

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

**MOTION OF REPUBLIC WIND, LLC TO STRIKE ALL TESTIMONY OF OHIO
DEPARTMENT OF TRANSPORTATION WITNESS JOHN STAINS AND PORTIONS
OF THE TESTIMONY OF OHIO POWER SITING BOARD STAFF
WITNESS ANDREW CONWAY**

Pursuant to Ohio Adm. Code 4906-2-27, Applicant Republic Wind, LLC moves to strike the testimony of Ohio Department of Transportation Office of Aviation (“ODOT-OA”) witness John Stains, ODOT-OAs letter determination dated July 18 and September 27, 2019, and portions of Ohio Power Siting Board Staff Andrew Conway’s October 28, 2019 prefiled written direct testimony and oral testimony. 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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**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)	Case No. 17-2295-EL-BGN
Generating Facility in Seneca and Sandusky)	
Counties, Ohio		

MEMORANDUM IN SUPPORT

I. INTRODUCTION

R.C. 4906.10(A)(5) requires the Ohio Power Siting Board (“OPSB”) Staff to consult with the Ohio Department of Transportation Office of Aviation (“ODOT-OA”) to determine whether the wind turbines proposed for the Republic Wind Farm comply with the rules and standards of R.C. 4561.32.

Similarly, R.C. 4561.341 requires ODOT-OA, pursuant to a consultation with OPSB Staff under R.C. 4906.05(A), to determine whether the proposed wind turbines will constitute an obstruction based upon the rules adopted under R.C. 4561.32.

Significantly, R.C. 4561.32 limits ODOT-OA’s determinations to an airport’s six imaginary surfaces: the clear zone surface, horizontal surface, conical surface, primary surface, approach surface or transitional surface. See, also, *One Energy Enterprises LLC, et al., v. Ohio Department of Transportation*, No. 17CV005513 (“*One Energy*”),

By letter dated March 10, 2020, filed with the Board in this proceeding on March 11, 2020, ODOT-OA admits that “[n]one of the proposed wind turbine structures impact these

surfaces.” Indeed, the written testimony filed September 9, 2020 by ODOT-OA witness John Stains and Board witness Andrew Conway arrive at the same conclusion.

However, ODOT-OA issued deamination letters on April 11, July 18 and September 27, 2019 based upon its review of Federal Aviation Administration regulations governing navigable airspace that fell outside of ODOT-OA’s limited jurisdiction. 14 CFR 77.17(A)(1)-(3). Because ODOT-OA’s determination letters exceed the scope of its statutory authority, they must be stricken from the record, as well as portions of Mr. Stains’ and Mr. Conway’s written and oral testimony submitted in this proceeding that support the ultra vires determinations.

To ensure the record is accurate and consistent with the legal implications of the *One Energy* decision, all of Mr. Stains prior testimony should be stricken. In addition, the following portions of Mr. Stains’ September 9, 2020 testimony and Mr. Conway’s prior testimonies should be stricken:

- Direct Examination of John Stains (September 9, 2020)
 - Page 3, Lines 10-11 “In light of the court’s ruling, it became apparent that this statute is ambiguous.”
 - Page 3, Line 12 “in light of this ambiguity”
 - Page 4, Lines 1 through 4, ending with “determination”
 - Page 4, Line 15 through Page 5 Line 2
- Direct Examination of Andrew Conway (October 28, 2019)
 - Page 21, line 10 starting with “In the letter...” through line 18 ending before “The condition...”
 - Page 21, line 19 strike “requirements and ODOT-OA”

- Page 21, line 21 starting with “with ODOT-” and ending on line 22,
line with “or”
- Page 24, lines 15 – 19
- Page 25, lines 11-20
- Page 26, lines 1-8
- Page 26, lines 15 – 22
- Page 27, lines 1-3
- Page 28, lines 1-6
- Cross Examination of Andrew Conway (Hearing Transcript, Volume VI)
 - Page 1261, lines 22-24
 - Page. 1262, lines 22-24
 - Page 1264, lines 5-8
 - All of Mr. Conway’s testimony from page 1267 -1274
 - Page 1275, line 1-2
 - Page 1276, Lines 6-8, 13, and 16-17
 - Page 1278, lines 12-16
 - Page 1280, lines 4,8, and 12-13

II. BACKGROUND

During the OPSB Staff’s investigation in this case, in accordance with R.C. 4906.10(A)(5) and R.C. 4561.32, Staff consulted with ODOT-OA to coordinate review of potential impacts of the facility on aviation. ODOT-OA issued a series of determination letters to Staff regarding whether certain proposed structures technically constituted obstructions under

the 14 CFR 77.17(a)(1) – (a)(3) surface standards.¹ Based on ODOT-OA’s July 18, 2019 determination letter, Staff recommended Conditions 52, 56, and 57 in its Staff Report. Based on the September 27, 2019 determination letter, Staff recommended Condition 59 in the Supplement to the Staff Report.

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 September 27, 2019 determination letter. Republic argued that ODOT-OA’s jurisdiction is limited to the “six imaginary surfaces” 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. In its Reply Brief, Republic cited *One Energy* to support its argument regarding the limitation on ODOT-OA’s jurisdiction.

On March 2, 2020, the Franklin County Court of Common Pleas issued a decision in *One Energy* 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 May 4, 2020, OPSB Staff filed a motion to reopen the proceeding to address the *One Energy* decision and the March 10, 2020 determination letter, which was granted by the Board.

¹ These provisions of the Code of Federal Regulations do not relate to the six imaginary surfaces identified in R.C. 4561.32 over which ODOT-OA has jurisdiction.

On September 9, 2020, ODOT witness John Stains and OPSB Staff witness Andrew Conway filed their prefiled written direct testimony regarding aviation issues.

III. LAW AND ARGUMENT

A. All of John Stains' prior written direct and oral testimony should be stricken from the record.

1. *ODOT-OA has "no authority to regulate or otherwise take any actions" regarding any of the turbines proposed in this case. One Energy Enterprises LLC, et al., v. Ohio Department of Transportation, No. 17CV005513 at pg. 11 (Ohio Com.Pl. March 2, 2020)*

All of ODOT-OA witness John Stains' October 28, 2019 pre-filed written testimony and the identified portions of his September 9, 2020 prefiled written direct testimony, and all his oral testimony should be stricken because ODOT-OA is acting outside the scope of its jurisdiction in this proceeding

The sole purpose of Stains' October 28, 2019 written direct testimony and oral testimony was to support ODOT-OA's April 11, July 18 and September 27, 2019 determination letters.² These determination letters were issued based on ODOT-OA's incorrect assumption that it had jurisdiction to issue the letters under R.C. 4561.341. However, it is undeniable that ODOT-OA did not have jurisdiction to issue the April 11, July 18 and September 27, 2019 determination letters. ODOT-OA's authority to make determinations is limited to the "six imaginary surfaces" set forth R.C. 4561.32. ODOT-OA's March 10, 2020 determination letter makes it abundantly clear that none of the turbines proposed in this case impact any of the imaginary surfaces. Therefore, the April 11, July 18 and September 27, 2019 determination letters, and all of Stains' October 28, 2019 written direct testimony and oral testimony is beyond ODOT's jurisdiction, unlawful, and should be stricken.

² Staff Ex. 3 at pp. 6 [Prefiled Testimony of John Stains ("Stains' Direct")].

Furthermore, the primary purpose of Stains' September 9, 2020 testimony is merely an attempt by Stains to preserve his prior testimony in this proceeding. The *Ohio Energy* decision conclusively established that ODOT-OA has "no authority to regulate or otherwise take any actions with respect to structures or proposed structures that will not penetrate or are not reasonably expected to penetrate any of the six Imaginary Surfaces." *One Energy*, at p. 11. Despite the *One Energy* decision and the March 10, 2020 determination letter, Stains doubles down on his extra-jurisdictional actions. He states, "Our detailed and extensive analysis identified the impacts of the proposed wind farm on these airports' navigable airspace, and these impacts remain the same as indicated in our September 27, 2019 determination." (Stains' Supplemental Testimony p. 4, Lines 1-3). Stains' testimony is nothing more than a back door approach to opine on the obstruction standards contained in 14 CFR 77.17(a)(1) – (a)(3) over which ODOT-OA lacks authority. This portion of his ultra vires testimony should be stricken; specifically: Page 4, Lines 1 through 4, ending with "determination" and Page 4, Line 15 through Page 5 Line 2

2. *Stains is testifying as a non-lawyer regarding his legal interpretation of the One Energy decision.*

John Stains' September 9, 2020 testimony is improper and should be stricken because it is the legal opinion of a non-lawyer. Mr. Stains testified that "ODOT Office of Aviation interprets [its] jurisdiction with regard to structures and objects near airports to be based in whole upon obstruction standards set forth in 14 C.F.R. 77.21 to 77.29, as amended." (Stains' Supplemental Testimony at p. 2.) He further opines that the statute is "ambiguous." However, the *One Energy* court rejected ODOT-OA's claims that the statute is ambiguous, and held that the statute clearly demonstrated that ODOT-OA exceeded its jurisdiction. ODOT-OA is attempting to dispute and argue against the ruling in *One Energy*. But this is not the proper time

nor place to do so. ODOT-OA failed to appeal the *One Energy* decision, and the Board should not allow Stains to pollute the record with his non-lawyer interpretation of the *One Energy* decision. For this reason, the following portions of Stains September, 9, 2020 testimony should be stricken: Page 3, Lines 10-11 “In light of the court’s ruling, it became apparent that this statute is ambiguous,” and Page 3, Line 12 “in light of this ambiguity”

B. Portions of Andrew Conway’s October 28, 2019 written direct testimony and oral testimony relying on ODOT’s determinations should be stricken.

In his October 28, 2019 written direct testimony, Andrew Conway’s explains that Staff’s recommended Conditions 52, 56, 57, and 59 were based on ODOT-OA’s July 18 and September 27, 2019 determination letters. In addition, at certain times during his cross-examination, Conway referred to and relied up ODOT-OA’s mistaken belief that it had the jurisdiction to issue the July 18 and September 27, 2019 determination letters. However, now that it is apparent that ODOT-OA did not have jurisdiction to issue these determination letters, it is necessary to correct the record by striking those portions Conway’s testimony where he relied on the extra-jurisdictional actions of ODOT-OA.

Striking these portions of Conway’s testimony would be consistent with Staff’s recommendations in the Second Supplement to the Staff Report and Conway’s September 9, 2020 testimony. In his September 9, 2020 testimony, Staff witness Conway recommends modification/withdrawal of Conditions 52, 56, 57 and 59. For clarity of the record, Republic requests that portions of Conway’s testimony be stricken to remove testimony regarding OPSB Staff’s reliance on ODOT-OA’s unlawful recommendations.

IV. CONCLUSION

For the reasons set forth above, Republic Wind respectfully requests that the Commission strike the testimony of John Stains in its entirety and portions of Andrew Conway's testimony as discussed above.

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 16th day of September, 2020.



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Summary: Motion of Republic Wind to Motion to Strike All Testimony of Ohio Department of Transportation Witness John Stains and Portions of the Testimony of Ohio Power Siting Board Staff Witness Andrew Conway electronically filed by Teresa Orahoad on behalf of Devin D. Parram