BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of **REPUBLIC WIND, LLC** for a Certificate of Environmental Compatibility and Public Need for a Wind-Powered Electric Generating Facility in Seneca and Sandusky Counties, Ohio.	)))))	Case No. 17-2295-EL-BGN

REPUBLIC WIND, LLC'S MEMORANDUM CONTRA STAFF'S MOTION TO REOPEN THE PROCEEDING

I. INTRODUCTION

The Ohio Power Siting Board ("Board") Staff seeks to reopen this proceeding to consider additional evidence regarding aviation issues in this proceeding. Pursuant to O.A.C. 4906-2-31(B), a motion to reopen a proceeding "shall specifically describe the nature and purpose of the requested reopening of such evidence and shall set forth facts showing why such evidence could not with reasonable diligence have been presented earlier in the proceeding." The impetus for Staff's motion is the recent issuance of: (1) the decision in *One Energy Enterprises LLC, et al., v. Ohio Department of Transportation*, No. 17CV005513 (Ohio Com.Pl. March 2, 2020) ("*One Energy Decision");* and (2) the Ohio Department of Transportation Office of Aviation's ("ODOT-OA") March 10, 2020 modified determination letter ("March 10, 2020 Determination Letter") which was filed with the Board on March 11, 2020.

In its motion, Staff proposes a Second Supplement to the Staff Report of Investigation ("Second Supplement"). In the Second Supplement, Staff proposes modifying Condition 52 and withdrawing Conditions 56, 57, and 59. Republic Wind, LLC ("Republic") completely agrees with Staff's proposed modification of Condition 52 and withdrawal of Conditions 56, 57, and 59.

Republic has been arguing throughout this case that these conditions were unlawful due to ODOT-OA's extra-jurisdictional determinations.[1] However, Republic opposes Staff's proposal for a new hearing regarding Conditions 52, 56, 57, or 59. The *One Energy Decision* and the March 10, 2020 Determination Letter address a purely legal issue: whether ODOT-OA lacks jurisdiction to review 14 CFR 77.17(a)(1) – (3) surfaces. No additional evidence is required to address this narrow jurisdictional question. Staff should modify/withdraw Conditions 52, 56, 57, and 59 based solely on the *One Energy Decision* and the March 10, 2020 Determination Letter.

Although Staff alludes to certain evidence in the Second Supplement that Staff discovered during its new investigation, this evidence was either presented during the hearing or, with reasonable diligence, could have been presented by Staff before the close of the hearing. Indeed, the Second Supplement reads more like a Staff brief that cites evidence already in the record to support its revised recommendation. No basis exists for reopening the proceeding to consider information that is already in the record or could have been presented during the hearing.

Republic proposes a much simpler process that preserves all parties' rights. The Board should take administrative notice of the March 10, 2020 Determination Letter.[2] In addition, because the letter presents a purely legal jurisdictional issue the Board should reopen the proceeding to allow briefing limited to the following narrow legal questions: (1) do the *One Energy Decision* and the March 10, 2020 Determination Letter confirm that ODOT-OA lacks jurisdiction to review 14 CFR 77.17(a)(1) – (3) surfaces and, if so (2) must Conditions 52, 56, 57, and 59, which are based on ODOT-OA's extra-jurisdictional review, be withdrawn by Staff or rejected by the Board? The Board should **not** allow parties to argue new legal theories to support Conditions 52, 56, 57 or 59,

[1] *See*, Republic Wind Initial Post-Hearing Brief at pp. 24-25, and 46; Republic Wind Reply Brief at pp. 36-39.

[2] Concurrent with the filing of this memorandum contra, Republic filed a motion for administrative notice of the March 10, 2020 Determination Letter.

or re-litigate the alleged impacts the facility will have on aviation. Briefs should be submitted on an expedited schedule so as not to prejudice Republic's interests by further delay.

Furthermore, the Board should not allow Staff to present new evidence regarding Condition 60 contained in the Second Supplement.[3] The *One Energy Decision* and the March 10, 2020 Determination Letter address solely a legal issue. Staff fails to explain how this new information justifies a new condition or requires the presentation of additional evidence to resolve this legal issue.

However, for the sake of expediency, Republic is willing to accept Staff's newly proposed Condition 60 to avoid additional hearings. This should resolve any dispute regarding the necessity for a hearing on Condition 60. Also, this is the most pragmatic and reasonable approach considering the impact the COVID-19 pandemic has had on Board hearings. Attempting to hold yet another hearing during this period of uncertainty will assuredly result in a significant delay of any final resolution of this case. Therefore, any additional proceedings should be limited to briefing the legal questions involving Conditions 52, 56, 57, and 59.

Alternatively, if the Board determines that a hearing is required, it must be narrow in scope and address only the new evidence Staff proposes in a timely manner. If a hearing is required, Republic proposes that the Second Supplement be made a part of the record [R.C. 4906.07(C)] with the opportunity for cross examination by Republic and the intervenors on the new evidence only.

[3] It should be noted that Staff already proposed a Condition 60 during the hearing. Staff's initial Condition 60 was included in the Amended Prefiled Testimony of Staff Witness Mark Bellamy.

II. BACKGROUND

A. R.C. 4906.10(A)(5) requires that the Board coordinate with ODOT-OA to determine if the facility complies with the aviation rules and standards adopted under R.C. 4561.32.

Pursuant to R.C. 4906.10(A), the Board shall render a decision upon the record either granting or denying an application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the Board considers appropriate. Further, pursuant to R.C. 4906.10(A), the Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless it makes the necessary findings and determinations set forth in R.C. 4906.10(A)(1) – (8).

R.C. 4906.10(A)(5) states:

> The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines… [t]hat the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and undersection 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

Staff preformed an investigation of Republic's Application pursuant to R.C. 4906.03(B) and R.C 4906.07(C). During its investigation, in accordance with R.C. 4906.10(A)(5) and R.C. 4561.32, Staff contacted the ODOT-OA to coordinate review of potential impacts of the facility on aviation.[4]

[4] Staff Ex. 1 (Staff Report of Investigation ["Staff Report")] at p. 52.

B. Staff's recommended Conditions 52, 56, 57, and 59 are based on determinations made by ODOT-OA.

On April 11, 2019, ODOT-OA initially provided Staff its preliminary recommendation letter to address aviation issues. Staff refers to these letters from ODOT-OA as "R.C. 4561.341 letters"[5] because they are provided pursuant to ODOT-OA's statutory obligation under R.C. 4561.341 to advise the Board based upon the rules adopted under section R.C. 4561.32.

On July 18, 2019, pursuant to R.C. 4561.341, ODOT-OA submitted its updated determination letter ("July 18, 2019 Determination Letter") to Staff.[6] In its July 18, 2019 Determination Letter, ODOT-OA made determinations whether certain proposed turbines technically constituted obstructions under the 14 CFR 77.17(a)(1) – (a)(3) surface standards. Based on the July 18, 2019 Determination Letter, Staff recommended Conditions 52, 56, and 57 in its Staff Report.[7]

On September 27, 2019, ODOT-OA updated its July 18, 2019 Determination Letter pursuant R.C. 4561.341 ("September 27, 2019 Determination Letter").[8] In the September 27, 2019 Determination Letter, ODOT-OA made determinations whether additional turbines technically constituted obstructions under the 14 CFR 77.17(a)(1) – (a)(3) surface standards. Based on the September 27, 2019 Determination Letter, Staff recommended Condition 59 in the Supplement to the Staff Report.[9]

The Board commenced an adjudicatory hearing regarding the Application on November 4, 2019 and concluded the hearing on November 25, 2019. In its post-hearing briefs, Republic argued that ODOT-OA exceeded the scope of its jurisdiction in its July 18, 2019 Determination Letter and

[5] Staff Ex. 1 at p. 52.

[6] Republic Ex. 29 at Attachment BMD-1 (Direct Testimony of Benjamin Doyle); Staff Ex. 1 at p. 52.

[7] Staff Ex. 1 at pp. 52-53, 54, and 68-69.

[8] Staff Ex. 4 (ODOT's September 27, 2019 Determination Letter).

[9] Staff Ex. 6 (Supplement to the Staff Report of Investigation) at pp. 5-6.

September 27, 2019 Determination Letter. Republic argued that ODOT-OA's jurisdiction is limited to the "six imaginary surfaces"[10] set forth in R.C. 4561.32, and that ODOT-OA's review of the surfaces listed under 14 CFR 77.17(a)(1) - (a)(3) was unlawful.[11] In its Reply Brief, Republic cited *One Energy Enterprises LLC, et al., v. Ohio Department of Transportation*, No. 17CV005513 ("*One Energy Case*") to support its argument regarding the limitation on ODOT-OA's jurisdiction.[12] When Republic filed its Reply Brief, One Energy's motion for partial summary judgment was pending before the Franklin County Court of Common Pleas regarding a complaint One Energy filed against the ODOT.

C. After the record closed in this case, ODOT-OA admitted that it did not have jurisdiction to make any determinations regarding any of the turbines in this case because of a March 2, 2020 decision in the *One Energy Case*.

On March 2, 2020, the Franklin County Court of Common Pleas issued the *One Energy Decision* granting One Energy's motion for partial summary judgment against ODOT. On March 11, 2020, Staff filed the March 10, 2020 Determination Letter on behalf of ODOT-OA. In the March 10, 2020 Determination Letter, ODOT-OA stated that ODOT-OA's determination in this proceeding is limited by statute to include only the "six imaginary surfaces." Therefore, ODOT-OA indicated that none of the proposed wind turbine structures involved in this case impact the surfaces subject to ODOT-OA's determination.

On April 14, 2020, the Administrative Law Judges ("ALJs") issued an entry scheduling a conference call to discuss the potential impacts of the *One Energy Decision* on this proceeding. During the April 17, 2020 conference, the ALJs indicated that a motion to reopen the proceeding

[10] The six imaginary surfaces are the: (1) clear zone, (2) horizontal, (3) conical, (4) primary, (5) approach, and (6) transitional surfaces of airports. These are the same imaginary surfaces of civil airports identified in 14 CFR 77.19 or military airports identified in 14 CFR 77.2. If a structure penetrates any of these six surfaces it is deemed an "obstruction" to air navigation under 14 CFR 77(a)(5). ODOT-OA's jurisdiction is limited to these surfaces contained in 14 CFR 77.17(a)(5).

[11] Republic Wind Initial Post-Hearing Brief at pp. 24-25, and 46; Republic Wind Reply Brief at pp. 36-39.

[12] Republic Wind Reply Brief at 39.

should be filed so the parties could address the *One Energy Decision* on the record in this proceeding. On May 4, 2020, Staff filed a motion to reopen the proceeding. As part of its motion, Staff seeks to reopen the proceeding to introduce the Second Supplement.

III. LAW AND ARGUMENT

A. The Board should deny Staff's motion to reopen this case for purpose of hearing because there is no need for the presentation of additional evidence.

1. The *One Energy Decision* and the March 10, 2020 Determination Letter present a purely legal issue and additional "evidence" is unnecessary.

Republic agrees that Staff Condition 52 should be modified and Conditions 56, 57, and 59 must be withdrawn by Staff. But additional evidence is not needed to achieve this goal. As Staff acknowledges in its motion, the *One Energy Decision* and the March 10, 2020 Determination Letter are the basis for reopening the proceeding. The *One Energy Decision* and the March 10, 2020 Determination Letter address purely legal questions: (1) does ODOT-OA lack jurisdiction to make the determinations it made in the July 18, 2019 Determination Letter and September 27, 2019 Determination Letter; and, if so, (2) does this require a modification and/or withdrawal of Conditions 52, 56, 57, and 59? No additional evidence is needed to answer these purely legal questions.

Instead of seeking to address narrow jurisdictional questions, Staff's motion appears to be a broad invitation to present additional evidence on any "aviation issue" that arose during the hearing. The expansive proceeding proposed by Staff is unnecessary because it would go well beyond the limited legal issue presented by the *One Energy Decision* and the March 10, 2020 Determination Letter. During the hearing, Republic made legal arguments regarding ODOT-OA exceeding the scope of its jurisdiction under R.C. 4561.32 and R.C. 4561.341. Any proceeding that exceeds these narrow jurisdictional issues would be highly prejudicial to Republic. Staff and other parties already had an opportunity to present evidence regarding the potential impacts on aviation.

As the ALJs are keenly aware, the aviation issues that arose during the hearing went well beyond the narrow jurisdictional question of ODOT-OA's authority under R.C. 4561.32. For example, there was extensive testimony regarding whether an increase in minimal flight altitudes will negatively impact pilots because of potential icing concerns. Also, there was substantial testimony regarding the potential impact on the non-directional beacon approach at the Seneca County Airport. Is Staff suggesting that the parties need to re-litigate these issues? The list goes on and on regarding the potential "aviation issues" that can be reargued. Many of these contentious aviation issues that have absolutely nothing to do with the limited jurisdictional question raised by the *One Energy Decision* and the March 10, 2020 Determination Letter.

Republic is deeply concerned that this new proceeding will open the floodgates for parties to re-litigate (or litigate for this first time) each and every potential aviation issue that comes to mind. The Board should not allow this to occur. Parties should not be provided a second (or third) bite at the apple. Moreover, opening the door for a new hearing on general aviation concerns would undoubtedly delay any final resolution of this case. Unless the scope of the proceeding is limited to the narrow issue of ODOT-OA's jurisdiction, the parties will assuredly be re-litigating all aspects of one of the most contentious issues in this case.

Furthermore, due to the COVID-19 pandemic, it is unclear when the Board would be able to have a hearing in case. Setting this matter for another hearing during the current state of emergency will result in even more uncertainty regarding the timing of a final resolution in this case. Considering that post-hearing briefing concluded on January 13, 2020, Republic is concerned that scheduling another hearing at this stage will significantly delay issuance of a final order.

The *One Energy Decision* does not require any additional hearing because it can be addressed by the Board in its Order. In addition, because the March 10, 2020 Determination Letter addresses a purely legal question, additional evidence regarding this letter is not needed. Rather,

the Board could take administrative notice of the March 10, 2020 Determination Letter and address the letter in its Order. Concurrent with the filing of this memorandum contra, Republic filed a motion for administrative notice of the March 10, 2020 Determination Letter.

The Board should address the *One Energy Decision* and March 10, 2020 Determination Letter without requiring any additional hearing. The Board should permit limited briefing on the following two legal questions: (1) do the *One Energy Decision* and the March 10, 2020 Determination Letter confirm that ODOT-OA lacks jurisdiction to review 14 CFR 77.17(a)(1) – (3) surfaces and, if so (2) must Conditions 52, 56, 57, and 59, which are based on ODOT-OA's extra-jurisdictional review, be withdrawn by Staff or rejected by the Board? Narrowing the scope of the proceeding to these two questions will address the jurisdictional question at issue. It will also prevent parties from re-litigating and rehashing every contested factual and legal issue regarding aviation in this proceeding.

2. The additional "evidence" contained in the Second Supplement is already contained in the record or could have been presented during the hearing.

In the Second Supplement, Staff intends to submit findings of its investigation which was apparently performed after the issuance of the *One Energy Decision* and the March 10, 2020 Determination Letter. It appears Staff included these findings in the Second Supplement to support its conclusion that Condition 56 and 59 should be withdrawn.[13] Although Republic agrees that Conditions 56 and 59 should be withdrawn, Republic disagrees that any additional evidence or investigation is needed to support withdrawal of Conditions 56 and 59.

Conditions 56 and 59 were based on the prior determinations of ODOT-OA. These determinations were made as part of ODOT-OA's statutory obligation to advise the Board whether

[13] It appears from the Second Supplement that Staff is modifying Condition 52 and withdrawing Condition 57 based solely upon ODOT-OA's March 10, 2020 Determination Letter. If this is accurate, Republic agrees that Condition 52 should be modified and Condition 57 should be withdrawn based solely on the fact ODOT-OA has acknowledged that its jurisdiction in this case is limited by statute to include only the "six imaginary surfaces."

the proposed facility constitutes or will technically constitute an obstruction to air navigation based upon the rules adopted under section R.C. 4561.32. Staff proposed Conditions 56 and 59 to assist the Board in making its statutorily required findings and determinations under R.C. 4906.10(A)(5). As stated above, the *One Energy Decision* and the March 10, 2020 Determination Letter address the legal question of whether ODOT-OA exceeded the jurisdictional limits set forth in R.C. 4561.32. No additional evidence is needed to answer this legal question. As such, it is unnecessary to hold a hearing regarding Staff's additional findings that go beyond the limited scope of ODOT-OA's jurisdiction.

Moreover, the additional evidence Staff relied upon in its new investigation is already in the record or was readily available to Staff before the close of the hearing. For example, Staff states that it found that "the non-directional beacon navigation system can continue to be utilized at Seneca County Airport but at a higher altitude after installation of the wind farm project as currently proposed."[14] Staff cites to the testimony of Bradley Newman, Seneca County Airport Manager, to support its position. Furthermore, Republic Witness Doyle testified that pilots at the Seneca County Airport would continue to be able to use the non-directional beacon approach with an increase in the procedure turn altitude.[15] If the Board or Staff needs "evidence" to support withdrawal of 56, there is already sufficient evidence in the record to do so and no additional evidence is required.

In addition, Staff cites its additional investigation into potential icing conditions due to increased flying altitudes. However, all the information Staff cites was available to Staff before the hearing. Staff cites to an Advisory Circular published by the FAA that addresses icing conditions. [16] Staff cites to this information to simply confirm Republic's position that icing conditions will have minimal impacts in pilots flying in the project area. This FAA Advisory Circular was available to

[14] Second Supplement at p. 4.

[15] App. Ex. at p. 5 (Rebuttal Testimony of Benjamin Doyle).

[16] Second Supplement at p. 5.

the public before the hearing and could have been discovered by Staff before the record closed. More importantly, this information merely confirms Republic's Witness Doyle testimony regarding the limited impact icing will have on pilots who fly near the project area.[17] In fact, Staff cites to Mr. Doyle's testimony to support is findings in the Second Supplement.[18] It is unnecessary to hold another hearing for Staff to revise its recommended conditions because testimony is already in the record that supports the revision.

Rather than reopen the record to re-litigate aviation issues that have already been thoroughly addressed, it is more appropriate for the Board to limit its consideration to the relevant legal questions raised by the *One Energy Decision* and the March 10, 2020 Determination Letter. If the Board does not narrow the scope of the proceeding to purely jurisdictional questions, the new proceeding could lead to a full-blown hearing on every single issue related to aviation. This would result in a duplicative and confusing record, and also unduly delay a final resolution of this case.

3. The Board should not hold any hearing on Staff's new Condition 60 because Staff failed to provide any new evidence that would justify a new condition.

In the Second Supplement, Staff proposes a new condition, Condition 60. Staff fails to provide any justification for presenting evidence regarding a new recommended condition. As discussed above, the *One Energy Decision* and the March 10, 2020 Letter address a purely jurisdictional issue. The purpose of conditions is to address potential impacts from the proposed project. After the close of the record, there have not been any changes in facts regarding potential impacts to aviation that would justify Staff's proposal of a new condition. The only thing that has changed is that the new information that confirms Republic's prior arguments that ODOT-OA exceeded its jurisdiction in this case.

[17] Tr. Vol. IV at pp. 873, 899.

[18] Second Supplement at p. 5.

Further, Staff appears to be proposing Condition 60 under a new legal theory to avoid the jurisdictional flaw in ODOT-OA's July 18, 2019 Determination Letter and September 27, 2019 Determination Letter. Conditions 52, 56, 57, and 59 were proposed by Staff as part of its statutory obligation to consult with ODOT-OA under R.C. 4906.10(A)(5) and R.C. 4561.32. These aviation conditions were clearly tied to Staff's finding and recommendations regarding R.C. 4906.10(A)(5), and were not related to any other criteria set forth in R.C. 4906.10(A). In the section of the Staff Report addressing minimum adverse environmental impact, there is no discussion regarding potential impacts on aviation or conditions necessary to address aviation concerns.[19] In addition, in the section of the Staff Report discussing public interest, convenience, and necessity, there is no discussion regarding aviation or conditions necessary to address aviation.[20] Furthermore, Staff Witness Conway's testimony clearly demonstrates that Conditions 52, 56, 57, and 59 were based entirely upon ODOT-OA's investigation and determinations made pursuant to R.C. 4906.10(A)(5), and R.C. 4561.32.[21]

Now that it is apparent ODOT-OA lacked jurisdiction to make its determinations, Staff is attempting to present a new aviation condition under new legal theories. But there has not been any change in the proposed project or new evidence regarding potential impacts that would justify a new condition. The mere fact ODOT-OA and Staff were legally incorrect regarding the scope of ODOT-OA's jurisdiction does not justify a brand new condition and a new hearing regarding this condition. It would be prejudicial and unfair to Republic to require another hearing simply because it has been determined that ODOT-OA exceeded its jurisdiction and Staff relied upon ODOT-OA's unlawful recommendations when developing conditions.

[19] Staff Report at p. 44-46. The section of the Staff Report addresses R.C. 4906.10(A)(3).

[20] Staff Report at p. 55-56. This section of the Staff Report addresses R.C. 4906.10(A)(6).

[21] Staff Ex. 5 at pp. 20-28 (Direct Examination of Andrew Conway).

B. Although Republic objects to a hearing on the Second Supplement, Republic is willing to accept Condition 60 to avoid additional hearings. Parties' positons regarding the modification of Condition 52 and withdrawal of Conditions 56, 57, and 59 should be addressed through limited briefing.

Although Staff's proposal of Condition 60 is not supported by the discovery of new evidence, Republic is willing to accept Condition 60 to avoid an unnecessary hearing. Staff's proposed modification of Condition 52 and withdrawal of Conditions 56, 57, and 59 are simply jurisdictional questions that do not necessitate any testimony or additional evidence. If parties disagree with Staff's proposal for Conditions 52, 56, 57, and 59, these issues can be addressed on brief. No one would benefit from a protracted hearing that rehashes all the contentious aviation issues. These issues have already been fully litigated and briefed.

To facilitate a timely resolution of this case:

1. On June 2, 2020, the ALJ will issue an entry establishing a briefing schedule to address the modification of Condition 52 and withdrawal Conditions 56, 57, and 59.

2. Initial briefs shall be due on June 16, 2020.

3. Reply briefs shall be due on June 23, 2020.

This proposed briefing schedule is reasonable considering the limited scope of issues. Also, this schedule will hopefully help avoid a delay of a final decision in this case.

C. Alternatively, if the Board determines that a hearing is required, it must be narrow in scope and address only the new evidence Staff proposes in a timely manner.

Pursuant to O.A.C. 4906-2-31(B), the purpose of reopening a proceeding is to consider evidence that was not, and could not have been, presented during hearing before the record closed. In accordance with this rule, any new hearing should specifically be tailored such that the Second Supplement be made a part of the record (R.C. 4906.07(C)) with the opportunity for Republic and intervening parties to cross examine only on the new evidence presented. To avoid further delay,

hearing should be held as expeditiously as possible, with arrangements made for the hearing to be conducted remotely, if necessary.

IV. CONCLUSION

Based on the foregoing, the Board should deny Staff's motion to reopen the proceeding to hold a hearing on the Second Supplement. No additional hearing is required because the *One Energy Decision* and the March 10, 2020 Determination Letter serve as a sufficient legal basis for Staff to modify/withdraw Conditions 52, 56, 57, and 59. In addition, Staff has failed to point to any new evidence justifying a hearing on its newly proposed Condition 60. However, Republic is willing to accept Condition 60 to avoid another hearing. Any issues regarding Staff's modification or withdrawal of Conditions 52, 56, 57, and 59 can be addressed through limited briefing. Alternatively, if hearing is required, it should be limited in scope consistent this memorandum contra.

Respectfully submitted on behalf of
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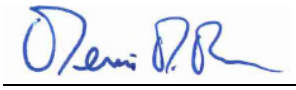
CERTIFICATE OF SERVICE

I hereby certify that the foregoing memorandum contra was served upon the following parties of record via regular or electronic mail on this 19th day of May 2020.



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Summary: Text Republic Wind, LLC'S Memorandum Contra Staff's Motion to Reopen the Proceeding electronically filed by Teresa Orahood on behalf of Devin D. Parram