

BEFORE THE OHIO POWER SITING BOARD

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

APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Rule 4906-2-32, the Business Network for Offshore Wind, Inc. (“Network”) submits this Application for Rehearing because the May 21, 2020 Opinion, Order and Certificate issued by the Ohio Power Siting Board (“Board”) in this proceeding is unlawful and unreasonable as follows:

1. The Board’s directive to completely feather turbines during nighttime hours, from dusk to dawn, from March 1 through November 1 of each year of operation, until or unless the Board directs otherwise is unreasonable and unlawful as it is against the manifest weight of the evidence, unnecessary and contrary to the Board’s own findings.

The facts and arguments that support this ground for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,
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**MEMORANDUM IN SUPPORT OF
THE APPLICATION FOR REHEARING OF
THE BUSINESS NETWORK FOR OFFSHORE WIND, INC.**

I. INTRODUCTION

The Business Network for Offshore Wind, Inc. (“Network”)¹ submits this application for rehearing asking the Ohio Power Siting Board to grant rehearing and approve the May 15, 2019 Revised Stipulation as presented to the Board. In issuing the May 21, 2020 Opinion, Order and Certificate in this proceeding (“Order”), the Board made a number of findings including findings that the projected risk to avian and bat species is expected to be low. The Board also summarized the conditions in the Revised Stipulation that provide additional protections for wildlife while noting that both Staff and the Ohio Department of Natural Resources (“ODNR”) are “eminently qualified” to oversee Icebreaker Windpower Inc.’s (“Icebreaker” or “Applicant”) compliance with the Board’s Order. The Board, however, imposed a mandate to completely feather (i.e., shutdown) turbines at nighttime from March 1 to November 1 of every year until and unless the Board approves otherwise. Network respectfully submits that the new condition imposed by the Board is against the manifest weight of the evidence, unnecessary and contrary to the Board’s own findings on the risk of the project to avian and bat species. Rehearing should be granted on this issue, and the Revised Stipulation should be approved as presented to the Board.

¹ The Network is a non-profit, private sector, membership-driven organization that brings together member businesses, developers, policy makers, national and international experts, and economic development agencies. The Network acts as a collaborative entity to leverage investment, deliver educational programming, conduct outreach and marketing, and foster bilateral cooperation in the offshore wind industry.

II. ARGUMENT

A. The Board's Directive to Completely Feather Turbines during Nighttime Hours from March 1 through November 1 of Each Year of Operation is Against the Manifest Weight of the Evidence, Unnecessary and Contrary to the Board's Own Findings.

1. The Revised Stipulation's conditions provide significant protection for bats and migratory birds.

Important to this proceeding was the Board Staff's execution of the Revised Stipulation and its agreement to Conditions 18, 21 and 23. Those conditions provided for (1) an avian and bat impact mitigation plan that includes in part the development of collision detection technology selected by the Applicant in consultation with the ODNR and Staff (including lab and field testing of that technology); (2) additional data collection through a radar monitoring program, including pre-construction data collection and post-construction data collection; and (3) modification of operations within 24 hours if there is a significant mortality event. These are just some of the protections provided by those three conditions in the Certificate.

The extensive protections created by Conditions 18, 21 and 23 are evident from the language of the conditions, fully stated below and highlighted for emphasis:

(18) At least 120 days prior to commencement of construction, the Applicant shall submit an avian and bat impact mitigation plan to 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 avian and bat impact mitigation plan shall incorporate the most current survey results, the post-construction avian and bat monitoring plan, and all measures that have been adopted to avoid and minimize potential adverse impacts to birds and bats. **The plan shall also include a collision monitoring plan, which will include a description of the collision detection technology selected by the Applicant in consultation with ODNR and Staff, the results of lab and field testing of the collision detection technology, and adaptive management strategies. The collision detection technology shall be installed and fully functioning at the time the turbines commence operation and shall continue to function in accordance with the collision monitoring plan. Operation of the collision detection technology is subject to audits by ODNR or its third-party**

consultant. Prior to the commencement of construction, the impact mitigation plan must be finalized and accepted through written communications from ODNR. The Applicant shall also provide the impact mitigation plan to, and seek consultation with, [U.S. Fish and Wildlife Service]. The Applicant shall update the impact mitigation plan as new information is attained through surveys. Any proposed modifications to the impact mitigation plan shall be submitted to ODNR and Staff for review to confirm compliance with this condition and shall be finalized and accepted through written communications from ODNR. **The impact mitigation plan (including the collision monitoring plan) shall survive the [Memorandum of Understanding] and shall remain in place for the life of the project.**

(21) 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 producing viable data 75 percent or greater of the hours of the survey time (dusk to dawn spring, summer, and fall April 1 to November 15). For post-construction monitoring, the radar may be placed on the turbine platform. For purposes of calculating the 75 percent, all potential scenarios, including force majeure events, shall be included. Force majeure events include heavy precipitation (rain or snow heavy enough to be unable to detect targets) or high seas (when the barge is removed from the lake for safety reasons because the wave heights are forecasted to significantly exceed 6 feet). The Applicant shall notify ODNR in writing within 48 hours after the barge is redeployed. During any such force majeure event, the Applicant shall summarize NEXRAD data to provide a large-scale assessment of nocturnal surveys for one full spring, summer, and fall survey period, the Applicant shall submit a radar monitoring survey report to ODNR which shall describe any force majeure event that occurred during the preceding survey time. For any period the barge was not on the lake, the Applicant shall provide a detailed description of when and why operations were interrupted and an analysis of how the useable radar data was used to satisfy the study objectives. The monitoring survey report shall demonstrate how the 75 percent criteria was met. The report shall be submitted to ODNR and Staff for review to confirm compliance with this condition and, if determined sufficient, shall be accepted through written communications from ODNR.

- 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 the number of targets in the rotor-swept zone to inform the potential for collision.**
- 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 bird migratory seasons and bat migratory seasons (April 1 to November 15) pre-construction.**
- g. **Radar must collect data for at least two spring/summer/fall migratory seasons post-construction to determine behavioral changes that make collision more or less likely.** If the Applicant demonstrates to ODNR's satisfaction that a second spring/summer/fall post-construction radar survey is unlikely to result in the collection of additional data to inform the question of avoidance/attract effects, ODNR may, in its sole discretion, determine that the Applicant does not need to conduct a second spring/summer/fall post-construction radar survey.

(23) **The Applicant will immediately report a significant mortality event regarding all avian or bat species (21 or more detected collisions at the facility within a 24-hour period based on a facility-wide detection probability of 59 percent) to ODNR.** The number of detected collisions that trigger a significant mortality event will be adjusted based on the demonstrated detection probability of the collision detection technology. **If there is a significant mortality event, the Applicant will modify operation activities that could adversely affect the identified animals to minimize risk as described in the impact mitigation plan within 24 hours** and follow the process for significant mortality events set forth in the impact mitigation plan.

All of these conditions provide significant protection to migratory birds with the significant involvement of both Staff and the ODNR. For example, both Staff and the ODNR will be involved in the development and implementation of the impact mitigation plan including collision monitoring using collision detection technology (Condition 18). As well, both ODNR and Staff will be involved in reviewing the results of Condition 21 which requires radar monitoring of not only groups of migratory birds but also of individual birds and their altitudes.

Condition 23 also provides for an immediate 24-hour change in operations if there are 21 or more detected collisions over all turbines within a 24-hour period with reporting to the ODNR.

Given the protections, it is understandable that the Board's Staff agreed to and recommended to the Board adoption of the conditions in the Revised Stipulation.

2. The Board's own findings support the adoption of the Revised Stipulation without the Board's mandate to shutdown turbines at night.

The Board's own statements and findings in the Order further support the adoption of the Revised Stipulation **without** the Board's mandate to turn turbines off during nighttime hours (for eight months of a production year). For example, in paragraph 108 of the Order, the Board found that the nature of the probable environmental impact of the Facility can be determined stating:

The small scope of the demonstration project and the proposed location minimize many potential effects often associated with wind generation. For example, by being located offshore, common issues such as location of nearby properties in relation to the wind turbines concerning such items as blade shear, shadow flicker, set-back requirements, and ice throw are not applicable to this project (Staff Ex. 1 at 28-30). In addition, the project's location in Lake Erie naturally limits the ecological impact on vegetation and animals. Although the turbines will be located in the lake, we found that any impacts to aquatic life is expected to be minimal. **While birds and bats will be affected by the project, the offshore location limits the impact.** Eagles and other raptors are not expected to frequent the project location, nor do most waterfowl venture that far away from the shoreline. **Similarly, bat activity is almost ten times more frequent on the shoreline than offshore. (Icebreaker Ex. 6, Attach. 4 at 7-8, 13.) Thus, Icebreaker's main impact is expected to be on nocturnal migrating birds.**

The Board also expressly found at paragraph 148 of the order that the "projected risk to avian and bat species associated with this small demonstration project **is expected to be low...**", but then stated "there is a considerable unknown risk associated with the number and density of birds and bats potentially migrating through the rotor-swept zone." The Board's statement on risk was then tempered by its subsequent statement (paragraph 156) that "... we have already

concluded that the project is anticipated to represent **a low, yet incrementally higher, level of risk** to avian and bat species that they would otherwise not be subject to, given the fact that the facility will be comprised of only six turbines.”

The Board also agreed with the parameters for the development and deployment of radar technology required by Condition 18, stating at paragraph 156 that “[t]he parameters for determining whether the radar technology and methodology are sufficient have already been established, regardless of what that eventual technology is or the form in which it is deployed.” The Board also agreed with the Signatory Parties that “... Revised Stipulation Condition 18 helps ensure that the facility will represent the minimum adverse environmental impact to wildlife by requiring that a collision monitoring plan, and the associated collision-monitoring technology, will be approved prior to construction[.]” (Order at ¶ 157).

The Board also found that measures can be taken to mitigate issues faced by mounting radar to a floating platform, and that the vessel-based radar (VBR) monitoring protocol could produce sufficient data to satisfy the radar monitoring criteria of Condition 21. (Order at ¶ 155). Relying on the radar, the Board noted that the radar study will be repeated after construction to determine if birds and bats are impacted by the facility. (Order at ¶ 153 citing to Staff Ex. 1 at 23). Through those studies, Icebreaker would have the ability to modify its operations in accordance with its adaptive management plan, subject to prior ODNR and Staff approval. (Order at ¶ 153 citing to Icebreaker Ex. 38, Attach. A at 12-13).

Given the Board’s statements in the Order, it is evident that the manifest weight of the evidence led the Board to conclude there is low risk to nocturnal migratory birds given the conditions in the Revised Stipulation. The Board’s statements support adaption of the Revised Stipulation without modification.

3. The Board's directive to turn turbines off during nighttime hours from March 1 through November 1 was contrary to the Board's own findings.

Although finding that the impact of the project on bats and birds is of low risk, the Board proceeded to require that turbines be turned off at night (100% feathering) from March 1 to November 1 of every year until the Board directed otherwise. (Order at ¶ 160). The Board adopted this requirement because it found “necessary risk mitigation measures should be installed from the beginning” and that as “more information is ascertained, the protections can be accordingly scaled back.” (Order at ¶ 160). The Board's added directive is contrary to its findings on the risk the six turbines present to nocturnal migratory birds by operation of the project as well as the requirements of the conditions, which by operation will provide the ODNR and Board's Staff with additional information on possible and proposed impacts.

As noted above, the Board expressly found that the project's “projected risk to avian and bat species associated with this small demonstration project **is expected to be low...**” (Order at ¶¶ 148, 156). In particular, the Board stated:

While birds and bats will be affected by the project, the offshore location limits the impact. Eagles and other raptors are not expected to frequent the project location, nor do most waterfowl venture that far away from the shoreline. Similarly, bat activity is almost ten times more frequent on the shoreline than offshore. (Icebreaker Ex. 6, Attach. 4 at 7-8, 13.) Thus, Icebreaker's main impact is expected to be on nocturnal migrating birds.

(Order at ¶ 148).

Yet, having made this finding, the Board subsequently stated that “[g]iven the novel nature of this project, we believe the more appropriate course is to limit operations during the periods where there is a heightened risk for bird and bat collisions, without waiting for a potential issue with the technology to occur.” (Order at ¶ 160, citations omitted). In doing so, the Board not only appears to have artificially inflated the risk to nocturnal migratory birds, but

also to other bird and bat species, all contrary to the Board's statements in paragraphs 148, 156 and 157 that the risk of impacts to wildlife are expected to be low.

The Board also ignored the record evidence that preconstruction radar monitoring would occur that would provide the Applicant, Staff and the ODNR with additional information on the number of nocturnal migratory birds in the turbine area as well as the altitude of the birds' flight paths. (See Condition 21, Order at pgs. 24-25). That radar monitoring would utilize parameters that the Board found acceptable, i.e., "[t]he parameters for determining whether the radar technology and methodology are sufficient have already been established, regardless of what that eventual technology is or the form in which it is deployed." (Order at ¶ 156). Likewise, the Board took no issue with the record evidence on the conditioning of the project on a collision monitoring plan and associated collision monitoring technology that would be approved prior to construction. (Order at ¶ 157).

Instead, the Board appears to be concerned about what the actual risk to nocturnal migratory birds may be as a result of the project's operation. But that information will be developed through Condition 21, which requires the Applicant to submit both pre-construction and post-construction monitoring survey reports to the ODNR and Staff for review with acceptance through written communications from the ODNR.² Thus, prior to construction, the Staff and ODNR will have data on actual bird counts with flight altitudes in the area of the project's turbines. Moreover, that data will continue to be collected post-construction for a minimum of two-seasons (absent ODNR approval to not monitor for a second season). Likewise, the collision detection monitoring required under Condition 18 must be in place at the start of operations and continue for the life of the project.

² The Board noted that Staff and ODNR are eminently qualified to oversee Icebreaker's compliance with the Order. (Order at ¶ 199).

Notably, the Board is “tasked with identifying the nature of the probable impact, not the actual impact.” (Order at ¶ 107). The Board was able to identify the nature of the probable impact to migratory nocturnal birds thus determining the nature of the probable environmental impact based on the record before it – and its Staff’s involvement will be able to calculate the specific, actual environmental impact in compliance with the certificate conditions as the project is constructed and begins operation. (Order, ¶ 199). The Board had no basis to impose the shut-down mandate and in doing so, took an action that is contrary to the record and the Board’s own findings, and is unnecessary given the Revised Stipulation’s protections.

The Board should grant rehearing and strike its modification to the Revised Stipulation mandating turbine shutdown at night from March 1 to November 1, as well as its corollary condition to provide for Board approval of the preconstruction radar compliance information, the bird and bat impact mitigation and any request to operate at nighttime in the shutdown period.

III. CONCLUSION

For the foregoing reasons, the Network respectfully requests that the Board grant rehearing to remove the new conditions imposed by the Board through the Order, and approve the Revised Stipulation as presented to the Board without modification. Sufficient justification exists to not modify the Revised Stipulation given the information that will be obtained through Conditions 18 and 21 coupled with the expertise of both the ODNR and Staff. The Revised

Stipulation presented a path forward for this project – the Board’s modifications if left in place will likely stop that forward path.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Business Network for Offshore Wind, Inc.