

**BEFORE  
THE OHIO POWER SITING BOARD**

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

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**REPUBLIC WIND, LLC’S MOTION TO TAKE ADMINISTRATIVE NOTICE**

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Pursuant to Ohio Administrative Code (“O.A.C.”) 4906-2-27, Applicant Republic Wind, LLC (“Republic”) moves the Ohio Power Siting Board (“Board”) to take administrative notice of the Ohio Department of Transportation Office of Aviation’s (“ODOT-OA”) March 10, 2020 modified determination letter which was filed with the Board on March 11, 2020. The reasons supporting this motion are set forth in the attached memorandum.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of ) <b>REPUBLIC WIND, LLC</b> 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
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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Republic requests that the Board take administrative notice of ODOT-OA's March 10, 2020 modified determination letter ("March 10, 2020 Determination Letter"). The March 10, 2020 Determination Letter was filed on the public docket by OPSB Staff on March 11, 2020. The March 10, 2020 Determination Letter modifies ODOT-OA's prior determination letters which are part of the record. Thus, to have a complete record, it is necessary to include the March 10, 2020 Determination Letter in the record. No party would be prejudiced by taking administrative notice in this instance because all parties can address the March 10, 2020 Determination Letter on brief.

Contemporaneous with the filing of this Motion, Republic filed a Memorandum Contra to OPSB Staff's May 4, 2020 motion to reopen the proceeding.

**II. BACKGROUND**

On March 2, 2020, the Franklin County Court of Common Pleas issued a decision in *One Energy Enterprises LLC, et al. v. Ohio Department of Transportation*, Case No. 17CV005513 (Ohio Com. Pl. March 2, 2020) ("the *One Energy Decision*") granting One Energy's motion for partial summary judgment against ODOT. One of the primary issues dealt with in the *One*

*Energy Decision* is directly relate to both prior determination letters by ODOT in this proceeding and the March 10, 2020 Determination Letter. On March 11, 2020, Staff filed the March 10, 2020 Determination Letter on behalf of ODOT-OA. *See* attached Exhibit A. 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."<sup>1</sup> As a result of the *One Energy Decision*, in its March 10, 2020 Determination Letter, ODOT-OA concluded that none of the proposed wind turbine structures involved in this case impact the surfaces subject to ODOT-OA's jurisdiction.

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 proceedings should be filed so the parties could address the *One Energy Decision* on the record in this proceeding.<sup>2</sup> Following the conference, on May 4, 2020, Staff filed a Motion to Reopen the Proceeding and Memorandum in Support.

In response to Staff's motion to reopen the proceeding, Republic filed a Memorandum Contra to address various issues with Staff's proposal, more fully discussed therein, concurrently with this Motion. Irrespective of the outcome of Staff's motion and Republic's Memorandum Contra, the Board should take administrative notice as discussed herein.

### **III. LAW AND ARGUMENT**

For completeness of the record, the Board should take administrative notice of the March 10, 2020 Determination Letter because it directly implicates a primary legal issue in this

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<sup>1</sup> As the Board well knows, the primary legal issue implicated by the March 10, 2020 Determination Letter is the scope of ODOT-OA's jurisdiction under Ohio Revised Code Sections ("R.C.") 4561.32 and 4561.341.

<sup>2</sup> During the April 17, 2020 conference, counsel for Staff indicated that Staff would file a motion to reopen the proceedings.

proceeding, namely, the jurisdiction of ODOT-OA to review 14 CFR 77.17(a)(1) – (3) surfaces under R.C. 4561.32 and R.C. 4561.341. The Ohio Supreme Court “has previously recognized neither an absolute right to nor prohibition against the [PUCO’s] authority to take administrative notice,” noting instead that “[e]ach case has been resolved based on the particular facts presented.” *Allen v. Pub. Utilities Com’n of Ohio*, 40 Ohio St.3d 184, 185, 532 N.E.2d 1307, 1309 (1988) (“*Allen*”). In *Allen*, the Court established the following three-part test for determining whether an agency properly took administrative notice:

1. Whether the complaining party has prior knowledge of the facts being noticed;
2. Whether the complaining party has an adequate opportunity to explain and rebut the facts being noticed; and
3. Whether the party was prejudiced by taking notice.

*Id.* at 186. This three-part test was reaffirmed in *In re Application of Ohio Edison Co.*, 2016-Ohio-3021, ¶ 30, 146 Ohio St. 3d 222, 227, 54 N.E.3d 1218, 1223.

The Commission has determined that its ability to take administrative notice is not limited to facts. *FirstEnergy ESP III*, Case No. 12-1230-EL-SSO, Opinion and Order, at 19, (July 18, 2012). In *FirstEnergy ESP III*, the Commission determined that there are no restrictions on its ability to take administrative notice of expert opinions. *See Id.* (“[E]xpert opinion testimony may be administratively noticed if it otherwise meets the standards set forth in *Allen*. Likewise, the narrow provisions for judicial notice the parties claim are set forth in Evid.R. 201 are not consistent with the standards for Commission proceedings set forth in *Allen*”). Further, the Commission has determined that it can also take administrative notice of orders or resolutions of other state agencies. *In re Complaint of AT&T Ohio*, Case No. 08-690-

TP-CSS, Opinion and Order at pp. 40-41 (June 9, 2010); *In re Application of Toledo Edison*, Case No. 95-910-EL-AEC, Entry on Rehearing, at pp. 1-2, (December 19, 1996).

Although there are limited cases where the Board discussed administrative notice, the Board has taken administrative notice of a permit obtained from sister agencies after the close of the record in a litigated Board case. *In re AMP-Ohio, Inc.*, Case No. 06-1358-EL-BGN, Opinion and Certificate, at 27 (March 3, 2008) (the Board took administrative notice of issuance a final air permit issued by Ohio EPA after the record was closed). Furthermore, the Board can look to Commission precedent for guidance regarding its discretion in determining whether administrative notice should be granted.

Administrative notice of the March 10, 2020 Determination Letter is justified pursuant to *Allen*. In this case, all the parties have knowledge of the March 10, 2020 Determination Letter because the letter was filed on the public docket in this case. In addition, all parties would have the ability to address the letter. As Republic proposes in its Memorandum Contra Staff's motion to reopen, the Board should allow parties to brief the legal issue regarding the impact of the March 10, 2020 Determination Letter. Further, no party will be prejudiced by the taking of administrative notice because all parties will have knowledge of and the opportunity to address the March 10, 2020 Determination Letter through briefing.

Also, taking administrative notice of the March 10, 2020 Determination Letter will provide for a complete and accurate record because the letter directly affects one of the legal issues in this proceeding (i.e., whether any of the turbine structures involved in this case impact the surfaces subject to ODOT-OA's jurisdiction). Based on the test set forth in *Allen*, the Board should grant Republic's motion to take administrative notice.

#### IV. CONCLUSION

Based on the foregoing, the Board should take administrative notice of the March 10, 2020 Determination Letter.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion was served upon the following parties of record via regular or electronic mail on this 19<sup>th</sup> day of May 2020.



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Summary: Motion to Take Administrative Notice of Republic Wind, LLC electronically filed by  
Teresa Orahod on behalf of Devin D. Parram