

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of :
Republic Wind, LLC, for a Certificate to : Case No. 17-2295-EL-BGN
Site Wind Powered Electric Generating :
Facilities in Seneca and Sandusky :
Counties, Ohio. :

**MEMORANDUM CONTRA REPUBLIC WIND, LLC'S
MOTION TO STRIKE STAFF TESTIMONY**

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**On Behalf of the Staff of
The Ohio Power Siting Board**

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I. INTRODUCTION

The Staff of the Ohio Power Siting Board (Board) files this Memorandum Contra. Republic Wind, LLC's (Republic) Motion to Strike the testimony of Mr. Stains, Mr. Conway, and the docketed July 18 and September 27 letters of the Ohio Department of Transportation (ODOT) letters should be rejected. This memorandum is filed pursuant to Ohio Adm.Code 4906-2-27.

II. BACKGROUND

The Board should reject Republic's Motion to Strike because Republic's reason for striking is solely based on the *One Energy Enterprises LLC, et al., v. Ohio Department of Transportation*, No. 17CV005513 (Feb. 5, 2019) ("*One Energy*") decision by the Franklin County Court of Common Pleas. The Board is not bound by the decisions of the Franklin County Court of Common Pleas. A decision to approve or reject the construction of fifty wind turbines, exceeding 400 feet in height must be thoroughly

considered by the Board. Republic filed a Motion to Strike Testimony seeking to limit the evidence that the Board will have to consider in making its decision. The Board is entitled to accept relevant testimony that assists it in reaching a decision regarding an application to build generation in Ohio. Guided by R.C. 4906.10(A)(5), the statute requires that the Board consult with ODOT Office of Aviation when considering a power siting application.

The Staff of the Board consulted with ODOT and ODOT provided its determination. After ODOT originally offered its determination in this case, the Franklin County Court of Common Pleas issued its *One Energy* decision, causing ODOT to subsequently modify its determination regarding the proposed Republic project in this case. The Board has authority to obtain additional information from whomever it chooses to about concerns with respect to the project. R.C. 4906.10. This includes the concerns of local airports or even the opinions and concerns of ODOT that are outside of ODOT's jurisdiction (if indeed it really is outside of their jurisdiction because again the Franklin County Court of Common Pleas decision is not precedent for the Board). So, even if the Franklin County Court of Common Pleas decision did serve as precedent to the Board – and it does not – it does not mean that the testimony regarding aviation should be stricken. Therefore, the testimony of Stains and Conway should not be stricken. The Board can assign whatever weight it wishes to the testimony and make a final determination concerning conditions. Staff gathered information and made a recommendation. Not all information gathered has to be in favor of the Applicant for the information to be admissible.

III. ARGUMENT

A. The Franklin County Court of Common Pleas *One Energy* decision does not serve as precedent that the Board must follow.

The Franklin County Court of Common Pleas opinion does not serve as precedent for the Board. The Board is a creature of statute and has exclusive jurisdiction over power siting issues. R.C. 4906.03. And its decisions are directly appealable to the Ohio Supreme Court. R.C. 4906.12. Republic claims that because the Court in the *One Energy* determined that ODOT could not make certain aviation determinations regarding a permit issued under the Ohio Airport Protection Act, the Board must follow the *One Energy* decision and limit evidence in the Board's proceedings. The Board is not bound by ODOT's permitting statute. Only Board and Ohio Supreme Court's decisions establish precedent that the Board must follow. The *One Energy* decision dealt with ODOT administering the Ohio Airport Protection Act. *One Energy*. The court explained ODOT's role in the *One Energy* case as requiring that ODOT consider applications for issuing and/or denying permits to tall structures that fall within certain defined surfaces or planes that extend from airports in Ohio. *One Energy*, citing the Complaint at ¶ 9. ODOT's recommendations that the common pleas court considered are not related to proceedings at the Board.

B. Rules of evidence permit the testimony of Stains, Conway, and the July 18 and September 27, 2019 letters because they are relevant.

Ohio Evidence Rule 402 permits testimony that is relevant and will assist the trier of fact in reaching a decision. Though the Board is not strictly bound by the Ohio Rules of Evidence, these rules are followed in Board proceedings. *Ohio Consumers' Counsel v.*

Pub. Util. Comm., 111 Ohio St.3d 300, 320, 2006 Ohio LEXIS 3263; R.C. 4906.12; 4903.22. Mr. Stains's earlier testimony, and ODOT's July 18 and September 27, 2020 letters give the Board a clear picture of the facts of the case and how the wind turbines' heights affect air travel. ODOT's September 27, 2019 letter (and Mr. Conway adopts these findings in his testimony) explains that, according to 14 C.F.R. 77.17, thirty-three of the proposed turbines would be considered an obstruction under Federal Aviation Agency ("FAA") standards. Republic argues that because the common pleas court determined that ODOT exceeded its jurisdiction in making these same types of findings in a case under the Ohio Airport Protection Act, Mr. Stains cannot opine on turbine obstructions ever. However, as stated above, the Board is not bound by the common pleas court's holdings.

Furthermore, Ohio law requires that the Board consult with ODOT according to R.C. 4906.10(A)(5). That is precisely what Staff did. It consulted with ODOT. The Board is also required by statute to ensure that the facility will serve the public interest, convenience, and necessity. R.C. 4906.10(A)(6). Mr. Stains is an engineer who was accepted as an expert before the Board and provided the Board with testimony explaining how the proposed turbines would affect navigable airspace. Certainly, in considering the public interest, the Board is entitled to understand the affect that the turbines may have on air travel. He also explained that the heights of the turbines constituted obstructions according to the FAA's regulations. Stains Oct. 28, 2019 Test. at 11. Republic makes no argument nor provides any testimony disputing these facts. The Board is entitled to consider this testimony.

Rule 402 allows relevant testimony that will assist the trier of fact. Republic does not argue that the testimony of Mr. Stains, Mr. Conway or the July 18th and September 27, 2020 letters are irrelevant. Additionally, Ohio Evidence Rule 403 allows testimony to be stricken on the grounds that it confuses the issues and is likely to mislead the trier of fact. *Early v. Toledo Blade*, 130 Ohio App. 3d 302, 1998 Ohio App. LEXIS 4820. The fact that the proposed project creates an obstruction according to federal rules is relevant to consideration of Republic's application. The facts associated with the turbines' heights will not confuse nor mislead the Board. In fact, this information will provide a clearer picture to the Board and should not be stricken from the record.

C. Mr. Stains offers his opinion of the *One Energy* decision as mandated by the examiners in the August 4, 2020 Entry in this case.

Witness Stains did exactly what the Entry ordered him to do. Mr. Stains was ordered to explain the impact of the *One Energy* decision. The Entry ordered Mr. Stains to provide exactly this testimony.

Additionally, Staff should provide testimony sponsoring the Modified Determination Letter and *explaining the impact* of the *One Energy Decision* and the Modified Determination Letter on Staff's previously admitted aviation-related testimony, including that of Staff witness John Stains. August 8, 2020 Entry at 10 (emphasis added).

Mr. Stains's testimony followed the directive set forth in the Entry. Because Republic does not like non-lawyers to use the words "jurisdiction" and "ambiguity" is no reason to exclude the testimony of Mr. Stains. He explains how ODOT's jurisdiction in permitting cases is "impacted" by the *One Energy* Decision and furthermore, how ODOT interprets

the court's opinion regarding jurisdiction. Mr. Stains's testimony was in keeping with the Entry and should not be stricken on the grounds that he is offering a legal interpretation.

IV. CONCLUSION

The Motion to Strike the testimony of Mr. Stains, Mr. Conway, and the docketed July 18 and September 27 ODOT letters should be rejected. The Board is bound to follow the mandates in R.C. 4906.10 in considering whether to approve or reject an application for siting generation in Ohio. The Board is not bound by the *One Energy* decision. The Board has a responsibility to consult with ODOT and, among other things, make sure that the proposed project is in the public interest, convenience and necessity. The Board should have all of testimony of Mr. Stains, Mr. Conway and all of the docketed ODOT letters available to it when making its decision.

Respectfully submitted,

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**On Behalf of the Staff of
The Ohio Power Siting Board**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum Contra Republic Wind, LLC's Motion to Strike Staff Testimony**, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail upon the following parties of record, this 23rd day of September, 2020.

/s/ Jodi J. Bair

Jodi J. Bair

Assistant Attorney General

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/23/2020 3:15:47 PM

in

Case No(s). 17-2295-EL-BGN

Summary: Memorandum Contra Republic Wind, LLC's Motion To Strike Staff Testimony
electronically filed by Mrs. Kimberly M Naeder on behalf of OPSB