

**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- ) Case No. 17-2295-EL-BGN  
Powered Electric Generating Facility in Seneca )  
and Sandusky Counties, Ohio )

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**MOTION OF REPUBLIC WIND, LLC TO STRIKE PORTIONS OF  
SUPPLEMENTAL DIRECT TESTIMONY OF MARK SHIELDCASTLE AND *IN*  
*LIMINE* TO EXCLUDE RELATED HEARING TESTIMONY**

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Pursuant to Ohio Adm. Code 4906-2-27, Applicant Republic Wind, LLC (“Applicant”) moves to strike portions of the supplemental direct testimony of Local Residents witness Mark Shieldcastle filed on September 9, 2020. The Applicant seeks to strike testimony that is beyond the scope of the narrow topics for which the Board has reopened the hearing. This testimony is not only beyond the scope of the limited topics outlined in the Board’s August 4, 2020 Entry, it is duplicative of testimony already presented by the Local Residents. The Applicant also seeks an order *in limine* prohibiting Mr. Shieldcastle from testifying on these matters at the reopened hearing. The reasons supporting this Motion are set forth in more detail in the attached Memorandum.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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### MEMORANDUM IN SUPPORT

#### **I. PROCEDURAL BACKGROUND**

On June 8, 2020, the Local Residents moved to reopen the proceedings to admit evidence regarding two new eagle nests located allegedly in or near the Project area. The new nests are referred to as the Robinson Nest and the N&F Wildlife Nest. In seeking to reopen the hearing as to these two nests, the Local Residents referenced the number of proposed turbine sites that are (allegedly) located within 1.17 miles and 2.5 miles of these nests. 1.17 miles is the half-mean inter-nest distance that had been calculated by the United States Fish and Wildlife Service (“USFWS”) for the Project. 2.5 miles relates to the opinion of Local Residents witness, Mark Shieldcastle, that there should be a buffer of 2.5 miles between nests and turbines.

On August 4, 2020, the Board granted the Local Residents’ motion, in part. The Board reopened the hearing only as to the N&F Wildlife Nest and specifically limited additional testimony to the following:

- “the significance of the half-mean, inter-nest buffer distance proposed by USFWS”
- “the existence of the N&F Wildlife Nest and its proximity to the proposed turbine locations”
- “the ramifications of the N&F Wildlife Nest with respect to the half-mean, inter-nest buffer distance proposed by USFWS”

(Aug. 4, 2020 Entry at ¶ 44.)

On September 9, 2020, the Local Residents submitted the “Supplemental Direct Testimony” of Mark Shieldcastle (“Shieldcastle Suppl. Testimony”). The Shieldcastle Suppl. Testimony

contains testimony that goes beyond the limited scope of the reopened hearing, as set forth in the August 4, 2020 Entry. Specifically, the irrelevant testimony consists of Mr. Shieldcastle's opinion that there should be a 2.5-mile buffer around eagle nests—an opinion that the Local Residents already had the opportunity to present during the first hearing, as well as argue in their post-hearing briefs. The testimony is found in Shieldcastle Suppl. Testimony at Page 4, Lines 14-18 (“The State of Ohio’s ... from the wind turbines.”) and Page 5, Lines 6-8 (“However, a buffer ... conduct other activities.”). Because this testimony is outside the scope of the reopened hearing, it must be stricken, and Mr. Shieldcastle should be precluded from testifying as to this opinion at the reopened hearing.

## **II. LAW AND ARGUMENT**

### **A. Only testimony relevant to the limited topics should be admissible at the reopened hearing.**

It is well established that “the Commission seeks to maintain consistency with the Ohio Rules of Evidence to the extent practicable.” *In re Dayton Power & Light Co.*, Case No. 12-0426-EL-SSO, et al. Opinion and Order, at 8 (Sept. 4, 2013) citing *Greater Cleveland Welfare Rights Org. v. Pub. Util. Comm.*, 2 Ohio St. 3d 62, 68, 442 N.E.2d 1288 (1982). Evid.R. 402 states that evidence that is not relevant is inadmissible. The Commission has stricken testimony that is not relevant or is outside the scope of the issues before the Commission. *See In the Matter of Appl. of Cols. So. Power Co. for Approval of Elec. Security Plan*, Case No. 08-917-EL-SSO (July 19, 2011 Entry at p. 6); *In Re Verizon Wireless*, Case No. 03-515-TP-ARB (Nov. 13, 2003 Order at p. 4).

Here, portions of Mr. Shieldcastle's supplemental testimony go beyond the limited topics for which the hearing was reopened (as to eagles.) Accordingly, this testimony is irrelevant and inadmissible.

**B. Portions of the Shieldcastle Suppl. Testimony, addressing his opinion that a 2.5-mile buffer is required, go beyond the narrow issues in this reopened hearing and must be stricken from the record and prohibited at the reopened hearing.**

The August 4, 2020 Entry (at ¶44) is very clear as to what evidence may be submitted at the reopened hearing. “Any additional testimony to be presented *shall be limited to*:

- the significance of the half-mean, inter-nest buffer distance proposed by USFWS,
- the existence of the N&F Wildlife Nest and its proximity to the proposed turbine locations,
- as well as the ramifications of the N&F Wildlife Nest with respect to the half-mean, inter-nest buffer distance proposed by USFWS.” [Emphasis added.]

Mr. Shieldcastle’s supplemental testimony attempts to interject into these limited topics the opinion he holds that any buffer less than 2.5 miles does not adequately protect bald eagles from wind turbines. (Shieldcastle Suppl. Testimony at p. 4, Lines 14-18; p. 5, Lines 6-8.) But Mr. Shieldcastle already submitted nearly identical testimony as to this opinion, both in his previous direct testimony and at the November 2019 hearing. (See Shieldcastle Oct. 28, 2019 direct testimony [Loc.Res. Ex. 23] at p. 18, Lines 9-19; Shieldcastle Nov. 13, 2019 hearing testimony at Vol. V, p. 1022, Lines 12-15.) In addition, the Local Residents devoted an entire subsection of their post hearing brief as to this opinion. (See Loc. Res. Dec. 23, 2019 Post Hearing Brief at pp. 66-67.)

The Board did not reopen the hearing for the purpose of submitting any and all evidence relating to bald eagles and purported buffers. It has reopened the hearing for the very limited purpose of addressing one new eagle nest and the impact, if any, of the location of this new eagle nest in relation to the 1.17-mile half-mean, inter-nest distance that had been previously calculated by USFWS. It is not about the alleged extensive studies “[t]he State of Ohio” has performed of bald eagle territories or Mr. Shieldcastle’s opinion as to whether USFWS’ methods and official guidance are acceptable to him or not. The Local Residents had ample opportunity to present—and indeed

already have presented—their evidence and position on that matter. The Local Residents should not be permitted to re-hash and re-argue that position in this limited-scope reopened hearing.

### **III. CONCLUSION**

For the reasons set forth above, the Applicant respectfully requests that the Board strike from the record the testimony set forth in Shieldcastle Suppl. Testimony at Page 4, Lines 14-18 (“The State of Ohio’s ... from the wind turbines.”) and Page 5, Lines 6-8 (“However, a buffer ... conduct other activities.”). Applicant further requests that the Board prohibit Mr. Shieldcastle from testifying on these matters at the reopened hearing.

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 electronic mail this 16<sup>th</sup> day of September, 2020.



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Summary: Motion of Republic Wind, LLC to Strike Portions of Supplemental Direct Testimony of Mark Shieldcastle and In Limine to Exclude Related Hearing Testimony electronically filed by Teresa Orahod on behalf of Jennifer A. Flint