

**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.)	

**MOTION TO QUASH SUBPOENA
AND MEMORANDUM IN SUPPORT**

Pursuant to Ohio Administrative Code (“OAC”) Rule 4906-2-23(C), Icebreaker Windpower Inc. (“Icebreaker”) respectfully moves the Ohio Power Siting Board (“OPSB” or “Board”) or its Administrative Law Judge (“ALJ”) to quash a subpoena served September 13, 2018, by intervening parties W. Susan Dempsey and Robert Maloney (“Intervenors”) upon Beth Nagusky, Director of Sustainable Energy for Lake Erie Energy Development Corporation (“LEEDCo”) (“Ms. Nagusky”) (“Subpoena”). Specifically, Icebreaker moves the Board / ALJ to quash the unreasonable portion of the subpoena that noted “Ms. Nagusky was personally involved in negotiations with Staff regarding proposed certificate conditions to be set forth in the stipulation to be presented to the Board....” and requested that Ms. Nagusky testify 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 the stipulation.” *See* Intervenor Motion for Subpoena, p. 3 (Sept. 13, 2018) (“Motion for Subpoena”). In addition, Icebreaker moves to quash Item 2 to Schedule 1 attached to the Subpoena that requests “[a]ll documents and emails relating to the Stipulation...including any drafts of the proposed stipulation...and any communications between LEEDCO or Icebreaker and OPSB Staff (including counsel for those entities) relating to a proposed stipulation....”

Under well-established state law, evidence of settlement discussions – including evidence related to furnishing, offering to furnish, accepting, or offering to accept a compromise between parties to a case – is inadmissible in court. *See* Ohio R. Evid. 408. Irrelevant evidence is similarly

inadmissible, and the Board / ALJ may take whatever action necessary to prevent the presentation of such evidence. *See* OAC Rule 4906-2-09(B)(8).

As detailed in the attached memorandum in support, Ms. Nagusky's testimony regarding negotiations and proposed certificate conditions during those negotiations, and her production of related communications, would represent inadmissible, irrelevant evidence of confidential settlement discussions. Allowing Intervenors to elicit such testimony / documentation during the hearing would be unreasonable, would violate Ohio's long-standing public policy in favor of negotiated settlements, would undercut the confidentiality afforded to settlement discussions, and would result in a chilling effect for such negotiations in future Board proceedings. Accordingly, Icebreaker respectfully requests the Board or ALJ to quash the subpoena to the extent it seeks information related to settlement negotiations.

In addition, the Subpoena requests the cross-examination of Ms. Nagusky and the production of all 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)." *See* Motion for Subpoena, p. 2 (emphasis added). The language "inter alia" and "relating to" causes this portion of Intervenors' Subpoena to be unreasonably broad and nonspecific to the point where it encompasses nearly every communication made to date regarding the proceeding. Therefore, Icebreaker respectfully requests that the Board or ALJ issue an Entry requiring the Intervenors to be more specific on the information requested and narrowing the scope of Intervenors' Subpoena language.

WHEREFORE, Icebreaker respectfully moves the Board or ALJ to quash the portion of the Subpoena requesting testimony and documentation regarding settlement discussions, and narrow the scope of the Subpoena's request regarding documents related to the FWS Letter.

Respectfully submitted,

/s/ Christine M.T. Pirik

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On April 20, 2018, the ALJ established the procedural schedule for this case. On July 23, 2018, Icebreaker circulated to OPSB Staff and all other parties a proposed Joint Stipulation and Recommendation. On July 30, 2018, all parties to the case jointly requested an extension to various deadlines and submitted a revised procedural schedule—which the Board adopted on August 1, 2018, and which established an adjudicatory hearing date of September 24, 2018.

In the ensuing weeks, all parties to the proceeding and OPSB Staff engaged in robust dialogue and negotiation regarding the July 23, 2018 proposal, the Staff Report, and the diverse array of conditions recommended for the project. Prior to and during the negotiations, it was made clear that the parties were there to negotiate in good faith, that the settlement discussions would be strictly confidential, and that no one involved in the negotiations would be called as a witness concerning anything discussed during the negotiations.¹

On September 4, 2018, after significant consideration and discussion by all parties, Icebreaker, the Business Network for Offshore Wind, Inc., the Sierra Club, the Indiana/Kentucky/Ohio Regional Council of Carpenters, and the Ohio Environmental Council (“Stipulating Parties”) executed and filed a finalized Joint Stipulation and Recommendation (“Stipulation”).

On September 13, 2018, Intervenors filed a Motion to Subpoena Ms. Nagusky, in part, requesting that she be compelled to testify and produce documentation regarding the confidential settlement discussions between the parties and OPSB Staff, which took place over the course of

¹ While these parameters are well-known and adhered to by parties that are negotiating in good faith, in an acknowledgement of these parameters, several of the intervening parties signed an “Agreement to Negotiate in Good Faith.”

nearly two months. During the two months of negotiations, all parties were invited to the table for discussions and all parties were provided drafts of the proposed settlement offers.

II. LEGAL AUTHORITY

Under OAC Rule 4906-2-23(C), the Board or ALJ may quash a subpoena if it is unreasonable or oppressive. Moreover, the ALJ is authorized under Ohio law to “take such actions as are necessary” to avoid unnecessary delay; prevent the presentation of irrelevant or cumulative evidence; and assure the hearing proceeds in an orderly and expeditious manner. OAC Rule 4906-2-09(B).

The Ohio Rules of Evidence and the Ohio Rules of Civil Procedure provide guidance on unreasonable subpoenas and irrelevant evidence. Ohio’s Rules of Civil Procedure contain provisions that protect parties subject to a subpoena from “unreasonable burden,” as well as provisions prohibiting the disclosure of “privileged or otherwise protected matter.” Civ.R. 45(C). Ohio’s Rules of Evidence provide that “evidence of conduct or statements made in compromise negotiations is likewise not admissible.” Ohio.R. Evid. 408. The same rules clarify that admissible “relevant” evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ohio.R. Evid. 401.

The Board has previously invoked these rules to address improper subpoenas and irrelevant, inadmissible testimony. *See e.g., In re: Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Entry at 10-11 (Oct. 22, 2012) (quashing unduly broad and burdensome subpoena). For the reasons described below, the unreasonable portion of Intervenors’ Subpoena on Ms. Nagusky should similarly be quashed in order to protect the integrity of the Board’s hearing process.

III. ANALYSIS

A. **Intervenors' Subpoena seeks the production of irrelevant and inadmissible communications, as well as irrelevant and inadmissible hearing testimony.**

The Board / ALJ should quash Intervenors' Subpoena because it seeks to compel the submission of irrelevant, inadmissible evidence. Allowing the Subpoena's requested testimony and cross-examination of 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" and "[a]ll documents and emails relating to the Stipulation...including any drafts of the proposed stipulation...and any communications between LEEDCO or Icebreaker and OPSB Staff (including counsel for those entities) relating to a proposed stipulation" would be equivalent to compelling testimony and the production of communications on prior settlement discussions—a direct violation of Ohio R. Evid. 408.

Moreover, such communications are completely irrelevant to this proceeding. The very purpose of the upcoming hearing is to consider the Final Stipulation submitted by the Stipulating Parties and the Staff Report. Deliberation over the dozens of hours of prior negotiations and numerous iterations of proposed compromises (all of which all parties were privy to) would only serve to confuse and complicate the hearing and impede settlement discussions in future case.

Not only is this evidence irrelevant, but its production and subsequent examination would be overly burdensome and would cause significant delay. Mandating Ms. Nagusky's testimony and production of the requested communications would not only burden Icebreaker, but it would also burden other parties and hinder the entire hearing process. The prospect of the Board, ALJ, Staff, and all other parties spending dozens of hours examining hundreds of pages of evidence related to nearly two-months of negotiations is highly troublesome and would set a dangerous precedent in future Board proceedings.

B. Intervenor's Subpoena undermines the strong public policy in favor of settlement, eliminates the confidentiality of settlement negotiations, and disincentivizes future settlements in Board proceedings.

The Board has historically encouraged settlement in OPSB proceedings, and has respected the confidentiality routinely and properly associated with settlement negotiations. The Board should not render a decision that runs contrary to this well-established precedent.

Settlement saves considerable time and resources, not only for the state but for parties to any case. The very nature of settlement ensures a packaged compromise that is acceptable to most, if not all, stakeholders. If settling parties could be forced to testify on their prior negotiations or produce related communications, the parties would be more hesitant to offer a compromise, knowing their proposals and recommendations could be subject to future questioning and scrutiny.

Throughout the negotiating process, all parties come to the table in good faith with the intent of settling on a "middle-ground" mutually-agreed agreed upon Joint Stipulation and Recommendation. Intervenor's attempt to use these discussions in an inappropriate way for purposes of the hearing represents an unconscionable abuse of the Board's process, and should not be permitted.

IV. CONCLUSION

As detailed previously, Icebreaker moves that the Board / ALJ quash the unreasonable portion of the subpoena that would require Ms. Nagusky to provide confidential information concerning the good faith negotiations entered into between Icebreaker and the parties. In addition, Icebreaker respectfully requests that the Board or ALJ require the Intervenor to be more specific on the information requested and narrowing the scope of Intervenor's Subpoena language regarding the request that Ms. Nagusky provide "*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)."

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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 listed below via electronic mail this 20th day of September, 2018.

/s/ Christine M.T. Pirik

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Summary: Motion to Quash and Memorandum in Support electronically filed by Christine M.T. Pirik on behalf of Icebreaker Windpower Inc.