker in the proceeding (*see e.g.*, the written testimony of Icebreaker witness Rhett Good at ¶14) to suggest that FWS supports OPSB certification of Icebreaker's Project is a March 12, 2018 U.S. Fish & Wildlife Service ("FWS") letter to the Ohio Department of Natural Resources ("ODNR") attached hereto as Exhibit A. Ms. Nagusky had email communications with ODNR regarding the FWS Letter. *See Exhibit A - 1*, an email exchange between Ms. Nagusky and Elizabeth Hazelton at ODNR. Intervenors are entitled to cross-examine Ms. Nagusky at the hearing (and obtain copies of applicable documents) regarding, *inter alia*, any communications among LEEDCo, Icebreaker, FWS, ODNR, or Staff relating to (1) FWS drafting and sending its letter to ODNR (before or after the letter was sent), and (2) the content of the FWS Letter (before or after the letter was sent). Such production would include any communications between FWS and ODNR that are in the possession of LEEDCo or Icebreaker.

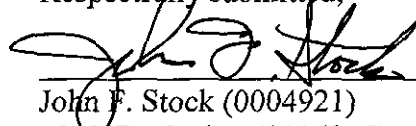
In addition, a primary focus of the written testimony of many of Icebreaker's witnesses (*see, e.g.*, the testimony of witnesses David P. Karpinski, and Rhett Good) is the purported propriety of the proposed certificate conditions set forth in Icebreaker's Stipulation with some of the parties in this case (not Staff), as contrasted to the purported impropriety of certain proposed

¹ Karpinski Testimony at ¶6: "... LEEDCO is performing project development tasks on behalf of Icebreaker. These tasks include securing state and federal permits. . . ."

certificate conditions set forth in the Staff Report. Icebreaker has put the contrasting conditions of each document directly at issue in this case. Ms. Nagusky was personally involved in negotiations with Staff regarding proposed certificate conditions to be set forth in a stipulation to be presented to the Board. The Intervenor is entitled to cross-examine Ms. Nagusky regarding proposed certificate conditions (whether accepted or rejected) and production of LEEDCo's / Icebreaker's communications (including communications of their counsel) with Staff regarding proposed certificate conditions to be included in a stipulation.

For the foregoing reasons, Intervenor is entitled to have the requested subpoena duces tecum issued to Ms. Nagusky.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John F. Stock", written over a horizontal line.

John F. Stock (0004921)

Mark D. Tucker (0036855)

BENESCH FRIEDLANDER COPLAN
& ARONOFF LLP

41 S. High St., 26th Floor

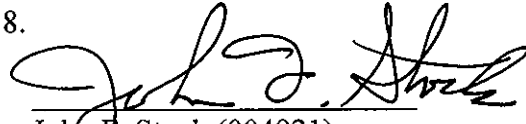
Columbus, Ohio 43215

(614) 223-9300

Attorneys for Intervenor

CERTIFICATE OF SERVICE

In accordance with OAC § 4906-2-23, I hereby certify that a copy of this Motion for Subpoena Duces Tecum, and the Subpoena Duces Tecum were served on each person below via the stated method this 13th day of September, 2018.


John F. Stock (004921)

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED:

Beth A. Nagusky
Lake Erie Development Corporation
50 Public Square, #200
Cleveland, OH 44115

VIA HAND-DELIVERY:

Christine M. T. Pirik
Dickinson Wright PLLC
150 E. Gay Street, 24th Floor
Columbus, OH 43215

VIA ELECTRONIC MAIL:

sbloomfield@bricker.com
dparram@bricker.com
dborchers@bricker.com
cendsley@ofbf.org
amilam@ofbf.org
jclark@senecapros.org
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org
mjsettineri@vorys.com
glpetrucci@vorys.com
mwtaylor@vorys.com



United States Department of the Interior

FISH AND WILDLIFE SERVICE

5600 American Boulevard West, Suite 990
Bloomington, Minnesota 55437-1458



IN REPLY REFER TO:

FWS/AES

MAR 12 2018

Gary Obermiller
Assistant Director
Ohio Department of Natural Resources
2045 Morse Road
Columbus, Ohio 43229

Dear Mr. Obermiller:

The U.S. Fish and Wildlife Service (Service) has provided technical assistance for the Icebreaker project since the early stages of project development. Service input has included Endangered Species Act consultation, migratory bird related technical assistance, and NEPA comments on the Department of Energy's (DOE) Draft Environmental Assessment. The intent of this coordination has been to promote pre- and post-construction data gathering and analyses sufficient to understand and minimize project impacts. It is important to clarify the Service's role in this process. Particularly for non-listed migratory birds (not including eagles) and bats, various authorities provide us with the responsibility to provide technical assistance and recommendations, but we are not decision makers in this context.

Regarding potential take of federally listed species, DOE has determined that LEEDCo's Project Icebreaker is not likely to adversely affect Indiana bat, northern long-eared bat, piping plover, rufa red knot, and Kirtland's warbler. The Service concurred with these determinations.

For pre-construction radar monitoring, a USGS expert (Dr. Robert Diehl) recently completed a report (December 2017) analyzing various radar proposals and identifying which vendor's proposal would have the likelihood of the most accurate data. Based on Dr. Diehl's report, LEEDCo subsequently worked with the preferred vendor (Accipiter Radar) to address specific concerns and recommendations. We appreciate that LEEDCo is working with the vendor to address concerns and incorporate recommendations from Dr. Diehl and the Service to increase the reliability of the monitoring program. Accipiter provided LEEDCo with a second proposal that would include placing the radar on a fixed platform, at a water intake crib a few miles offshore. The Service believes both proposals have trade-offs (i.e., vessel based at the project site vs. fixed platform several miles away) and uncertainties related to data collection and interpretation. However, both proposals have the potential to contribute meaningfully to migratory bird and bat exposure data for the project.



ICE0003538

The Service agrees with stakeholders that post-construction fatality monitoring is of particular importance to the project. This is because pre-construction monitoring will indicate if birds and bats are flying in or near the project area, whereas post-construction monitoring will help determine if birds and bats are actually struck by the turbines. In recent discussions, LEEDCo indicated there have been advancements in fatality monitoring detector technology. LEEDCo shared with the Service an Oregon State University proposal to further develop this technology and implement research at the project site. LEEDCo noted another research proposal is pending from the Netherlands. The Service is encouraged that there is progress in this realm of technological development. The Service continues to recommend implementation of post-construction monitoring (whether it be this technology if shown to be effective or another valid method) as soon as the wind turbine project is operational.

The Service acknowledges that Icebreaker is a relatively small-scale demonstration project consisting of six turbines and as such has limited direct risk to migratory birds and bats. The Service's interest is in both reducing the risk to birds and bats from this project and also gaining useful data from the pre- and post-construction monitoring of the operation of Icebreaker to inform any future off-shore wind developments in the Great Lakes so that risk to birds and bats from such projects can be avoided or minimized.

We recognize that for an off-shore project such as Icebreaker, any pre- and post-construction monitoring strategies will have technological challenges and uncertainties as a result of the environmental conditions under which the project will operate. Based on LEEDCo's ongoing efforts to incorporate expert input for pre- and post-construction monitoring, the Service believes the monitoring will inform our understanding of project impacts on birds and bats. It will also advance the understanding of radar capabilities and monitoring strategies in an off-shore environment. We expect that pre- and post-construction monitoring will be tied to a strong adaptive management plan so that any necessary changes can be made as monitoring results are acquired to reduce impacts to birds and bats.

Thank you for the opportunity to provide input on the technology for the pre- and post-construction monitoring for the Icebreaker project. If you have any questions regarding this letter, please don't hesitate to contact me.

Sincerely,



Lori H. Nordstrom
Assistant Regional Director
Ecological Services
Midwest Region

cc: Dan Everson, Ohio Ecological Services Field Office, USFWS

ICE0003539

Message

From: Beth Nagusky [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=087e4c4a3125490e987cf277b1bfec83-bnagusky]
Sent: 3/14/2018 5:50:13 PM
To: Erin.Hazelton@dnr.state.oh.us
CC: Christine M. T. Pirik [CPirik@dickinson-wright.com]
Subject: Re: letter

Erin:

Thanks for letting me know, and I just left you another voicemail. What I wanted to explain is that it seems there is some miscommunication going on between ODNR and OPSB. This is based on Chris Pirik's conversations with John Jones.

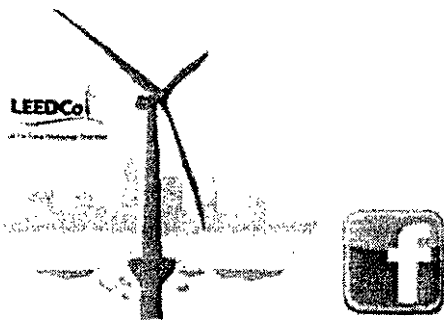
Over a year ago (August 2016) we started the conversations with ODNR and FWS about the radar and other pre-con studies. At that time FWS stated (letter from October 2016) that the radar and other pre-con studies were needed to assess risk, and that the permitting process could not proceed without them. This seems to be where John Jones is now. However, subsequently, FWS reversed course and agreed that we had sufficient information to make a risk determination. They have in fact now stated on a couple of occasions in writing that the project poses low risk of adverse impacts. They continued to want the pre-con studies, but the purpose of them was only to provide a point of comparison to the post-con studies to show any project avoidance/attraction and displacement effects.

It has always been our impression that the ODNR agreed with the FWS on this, and that our MOUs and monitoring protocols reflect this understanding.

Please let me know if you have any questions or would like to discuss with us.

Thanks much,

Beth A. Nagusky
Director of Sustainable Development
Lake Erie Energy Development Corporation
1938 Euclid Avenue, Suite 200
Cleveland, Ohio 44115
Email: bnagusky@leedco.org
Cell: (207) 592-1961
Fax: (216) 965-0629



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ICE0003325

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From: "Erin.Hazelton@dnr.state.oh.us" <Erin.Hazelton@dnr.state.oh.us>

Date: Wednesday, March 14, 2018 at 1:31 PM

To: Beth Nagusky <bnagusky@leedco.org>

Subject: letter

Hi Beth,

I did get a copy of the letter (just yesterday)—thanks for checking in. We are meeting internally to discuss later today so I'll let Gary know you called, have spoken with John Jones and are available if he wants to call.

Thanks again,

Erin

Erin Hazelton

Wind Energy/Wildlife Administrator

ODNR Division of Wildlife

2045 Morse Road

Columbus, OH 43229

Phone: 614-265-6349

Email: Erin.Hazelton@dnr.state.oh.us

Good intentions can hurt, leave wildlife in the wild. Visit wildohio.gov/staywild to find out more.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO
SUBPOENA

TO:

Beth A. Nagusky, Director of Sustainable Development
Lake Erie Development Corporation
50 Public Square, #200
Cleveland, OH 44113

Upon application of Intervenors W. Susan Dempsey & Robert Maloney you are hereby required to appear before the Public Utilities Commission of Ohio as a witness ~~for~~ on cross-examination for Intervenors in the following proceeding:


Case No. 16-1871-EL-BGN

Case Title In the Matter of the Application of Icebreaker Windpower, Inc. for a Certificate
to Construct a Wind-Powered Electric Generation Facility in Cuyahoga County, Ohio

You are to appear at the offices of the Commission, 180 East Broad Street, Columbus, Ohio, on the 24th day of September, 20 18, at 10:00 a .m. in hearing room 11-A.

You shall bring with you the following: the materials set forth on Schedule 1 attached hereto.

Dated at Columbus, Ohio, this 13th day of September, 2018.



Attorney Examiner

Notice: If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

SCHEDULE 1

1. All documents and emails in the possession of Lake Erie Development Corporation ("LEEDCO") and Icebreaker Windpower, Inc. ("Icebreaker") relating to the March 12, 2018 U.S. Fish and Wildlife Service letter attached hereto as Exhibit A, including all communications between any of the following: LEEDCO, Icebreaker, FWS, the Ohio Department of Natural Resources ("ODNR"), and OPSB Staff -- relating in any way to FWS drafting or sending Exhibit A to ODNR or the content of Exhibit A. Such documents include copies of communications between ODNR and FWS of which LEEDCO or Icebreaker has had possession.

2. All documents and emails relating to the Stipulation attached hereto as Exhibit B, including any drafts of a proposed stipulation for Case No. 16-1871-EL-BGN and any communications between LEEDCO or Icebreaker and OPSB Staff (including counsel for those entities) relating to a proposed stipulation for Case No. 16-1871-EL-BGN.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

5600 American Boulevard West, Suite 990
Bloomington, Minnesota 55437-1458



IN REPLY REFER TO:

FWS/AES

MAR 12 2018

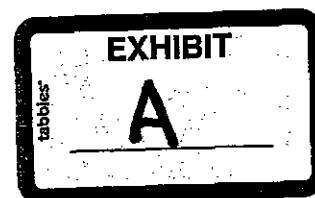
Gary Obermiller
Assistant Director
Ohio Department of Natural Resources
2045 Morse Road
Columbus, Ohio 43229

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Sincerely,



Lori H. Nordstrom
Assistant Regional Director
Ecological Services
Midwest Region

cc: Dan Everson, Ohio Ecological Services Field Office, USFWS

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.)



Carpenters' Council, and OEC filed motions to intervene in this proceeding, which were granted by the Administrative Law Judge on May 23, 2018.

This Stipulation is supported by adequate data and information; represents a just and reasonable resolution of issues in this proceeding; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process to resolve all of the issues in this proceeding. This Stipulation represents the culmination of these discussions, and the Signatory Parties acknowledge that this agreement is amply supported by the record and, thus, entitled to careful consideration by the Board. Accordingly, the Signatory Parties recommend that the Board issue a Certificate of Environmental Compatibility and Public Need for the facility.

II. JOINT RECOMMENDATIONS OF THE SIGNATORY PARTIES

A. Recommended Conditions

The proposed facility is a 6-turbine demonstration wind facility 8-10 miles off the shore of Cleveland, Ohio, located on approximately 4 acres of leased land, with a total project generating capacity of 20.7 megawatts. An approximately 11.8-mile long transmission cable route will transmit the electricity to the mainland substation. Construction of the facility is expected to begin as early as 2020.

The Signatory Parties recommend that the Board issue the Certificate of Environmental Compatibility and Public Need requested by the Applicant subject to the following conditions:

- (1) The Applicant shall install the facility, utilize equipment and construction practices, and implement mitigation measures as described in the application and as modified and/or clarified in supplemental filings, replies to data requests, and recommendations in the Staff Report, as presented and modified by this Stipulation.
- (2) Prior to constructing a transmission line associated with this generating facility, the Applicant shall complete a separate filing with the Board to address its proposed electric transmission line. The separate filing shall take

the form indicated by Ohio Adm.Code 4906-1-01 and its applicable appendices.

- (3) The Applicant shall not commence construction of the facility until it has a signed Interconnection Service Agreement with PJM Interconnection, LLC, which includes construction, operation, and maintenance of system upgrades necessary to integrate the proposed generation facility reliably and safely into the regional transmission system. The Applicant shall file in this proceeding either a letter stating that the Agreement has been signed or a copy of the signed Interconnection Service Agreement.
- (4) The facility shall be operated in such a way as to assure that no more than 18 megawatts would be injected into the American Transmission Systems, Inc. transmission grid at any time.
- (5) The Applicant shall conduct a preconstruction conference prior to the start of any construction activities. Staff, the Applicant, and representatives of the primary contractor and all subcontractors for the project shall attend the preconstruction conference. The conference shall include a presentation of the measures to be taken by the Applicant and contractors to ensure compliance with all conditions of the certificate, and discussion of the procedures for on-site investigations by Staff during construction. Prior to the conference, the Applicant shall provide a proposed conference agenda for Staff review. The Applicant may conduct separate preconstruction conferences for each stage of construction.
- (6) Within 60 days after the commencement of commercial operation, the Applicant shall submit to Staff a copy of the as-built specifications for the entire facility. If the Applicant demonstrates that good cause prevents it from submitting a copy of the as-built specifications for the entire facility within 60 days after commencement of commercial operation, it may request an extension of time for the filing of such as-built specifications. The Applicant shall use reasonable efforts to provide as-built drawings in both hard copy and as geographically referenced electronic data.
- (7) The certificate shall become invalid if the Applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate, unless the Board grants a request for waiver or an extension of time.
- (8) As the information becomes known, the Applicant shall file in this proceeding the date on which construction will begin, the date on which construction was completed, and the date on which the facility begins commercial operation.

- (9) Prior to the commencement of construction activities in areas that require permits or authorizations by federal or state laws and regulations, the Applicant shall obtain and comply with such permits or authorizations. The Applicant shall provide copies of permits and authorizations, including all supporting documentation, to Staff within seven days of issuance or receipt by the Applicant. The Applicant shall provide a schedule of construction activities and acquisition of corresponding permits for each activity at the preconstruction conference.
- (10) At least 30 days prior to the preconstruction conference, the Applicant shall submit to Staff, for review to confirm compliance with this condition, one set of detailed engineering drawings of the final project design, including the facility, construction staging areas, and any other associated facilities and access points, so that Staff can determine that the final project design is in compliance with the terms of the certificate. The final project layout shall be provided in hard copy and as geographically referenced electronic data. The final design shall incorporate all conditions of the certificate and references at the locations where the Applicant and/or its contractors must adhere to a specific condition in order to comply with the certificate. The detailed engineering design of the foundation and ice cone shall include the identity of the registered professional engineer or engineering firm, appropriately licensed to practice engineering who reviewed and approved the designs.
- (11) Prior to construction, the Applicant shall finalize coordination with the appropriate federal agency (U.S. Department of Energy) in consultation with the Ohio Historic Preservation Office with regards to completing Section 106 of the National Historic Preservation Act of 1966, as amended. If the resulting coordination results in any mitigation efforts in order to ensure minimal effects on cultural resources, those results shall be submitted to Staff for review to ensure compliance with this condition.
- (12) No commercial signage or advertisements shall be located on any turbine, tower, or related infrastructure, except for reasonable identification of the manufacturer, the operator of the wind farm, or the operator's designee. If vandalism should occur, the Applicant shall remove or abate the damage within 30 days of discovery or as extended by Staff for good cause shown, to preserve the aesthetics of the project. Any abatement other than the restoration to pre-vandalism condition is subject to review by Staff to ensure compliance with this condition.
- (13) At least 30 days prior to construction, the Applicant shall provide Staff, any affected property owners and tenants, the municipalities along the shore in the project viewshed, Cuyahoga County officials, emergency responders, and libraries with written notice regarding the start of construction and the complaint resolution process outlined in Exhibit N of the application. The

notice shall include a description of the nature of the project, contact information for the project, and the proposed timeframe for project construction. A copy of the notice shall be filed on the docket in this case.

- (14) During the construction and operation of the project, the Applicant shall file on the docket in this case a summary report of any complaints received through its complaint resolution process, a description of actions taken to resolve each complaint, and a status update if the complaint has yet to be resolved in the case record by the fifteenth day of April, July, October, and December of each year.
- (15) The Applicant shall comply with all terms in the Avian and Bat memorandum of understanding ("MOU") and the Fisheries and Aquatic Resources MOU, as well as any other protocols or documents resulting from these MOUs. Any modifications to the MOUs or resulting documents shall be filed in the case docket upon completion.
- (16) Prior to construction, the Applicant shall execute a modified submerged lands lease ("SLL") with the Ohio Department of Natural Resources ("ODNR") and adhere to all terms and conditions stated in the modified SLL. A copy of the modified SLL shall be filed in the case docket upon completion.
- (17) At least 60 days prior to commencement of construction, the Applicant shall submit a fisheries and aquatic resources construction monitoring plan to the ODNR and Staff for review to confirm compliance with this condition. The Applicant's plan shall be consistent with the ODNR approved Fisheries and Aquatic Resources MOU. The monitoring start date and reporting deadlines will be provided in the ODNR approval letter and the Staff concurrence letter.
- (18) At least 60 days prior to commencement of construction, the Applicant shall submit an avian and bat impact mitigation plan which incorporates the most current survey results and post-construction avian and bat monitoring plan to the ODNR and Staff for review to confirm compliance with this condition that implementation of the plans would be effective in avoiding significant impacts to avian and bat species. The Applicant shall also provide the monitoring plan to, and seek consultation with, the U.S. Fish and Wildlife Service ("USFWS"). The Applicant shall update the mitigation plan as new information is attained through surveys. Any proposed modifications to the plans shall be submitted to the ODNR and Staff for review to confirm compliance with this condition.

- (19) The Applicant shall submit a post-construction avian and bat collision monitoring plan and shall demonstrate that, considering the state of available technology, the plan is sufficient either prior to construction through lab and field testing, or during operation. Compliance with this condition will be determined by the ODNR in consultation with Staff. Because this project is the first of its kind in Lake Erie, if the ODNR and Staff find that the plan is not sufficient, the ODNR and Staff may require turbines be feathered up to 30 minutes prior to sunset to 30 minutes after sunrise during peak spring and fall migration periods when cloud ceilings are low.
- (20) At least 60 days prior to commencement of construction, the Applicant shall submit a fisheries and aquatic resources mitigation plan which incorporates the most current survey results and post-construction fisheries and aquatic resources monitoring plan to the ODNR and Staff for review to confirm compliance with this condition that implementation of the plans would be effective in avoiding significant impacts to fisheries and aquatic resources. The Applicant shall also provide the plans to and seek consultation from the USFWS. The Applicant shall update the mitigation plan as new information is attained through surveys. Any proposed modifications to the plans shall be submitted to the ODNR and Staff for review to confirm compliance with this condition.
- (21) If state or federally listed endangered or threatened species are encountered during construction, operation, or monitoring activities, the Applicant shall contact Staff, the ODNR, and the USFWS, as applicable, within 24 hours. Construction or operation activities that could adversely impact the identified animals shall be modified to minimize risk to the identified species until an appropriate course of action has been agreed upon by the Applicant, Staff, and the ODNR in consultation with the USFWS. Nothing in this condition shall preclude agencies having jurisdiction over the facility with respect to wildlife from exercising their legal authority over the facility consistent with law.
- (22) The Applicant shall implement a radar monitoring program which includes the following:
- (a) Radar must be able to detect and track directional movement and altitude of individual 10-gram and larger vertebrates.
 - (b) Radar must have the ability to collect data continuously, due to the pulsed nature of migration.

- (c) Radar must suppress false detections from insects, wave clutter, and weather and without downtime bias with respect to biological periods (dawn, dusk, night) (80 percent or greater of survey time producing viable data, unless precluded by heavy precipitation or high sea events).
 - (d) Radar must be able to determine flight altitude of migrants at altitudes near and entirely within the rotor-swept zone at the project site to quantify collision risk.
 - (e) Radar must be able to provide information that can be used to determine and quantify behavioral avoidance or attraction to turbines in the open water setting.
 - (f) Radar must collect data for both small bird migratory seasons and bat migratory seasons (April to mid-June; August to mid-November) preconstruction.
 - (g) Radar must collect data for at least two spring/fall migratory seasons post-construction. If the Applicant demonstrates to the ODNR's satisfaction that a second spring and/or fall post-construction radar survey is unlikely to result in the collection of additional data to inform the question of avoidance/attract effects, the ODNR may, in its sole discretion, determine that the Applicant does not need to conduct a second spring and/or fall post-construction radar survey.
- (23) Prior to construction, the Applicant shall demonstrate that these requirements can be satisfied through implementation of the radar-monitoring program for one spring and one fall migration season. Proof of completion of these requirements shall be submitted to the ODNR and Staff for review to confirm compliance with this condition at least 90 days prior to construction.
- (24) If Staff and the ODNR, in consultation with the USFWS, determine the project results in significant adverse impact (i.e., biologically significant impact on the population level of any species or the occurrence of a large mortality event as defined in the impact mitigation plan) to species covered under the Avian and Bat MOU and the Fisheries and Aquatic Resources MOU (other than state or federally listed endangered or threatened species, which are exclusively addressed in Stipulation Condition 21), the Applicant will develop and submit a mitigation or adaptive management strategy to Staff and the ODNR to confirm compliance with this condition. Following execution of the strategy, if the significant adverse impact persists, the Applicant will request a meeting with Staff and the ODNR to jointly develop a revised mitigation or adaptive management strategy.

Within 30 days of an agreement between the Applicant, Staff, and the ODNR, the Applicant will submit the revised mitigation and adaptive management strategy to Staff and the ODNR to confirm compliance with this condition.

- (25) All annual and final reports, as outlined in the MOUs, shall be filed on the docket in this case upon completion.
- (26) Should construction be delayed beyond five years of the date of the certificate, certain wildlife and aquatic surveys may need to be updated and approved by Staff and the ODNR, if required by the Board.
- (27) The Applicant shall comply with the turbine manufacturer's most current safety manual and shall maintain a copy of that safety manual in the operations and maintenance building of the facility.
- (28) Prior to commencement of construction activities that require transportation permits, the Applicant shall obtain all such permits. The Applicant shall coordinate with the appropriate authority regarding any traffic management issues. Coordination shall include, but not be limited to, the county engineer, the Ohio Department of Transportation ("ODOT"), local law enforcement, and health and safety officials. This coordination shall be detailed as part of a final transportation management plan submitted to Staff prior to the preconstruction conference for review and confirmation that it complies with this condition.
- (29) The Applicant shall enter into a road use agreement with the appropriate authorities prior to construction and subject to Staff review and confirmation.
- (30) The Applicant shall mitigate any observed impacts of the project to communication systems, including maritime VHF radio, within seven days or if good cause is shown within a longer time period acceptable to Staff. Avoidance and mitigation for any known communication systems shall consist of measures acceptable to Staff, the Applicant, and the affected path owner, operator, or licensee.
- (31) The Applicant shall comply with the following conditions regarding decommissioning:
 - (a) The Applicant shall provide the final decommissioning plan to Staff for review and confirmation of compliance with this condition, at least 30 days prior to the preconstruction conference. The plan shall:

- (i) Indicate the intended future use of the land following reclamation.
 - (ii) Describe the following: engineering techniques and major equipment to be used in decommissioning and reclamation.
 - (iii) Provide a detailed timetable for the accomplishment of each major step in the decommissioning plan, including the steps to be taken to comply with applicable air, water, and solid waste laws and regulations and any applicable health and safety standards in effect as of the date of submittal.
- (b) The Applicant shall file with the Board a revised decommissioning plan every five years from the commencement of construction. The revised plan shall reflect advancements in engineering techniques and reclamation equipment and standards. The revised plan shall be applied to each five-year decommissioning cost estimate. Prior to implementation, the decommissioning plan and any revisions shall be reviewed by Staff, in consultation with the ODNR, to confirm compliance with this condition.
- (c) The Applicant shall, at its expense, complete decommissioning of the facility, or individual wind turbines, within 12 months after the end of the useful life of the facility or individual wind turbines. If no electricity is generated for a continuous period of 12 months, or if the Board deems the facility or turbine to be in a state of disrepair warranting decommissioning, the wind energy facility or individual wind turbines will be presumed to have reached the end of its useful life. The Board may extend the useful life period for the wind energy facility or individual turbines for good cause as shown by the Applicant. The Board may also require decommissioning of individual wind turbines due to health, safety, wildlife impact, or other concerns that prevent the turbine from operating within the terms of the Certificate.
- (d) Decommissioning shall include the removal and transportation of the wind turbines off site. Decommissioning shall also include the removal of buildings, electrical components, and any other associated facilities, unless otherwise mutually agreed upon by the Applicant and the landowner. The disturbed area shall be restored to the same physical condition that existed before erection of the facility.
- (e) During decommissioning, all recyclable materials, salvaged and non-salvaged, shall be recycled to the furthest extent practicable. All other non-recyclable waste materials shall be disposed of in accordance with state and federal law.

- (f) The facility owner and/or facility operator shall not remove any improvements made to the electrical infrastructure if doing so would disrupt the electric grid, unless otherwise approved by the applicable regional transmission organization and interconnection utility.
- (g) Subject to confirmation of compliance with this condition by Staff in consultation with the ODNR, and seven days prior to the preconstruction conference, an independent, registered professional engineer, licensed to practice engineering in the state of Ohio, shall be retained by the Applicant to estimate the total cost of decommissioning in current dollars, without regard to salvage value of the equipment. Said estimate shall include: (1) an identification and analysis of the activities necessary to implement the most recent approved decommissioning plan including, but not limited to, physical construction and demolition costs assuming good industry practice and based on ODOT's Procedure for Budget Estimating and RS Means material and labor cost indices or any other publication or guidelines approved by Staff; (2) the cost to perform each of the activities; (3) an amount to cover contingency costs, not to exceed 10 percent of the above calculated reclamation cost. Said estimate will be converted to a per-turbine basis (the "Decommissioning Costs"), calculated as the total cost of decommissioning of all facilities as estimated by the professional engineer divided by the number of turbines in the most recent facility engineering drawings. This estimate shall be conducted every five years by the Applicant.
- (h) The Applicant shall post and maintain for decommissioning a performance bond in an amount equal to the per-turbine Decommissioning Costs multiplied by the sum of the number of turbines constructed and under construction. The performance bond need not be posted separately for each turbine so long as the total amount reflects the aggregate of the Decommissioning Costs for all turbines constructed or under construction. For purposes of this condition, a turbine is considered to be under construction at the installation of the foundation. The performance bond shall be a financial instrument mutually agreed upon by the Board and the Applicant. The performance bond shall ensure the faithful performance of all requirements and reclamation conditions of the most recently filed and approved decommissioning and reclamation plan. At least 30 days prior to the preconstruction conference, the Applicant shall provide an estimated timeline for the posting of decommissioning funds based on the construction schedule for each turbine. Prior to commencement of construction, the Applicant shall file a statement from the holder of the performance bond demonstrating that adequate funds have been posted for the scheduled construction. Once the performance bond is provided, the Applicant shall maintain such funds or assurance throughout the

remainder of the applicable term and shall adjust the amount of the assurance, if necessary, to offset any increase or decrease in the Decommissioning Costs.

- (i) The performance bond shall be released by the holder when the Applicant has demonstrated, and the Board concurs, that decommissioning has been satisfactorily completed, or upon written approval of the Board, in order to implement the decommissioning plan.
- (32) The Applicant shall meet all recommended and prescribed Federal Aviation Administration ("FAA") and ODOT Office of Aviation requirements to construct an object that may affect navigable airspace. This includes submitting coordinates and heights for all towers exceeding 200 feet AGL for ODOT Office of Aviation and FAA review prior to construction, and the non-penetration of any FAA Part 77 surfaces.
- (33) All applicable structures, including construction equipment, shall be lit in accordance with FAA circular 70/7460-1 K Change 2, Obstruction Marking and Lighting; or as otherwise prescribed by the FAA. This includes all cranes and construction equipment.
- (34) The Applicant shall comply with fugitive dust rules by the use of water spray or other appropriate dust suppressant measures whenever necessary.
- (35) Signatory Parties to this Stipulation shall be invited to participate in and provide advisory input throughout discussion with the identified agencies and Staff during efforts to finalize the programs and plans referenced in conditions (17), (18), (19), (20), (22), and (24).

B. Exhibits

Subject to the terms and conditions of this Stipulation, the Applicant, the Business Network, the Sierra Club, the Carpenters' Council, and OEC, agree, stipulate, and recommend that the following exhibits submitted to this docket be marked and admitted into the record of this proceeding:

- 1. Applicant Exhibit 1: Application filed on February 1, 2017.
- 2. Applicant Exhibit 2: Supplement to Application filed on March 13, 2017.
- 3. Applicant Exhibit 3: Second Supplement to Application filed on July 20, 2017.
- 4. Applicant Exhibit 4: Erratum to the Second Supplement to the Application filed July 24, 2017.

5. Applicant Exhibit 5: Third Supplement to Application filed on August 18, 2017.
6. Applicant Exhibit 6: Fourth Supplement to Application filed on March 22, 2018.
7. Applicant Exhibit 7: Response to First Set of Interrogatories filed on September 6, 2017.
8. Applicant Exhibit 8: Response to Second Set of Interrogatories filed on October 2, 2017.
9. Applicant Exhibit 9: Supplement to Response to Second Set of Interrogatories filed on October 13, 2017.
10. Applicant Exhibit 10: Correction to Response to Second Set of Interrogatories filed on July 3, 2018.
11. Applicant Exhibit 11: Response to Third Set of Interrogatories filed on November 7, 2017.
12. Applicant Exhibit 12: Correction to Response to Third Set of Interrogatories filed on November 7, 2017.
13. Applicant Exhibit 13: Response to Fourth Set of Interrogatories filed on January 29, 2018.
14. Applicant Exhibit 14: Response to Fifth Set of Interrogatories filed on June 11, 2018.
15. Applicant Exhibit 15: Response to Sixth Set of Interrogatories filed on July 3, 2018.
16. Applicant Exhibit 16: Certificate of Service of the November 3, 2016 Public Information Meeting, notice on property owners and entities filed on October 13, 2016, in accordance with Ohio Adm.Code 4906-3-03(B)(2).
17. Applicant Exhibit 17: Proof of Publication of November 3, 2016 Public Information Meeting in *The Plain Dealer* filed on November 9, 2016, in accordance with Ohio Adm.Code 4906-3-03(B)(1).
18. Applicant Exhibit 18: Certificate of Service of the accepted, complete application on local public officials and libraries filed on August 1, 2017, in accordance with Ohio Adm.Code 4906-3-07(A)(1) and (2).
19. Applicant Exhibit 19: Proof of Service of the accepted, complete application on all local public officials, libraries, and each owner of property crossed and/or adjacent to the proposed facility site filed on September 8, 2017, in accordance with Ohio Adm.Code 4906-3-09(A)(1).

20. Applicant Exhibit 20: Proof of Publication of the accepted, complete application in *The Plain Dealer* filed on August 30, 2017, in accordance with R.C. 4906.06(E).
21. Applicant Exhibit 21: Proof of the Second Publication of the accepted, complete application in *The Plain Dealer* filed on November 3, 2017, in accordance with Ohio Adm.Code 4906-3-09(A)(2).
22. Applicant Exhibit 22: Proof of Service of the accepted, complete application on all local public officials, libraries, and each owner of property crossed and/or adjacent to the proposed facility site filed on April 27, 2018, in accordance with Ohio Adm.Code 4906-3-09(A)(1).
23. Applicant Exhibit 23: Proof of Publication of reestablished procedural schedule of the accepted, complete application in *The Plain Dealer* filed on May 11, 2018, in accordance with R.C. 4906.06(E).
24. Applicant Exhibit 24: Proof of the Second Publication and service of reestablished procedural schedule of the accepted, complete application in *The Plain Dealer* filed on July 13, 2018, in accordance with Ohio Adm.Code 4906-3-09(A)(2).
25. Joint Exhibit 1: This "Joint Stipulation and Recommendation" signed on behalf of the Applicant, the Business Network, the Sierra Club, the Carpenters' Council, and OEC.

C. Other Terms of the Stipulation

1. This Stipulation is expressly conditioned upon its adoption by the Board without material modification. In the event the Board rejects or materially modifies all or part of this Stipulation or imposes additional conditions or requirements upon the Signatory Parties, each party shall have the right, within 30 days of the Board's order, to file an application for rehearing with the Board. Upon the Board upholding the material modification of the Stipulation in its entry on rehearing, any party may terminate or withdraw from the Stipulation by filing a second application for rehearing with the Board within 30 days of the Board's entry on rehearing. The second application shall be limited in scope to a party giving notice of exercising its right to terminate and withdraw from the Stipulation to the Board, and requesting an evidentiary hearing with all appertaining rights of process, as if the Stipulation had never been executed. Prior to any party seeking rehearing or terminating and withdrawing from the Stipulation pursuant to this provision, the Signatory Parties agree to convene as soon as possible to work in good faith to achieve an outcome that substantially satisfies the intent of the Board or propose a reasonable equivalent thereto to be submitted to the Board for its consideration. Upon a second application for rehearing being filed giving notice of termination or withdrawal by any party, pursuant to the above provisions, the Stipulation shall immediately become null and void.

2. The Signatory Parties agree and recognize that this Stipulation has been entered into only for the purpose of this proceeding. Each party further agrees that this Stipulation carries no factual or legal precedent on any issue.

III. RECOMMENDED FINDINGS

The Signatory Parties agree that the record in this case, provided the Board approves the conditions in this Stipulation, contains sufficient probative evidence for the Board to find and determine, as findings of fact and conclusions of law, that:

A. Recommended Findings of Fact

1. The Applicant was formed through the collaboration of the Lake Erie Energy Development Corporation and Fred. Olsen Renewables USA.
2. The facility qualifies as an economically significant wind farm defined in R.C. 4906.13(A).
3. The Applicant formally submitted its application for a Certificate of Environmental Compatibility and Public Need on February 1, 2017.
4. The Business Network, the Sierra Club, the Carpenters' Council, and OEC, filed motions to intervene in this proceeding, which were granted on May 23, 2018.
5. On October 13, 2016, August 1, 2017, September 8, 2017, April 27, 2018, and July 13, 2018, the Applicant filed Proofs of Service of the public information meeting, and/or the accepted, complete application on local public officials, libraries, and/or each owner of property crossed and/or adjacent to the proposed facility site, in accordance with Ohio Adm.Code 4906-3-03(B)(2) and/or 4906-3-09(A)(1).
6. On November 9, 2016, August 30, 2017, November 2, 2017, May 11, 2018, and July 13, 2018 the Applicant filed Proofs of Publication of the public information meeting and/or the accepted, complete application in *The Plain Dealer*, in accordance with Ohio Revised Code ("R.C.") 4906.06(E), Ohio Adm.Code 4906-3-03(B)(1), and/or Ohio Adm.Code 4906-3-09(A)(2).
7. The Staff Report was filed on July 3, 2018.
8. Two local public hearings were held at the Cleveland City Council Chambers, 601 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44114, on November 8, 2017, and July 19, 2018, in accordance with R.C. 4906.08(C).

9. An adjudicatory hearing was held on September 24, 2018, commencing at 10:00 a.m., 11th floor, hearing room 11-A, at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215.
10. The basis of need, as specified under R.C. 4906.10(A)(1), is not applicable to this generating facility project.
11. Adequate data on the project has been provided to determine the nature of the probable environmental impact, as required by R.C. 4906.10(A)(2).
12. Adequate data on the project has been provided to determine that the facility described in the application represents the minimum adverse environmental impact, considering the available technology and nature and economies of the various alternatives, and other pertinent considerations, as required by R.C. 4906.10(A)(3).
13. Adequate data on the project has been provided to determine that, because the project is an electric generation facility, the proposed electric generating facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving the state of Ohio and interconnected utility systems, that the facility will serve the interests of electric system economy and reliability, and the requirements of R.C. 4906.10(A)(4) are met.
14. Adequate data on the project has been provided to determine that, to the extent that any of them are applicable, the wind-powered generation facility farm will comply with the requirements in the R.C. regarding air and water pollution control, withdrawal of waters of the state, solid and hazardous waters, and air navigation, and all regulations thereunder, as required by R.C. 4906.10(A)(5).
15. Adequate data on the project has been provided to determine that the facility will serve the public interest, convenience, and necessity, as required by R.C. 4906.10(A)(6).
16. Adequate data on the project has been provided to determine what the facility's impact will be on the viability as agricultural land of any land in an existing agricultural district established under R.C. Chapter 929 that is located within the site of the proposed facility, as required by R.C. 4906.10(A)(7).
17. Adequate data on the project has been provided to determine that the facility as proposed incorporates maximum feasible water conservation practices considering available technology and the nature and economics of the various alternatives, as required by R.C. 4906.10(A)(8).

18. The record evidence in this matter provides sufficient factual data to enable the Board to make an informed decision.

B. Recommended Conclusions of Law

1. Icebreaker Windpower Inc. is a "person" under R.C. 4906.01(A).
2. The proposed facility is an economically significant wind farm as defined in R.C. 4906.13(A).
3. The application complies with the requirements of Ohio Adm.Code Chapter 4906-3.
4. The requirement for the need for the facility under R.C. 4906.10(A)(1) is inapplicable.
5. The record establishes the nature of the probable environmental impact from construction, operation, and maintenance of the facility under R.C. 4906.10(A)(2).
6. The record establishes that the facility, if conditioned in the certificate as recommended by the Signatory Parties, represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations under R.C. 4906.10(A)(3).
7. The record establishes that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving the State of Ohio and interconnected utility systems, and will serve the interests of electric system economy and reliability, as required by R.C. 4906.10(A)(4).
8. The record establishes, as required by R.C. 4906.10(A)(5), that, to the extent that any of them are applicable, construction of the proposed facility will comply with the requirements in the R.C. regarding air and water pollution control, withdrawal of waters of the state, solid and hazardous waters, and air navigation, and all rules and standards adopted under the relevant Chapters of the R.C.
9. The record establishes that the facility, if conditioned in the certificate as recommended by the Signatory Parties, will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6).
10. The facility's impact on the viability as agricultural land of any land in an existing agricultural district has been determined under R.C. 4906.10(A)(7).

11. The record establishes that the facility would incorporate maximum feasible water conservation practices under R.C. 4906.10(A)(8).
12. Based on the record, the Signatory Parties recommend that the Board issue a Certificate of Environmental Compatibility and Public Need for construction, operation, and maintenance of the facility, which includes the conditions in the Staff Report, as presented and modified by this Stipulation.

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COLUMBUS 63172-1 96626v5

The undersigned hereby stipulate and agree and they represent that they are authorized to enter into this Joint Stipulation and Recommendation.

Respectfully submitted on behalf of,

ICEBREAKER WINDPOWER, INC.

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in

Case No(s). 16-1871-EL-BGN

Summary: Stipulation - Joint Stipulation and Recommendation electronically filed by Christine M.T. Pirik on behalf of Icebreaker Windpower Inc.