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 Generation Facility in Cuyahoga County, Ohio	)))))	Case No. 16-1871-EL-BGN

BRATENAHL RESIDENTS' MEMORANDUM IN OPPOSITION TO THE JOINT MOTION TO EXCLUDE TESTIMONY OF JEFF GOSSE

I. INTRODUCTION

This matter is before the Board on the Joint Motion of Icebreaker Windpower, Inc. ("Icebreaker"), the Business Network for Offshore Wind, Inc. ("BNOW"), and the the Indiana/Kentucky/Ohio Regional Council of Carpenters ("Carpenters") (collectively, "Joint Movants") (the Board's Staff did not join in the motion) to exclude the testimony of avian radar expert Dr. Jeff Gosse, retired from the U.S. Fish & Wildlife Service (the "FWS"),[1] from the August 20, 2019 hearing in this case. The Board must deny the Joint Motion. First, the Joint Movants do not possess standing to attempt to prevent a retired FWS employee from testifying in this case. See *United States ex re. Liotine v. CDW Government, Inc.,* No. 05-33-DRH, 2012 WL 2807040 at *6 (S.D.Ill. July 10, 2012) (". . . ***a private party, lacks standing to claim a violation of the [Touhy] regulations***. . . .") (emphasis added).

Second, it would be unlawful to apply the *Touhy* regulations, designed to provide for federal agencies' internal management of their operations, to former employees (now private citizens) no longer managed by such agencies. See *Sherwood v. BNSF Railway Co.,* No. 2:16-CV-00008-BLW, 2019 WL 943548 at *2-3 (D.Idaho Feb. 25, 2019) (the *Touhy* "***regulations are invalid to the extent they purport to apply to former employees***.") (emphasis added).

[1]Dr. Gosse retired from the FWS on March 30, 2018.

Third, 18 U.S.C. §207 (mentioned nowhere in the Joint Motion), the federal statute that actually governs when and where former FWS employees are prohibited from testifying—rather than the *Touhy* internal management regulations—does not prohibit Dr. Gosse from testifying in this proceeding.

Fourth, the direct testimony to be proffered by Dr. Gosse, not yet known to the Joint Movants or the Board, will comply with the Board's June 17, 2019 Entry limiting the evidence at the August 20, 2019 hearing "to the fifth amendment to the application, modifications made between the September 4, 2018 stipulation and the [Revised] Stipulation, as well as any new, relevant information that has developed since . . . October 2, 2018. . . ." Thus, Dr. Gosse's direct testimony—the only testimony that will offered in opposition to Icebreaker's proposed new Joint Stipulation—will not be unduly prejudicial to Icebreaker. The Board cannot accede to Icebreaker's attempt to make the testimony at the August 20 hearing a "whitewash" in favor of the Stipulation.

There is no merit to the Joint Motion. It must be denied.

II. BACKGROUND

On February 1, 2017, Applicant Icebreaker filed with the Board an application for a Certificate of Environmental Compatibility & Public Need to construct an offshore 6-turbine wind-powered electric generation facility located on approximately 4.2 acres of submerged, leased state of Ohio land in Lake Eric, 8-10 miles off the shore of Cleveland, in Cuyahoga County. On May 23, 2018, the Board issued an Entry permitting the intervention of, *inter alia,* Susan Dempsey and Robert M. Maloney ("Bratenahl Residents"), as well as BNOW, the Sierra Club, the Ohio Environmental Council ("OEC"), and the Carpenters. On September 4, 2018, pursuant to Ohio Adm. Code 4906-2-24(A), Icebreaker, BNOW, the Sierra Club, OEC, and the

Carpenters filed a "Joint Stipulation and Recommendation" which purported to resolve most of the "issues presented" in the case. The Bratenahl Residents and the Board's Staff did not agree to the Joint Stipulation.

An adjudicatory hearing was conducted from September 24 through October 2, 2018. During the hearing, Board witnesses testified that, in their opinion, the Project did not satisfy the requirements for issuance of a certificate, because, *inter alia*, it did not "represent[ ] the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations," as required by R.C. 4906.10(A)(3). See Erin Hazelton Testimony at 10, 12, 15 ((Sept. 18, 2019). Following the hearing, the ALJ set a post-hearing briefing schedule, but Icebreaker sought, and received, six extensions of the procedural schedule in this case to engage in discussions with Board Staff to attempt to resolve Staff's opposition to Icebreaker's application. All parties except the Bratenahl Residents eventually reached an agreement, and a Revised Joint Stipulation was filed with the Board on May 15, 2019.

The Board thereafter reopened the record in the case, and scheduled a prehearing conference for June 5, 2019. *In re Icebreaker Windpower, Inc.,* No. 16-1871-EL-BGN, Entry at 3, ¶12 (May 22, 2019). Following the prehearing conference, the Administrative Law Judge issued another Entry establishing a procedural schedule and setting an evidentiary hearing for August 20, 2019. *In re Icebreaker Windpower, Inc.,* No. 16-1871-EL-BGN, Entry at 3, ¶10(d) (June 17, 2019). In that same Entry, the Administrative Law Judge indicated that:

> Evidence presented at hearing should be limited to the fifth amendment to the application, modifications made between the September 4, 2018 stipulation and the Stipulation, as well as any new, relevant information that has developed since the proceeding adjourned on October 2, 2018, which could not, with reasonable diligence, have been presented earlier in the proceeding, consistent with Ohio Adm. Code 4906-2-31.

In re Icebreaker Windpower, Inc., No. 16-1871-EL-BGN, Entry at 2-3, ¶10 (June 17, 2019).

On July 12, 2019, in accordance with the Board's procedural schedule, the Bratenahl Residents identified "Jeff Gosse as a witness they may call at the adjudicatory hearing scheduled to commence on August 20, 2019 in this case." Bratenahl Resident' Witness List at 1. Dr. Gosse is a former Regional Energy Coordinator for the FWS. He retired from the FWS in March 2018.

In an attempt to prevent any testimony unfavorable to Icebreaker and its Proposed Project from being presented at the August 20, 2019 hearing, Icebreaker has filed its Joint Motion to preclude Dr. Gosse from testifying. In their motion, the Joint Movants assert that: (1) Dr. Gosse is prohibited from testifying pursuant to the United States Department of the Interior's ("Department") so-called *Touhy*[2] regulations, and (2) even if the Department's *Touhy* regulations do not prevent Dr. Gosse from testifying (they do not), his testimony should be excluded "on the basis that any testimony is unfairly prejudicial to" Icebreaker. Join Motion at 3. Both of these assertions are without merit. The Bratenahl Residents respectfully request that the Joint Motion be denied.

III. ARGUMENT

A. The *Touhy* Regulations Govern FWS's Internal Management of Its Own Employees. No Private Party Is Granted Standing to Use Such Internal Management Regulations to Attempt to Prevent a Former Federal Employee From Testifying.

Joint Movants' primary assertion is that Dr. Gosse's testimony would violate the federal *Touhy* regulations, 43 C.F.R. §§2.280-2.290, which, *inter alia,* purport to require a federal agency to grant permission for employees, and former employees, to testify "in any judicial or

[2]*United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951).

administrative proceeding in which the United States, while not a party, has a direct and substantial interest." In *Touhy,* the United States Supreme Court upheld the validity of a United States Department of Justice order that required subordinate officials (still employed by that department) to obtain the Attorney General's permission before producing department records in response to a subpoena. *Touhy,* 340 U.S. at 468. The department's order was issued pursuant to the federal "Housekeeping Statute," the current version of which is codified at 5 U.S.C. §301. That section provides:

> The head of an Executive department or military department may prescribe regulations ***for the government of his department***, the conduct ***of its employees***, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. ***This section does not authorize withholding information from the public or limiting the availability of records to the public.***

5 U.S.C. §301 (emphasis added). At the time *Touhy* was decided, the Housekeeping Statute was found at 5 U.S.C. §22 and contained only the first sentence of the current version.

> The antecedents of §301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority ***to govern internal departmental affairs***. Those laws were consolidated into one statute in 1874 and the current version of the statute was enacted in 1958.
>
> Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority ***to the agency to regulate its own affairs***. * * *
>
> The 1958 amendment to §301 was the product of congressional concern that agencies were invoking §301 as a source of authority to withhold information from the public. Congressman Moss sponsored an amendment that added the last sentence to §301, which specifically states that ***this section "does not authorize withholding information from the public***." * * * It is indeed a "housekeeping statute," authorizing what the APA terms "rules of agency organization, procedure or practice," as opposed to "substantive rules."

Chrysler Corp. v. Brown, 441 U.S. 281, 309-10 (1979) (emphasis added) (footnotes and citations omitted). See also *Exxon Shipping Co. v. United States Dep't of Interior,* 34 F.3d 774, 776-77 (9th Cir. 1994).

Pursuant to the Housekeeping Statute, federal "[e]xecutive agencies may also promulgate regulations regarding the testimony of employees. Such federal regulations pertaining to the release of documents or information, including through testimony, have become known as *Touhy* regulations." *Louisiana Dep't of Transp. & Dev. v. United States Dep't of Transp.,* No. 15-2638, 2015 WL 7313876 at *3 (W.D.La. Nov. 20, 2015).

B. Joint Movants Lack Standing to Assert a Violation of the *Touhy* Regulations

As noted above, the *Touhy* regulations "govern internal department affairs." *Chrysler Corp.,* 441 U.S. at 309. Such regulations "establish policy between [a federal] Department . . . and its personnel, ***not between a private party and [department] employees***." *United States ex rel. Treat Brothers Co. v. Fidelity and Deposit Co. of Md.,* 986 F.2d 1110, 1119 (7th Cir. 1993) (emphasis added). The Joint Movants' attempt to use the *Touhy* regulations to prevent Dr. Gosse from testifying, therefore, "present[s] . . . a rather unusual situation in which a private litigant . . . is attempting to enforce [a federal department's] regulations in litigation in which [the department] is not a party and has no interest." *Fidelity and Deposit Co. of Md.,* 986 F.2d at 1118. In such cases, the private litigants seeking to exclude testimony pursuant to the *Touhy* regulations lack standing to raise the issue:

> [The movant] presents us with no other evidence that private enforcement of the [*Touhy*] regulations was intended by their enactment. Thus, regardless of whether [the witnesses] received permission to testify in strict accordance with the letter of the [department's *Touhy*] regulations, we believe that ***[the private movant] does not have standing to claim a violation*** based upon the provisions at issue.

Fidelity and Deposit Co. of Md., 986 F.2d at 1119 (emphasis added). See also *United States ex re. Liotine v. CDW Government, Inc., supra* at *6 ("Based upon these [*Touhy*] regulations, CDW-G maintains that Withycombe is prohibited from testifying as an expert witness on behalf of relator because he has not obtained permission from the appropriate government entity to do so. Like in *Fidelity & Deposit Co. of Md.,* however, the Court finds that CDW-G, ***a private party, lacks standing to claim a violation of the [Touhy] regulations at issue***. CDW-G has provided the Court with nothing to persuade it that the regulations at issue here were intended to benefit private litigants, and not just the United States. Thus, ***CDW-G lacks standing to pursue this claim, and the motion to exclude the expert testimony of Withycombe is denied***.") (emphasis added) (citations omitted); *Halliwell v. A-T Solutions,* No. 13–CV–2014–H, 2014 WL 4472724 at *5 (D.Haw. Sept. 10, 2014) ("***A private party has no standing*** to enforce military regulations that require a witness to receive permission from the military before testifying.") (emphasis added). Because the Joint Movants lack standing to attempt to use the *Touhy* internal agency management regulations to prevent a former federal employee's testimony in a state administrative proceeding, their Joint Motion to exclude Dr. Gosse's testimony must be denied.

C. The *Touhy* Regulations Cannot Prevent a Former Employee from Testifying

As noted above, Dr. Gosse has been retired from the FWS since March 201; he is no longer an employee of that agency. Although the *Touhy* regulations purport to apply to both "employees" and "former employees" of federal agencies—by defining the term "employee" as "a current or former Department employee, including a contract or special government employee," 43 C.F.R. §2.280(b)—courts have uniformly held that such regulations "***are unlawful to the extent they apply to former employees***." *Koopmann v. United States Dep't of Transporation,* 335 F.Supp.3d 556, 558 (S.D.N.Y. 2018) (emphasis added).

> In short, the text, structure, and purpose of the Housekeeping Statute all compel the conclusion that ***the phrase "conduct of its employees" refers to current employees alone*** and, thus, that USDOT's regulations regulating when "employees" may testify ***are invalid to the extent they purport to apply to former employees***. Notably, the few courts to have considered the issue presented here have all reached the very same conclusion. See *La. Dep't of Transp. & Dev. v. United States Dep't of Transp.*, No. 15-CV-2638 (RGJ), 2015 WL 7313876 (W.D.La. Nov. 20, 2015); see also *Gulf Oil Corp. v. Schlesinger,* 465 F.Supp. 913, 917 (E.D. Pa. 1979) * * *; *Gulf Grp. Gen. Enters. Co. W.L.L. v. United States,* 98 Fed.Cl. 639, 644 (2011) * * *.

Koopmann, 335 F.Supp.3d at 562. See also *Sherwood v. BNSF Railway Co., supra* at *2-3 (*Touhy* "***regulations are invalid to the extent they purport to apply to former employees***.") (emphasis added). Accordingly, even if the Joint Movants had standing to raise a purported *Touhy* prohibition (which they do not), the Department's regulations cannot prevent Dr. Gosse, a former FWS employee, from testifying in this matter. The Joint Movants' motion is without merit and must be denied.

D. Because the *Touhy* Regulations Govern Only the Internal Affairs of Federal Departments, Such Regulations Cannot be Construed to Exceed Congress's Express Statutory Restrictions—Set Forth in 18 U.S.C. §207—on the Testimony of Former Federal Employees

As noted above, the *Touhy* regulations are authorized by the federal Housekeeping Statute "to govern internal departmental affairs." *Chrysler Corp.,* 441 U.S. at 309. Such regulations are "'rules of agency organization, procedure or practice,' as opposed to 'substantive rules.'" *Chrysler Corp.,* 441 U.S. at 310. See also *In re Bankers Trust Co.,* 61 F.3d 465, 470 (6th Cir. 1995) ("Section 301, however, is nothing more than a general housekeeping statute and does not provide 'substantive' rules regulating disclosure of government information.") (citation omitted), *cert. dismissed,* 517 U.S. 1205 (1996); *Exxon Shipping Co.,* 34 F.3d at 777. Rather, the governing, substantive, restrictions controlling testimony of former federal employees are established by federal statute, in 18 U.S.C. §207 (mentioned nowhere in the Joint Motion).

> There is an existing, elaborate government construct to control future employment and activities of government personnel who leave government service. ***Post-employment restrictions are imposed on federal employees and former military officers * * * by 18 U.S.C. §207 (2006)***, titled "Restrictions on former officers, employees, and elected officials of the executive and legislative branches." The statute at 18 U.S.C. §207 is not a general housekeeping statute, but contains specific, substantive, prohibitions and penalties.

Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 98 Fed.Cl. 639, 645 (2011). 18 U.S.C. §207 only prohibits former employees, in certain instances, from appearing "before any officer or employee of any department, agency, court, or court-martial ***of the United States or the District of Columbia*** on behalf of any other person . . . ." 18 U.S.C. §207(a)(1) & (b)(1) (emphasis added). There is no federal prohibition on a former federal employee testifying in a state court proceeding, much less in a state administrative proceeding. The limited prohibitions of 18 U.S.C. §207 are completely inapplicable Dr. Gosse's testimony before this Board.[3]

E. In Compliance With the Board's June 19, 2019 Entry, Dr. Gosse's Testimony Will Relate "*to the fifth amendment to the application, modifications made between the September 4, 2018 stipulation and the [Revised] Stipulation, as well as any new, relevant information that has developed since . . . October 2, 2018*"—and Is Not, Therefore, Unfairly Prejudicial to Icebreaker.

Finally, the Joint Movants assert that Dr. Gosse's testimony must be precluded because it will be unfairly prejudicial to Icebreaker—despite the fact that Icebreaker does not know what Dr. Gosse's testimony will be. In support of this blind assertion, the Joint Movants contend that because Dr. Gosse was involved in the FWS's consideration of Icebreaker's proposed project before his retirement, "[h]e was privy to confidential information and internal FWS discussions

[3]Even if 18 U.S.C. §207 could be interpreted to prohibit Dr. Gosse's testimony before the Board (it cannot), as with the *Touhy* regulations, the private-party Joint Movants would lack standing to attempt to use the statute to prevent Dr. Gosse's testimony. *Dean v. Veterans Admin.,* 151 F.R.D. 83, 85 (N.D.Ohio 1993) (citing *In re Crash Disaster at Detroit Metro. Airport,* 737 F.Supp. 399 (E.D.Mich. 1989), for the proposition that the statute was not intended "to serve as a statutory rule which would mandate the exclusion of otherwise relevant evidence from a civil trial.").

both with [Icebreaker] and with the Ohio Department of Natural Resources and the Board that render any testimony he will give unfairly prejudicial to" Icebreaker. Joint Motion at 3. This argument is utterly without merit.

To repeat, Dr. Gosse has yet to proffer his written testimony. Icebreaker does not know what he will say. It would be absurd for the Board to preclude as "unfairly prejudicial" testimony that does not yet exist. It is premature, to say the least, for Icebreaker to assert that Dr. Gosse's testimony will deal with unidentified "confidential" information or will be "unfairly prejudicial" to it when the testimony does not yet exist.[4]

Moreover, Dr. Gosse has been retired from FWS since March 2018. He would not been privy to any allegedly "confidential information" or "internal discussions" (again, unspecified) at FWS since that date. Moreover, the Board has limited the evidence for the August 20, 2019 hearing "to the fifth amendment to the application, modifications made between the September 4, 2018 stipulation and the [Revised] Stipulation, as well as any new, relevant information that has developed since . . . October 2, 2018 . . . ," *In re Icebreaker Windpower, Inc.,* No. 16-1871-EL-BGN, Entry at 2-3, ¶10 (June 17, 2019). Dr. Gosse testimony will comply with the Board's directive. Joint Movants' motion has not merit. It must be denied.

[4]As evidence of the "unfair prejudice" that has yet to arrive, the Joint Movants note that "[i]n response to discovery requests seeking reports authored by Gosse that may relate to these proceedings, the Resident Intervenors identified two reports. Both reports were conducted by USFWS." Joint Motion at 3. Joint Movants imply, with no basis in fact, that these reports will be central to Dr. Gosse's testimony. The particular discovery request, however, simply asked for reports Gosse had authored, not reports that he would sponsor as a witness at the August 20, 2019 hearing. Indeed, the Bratenahl Residents objected to Icebreaker's request for the production of reports authored by Dr. Gosse "relative to this matter" as ambiguous, and specifically stated that "***Dr. Gosse has not yet formed his opinions related to this matter***," and that he "***has not prepared any additional report relative to this matter as of the date of these responses***." (emphasis added).

IV. CONCLUSION

For the foregoing reasons, the Bratenahl Residents respectfully urge the Board to deny the Joint Motion to exclude the testimony of Dr. Gosse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Memorandum BRATENAHL RESIDENTS' MEMORANDUM IN OPPOSITION TO THE JOINT MOTION TO EXCLUDE TESTIMONY OF JEFF GOSSE electronically filed by John F Stock on behalf of W. Susan Dempsey and Robert M Maloney