

**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 )

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

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**I. INTRODUCTION**

The statutory bases for Republic Wind, LLC's ("Republic") motion to strike ("Motion") were explained at page one of the Motion's Memorandum in Support:

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. 4906.10(A)(5), 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*").

Republic's position is that, because ODOT-OA's determinations of July 18, 2019<sup>1</sup> and September 27, 2019<sup>2</sup> ("Determinations") address obstructions identified in 14 CFR 77.17(a)(1)-(3), and not the six imaginary surfaces identified in R.C. 4561.32, the Determinations are ultra

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<sup>1</sup> Applicant Exhibit 37.

<sup>2</sup> Staff Exhibit 4.

vires, invalid and void. Therefore, the Determinations, and the prior testimony of Staff witnesses Stains<sup>3</sup> and Conway<sup>4</sup> that support the Determinations, must be stricken.

In addition, the Motion requests that certain portions of Staff witness Stains' September 9, 2020 testimony be stricken on two bases: (1) it consists of legal opinion<sup>5</sup> and (2) it continues to attempt to support the ultra vires September 27 determination.<sup>6</sup>

Staff raises four grounds to oppose the Motion:

1. The Motion is based "solely" on the *One Energy* decision, which is not binding on OPSB.<sup>7</sup>
2. The Determinations comply with R.C. 4906.10(A)(5).
3. The ultra vires Determinations and supporting testimony are nevertheless relevant for OPSB's consideration.
4. All of Staff witness Stains' September 9, 2020 testimony was required by entry issued August 4, 2020.

None of these grounds have merit.

## II. ARGUMENT

- A. Republic's Motion is not based "solely" on *One Energy*. It is based on Republic's Statutory Analysis, which is supported by the *One Energy* decision, ODOT-OA's March 10, 2020 determination letter, and Staff witnesses Stains' and Conway's testimony pre-filed on September 9, 2020.**

Staff misunderstands the bases for Republic's Motion. The Motion does not rely "solely" on *One Energy* to support that ODOT-OA lacks authority to issue the Determinations. As OPSB is well aware, Republic consistently raised ODOT-OA's lack of authority to issue the Determinations throughout this proceeding, both in testimony and on brief. Republic's position

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<sup>3</sup> This testimony includes Staff Exhibit 3 (Stains Direct) in its entirety, and Tr. Vol. V (Stains Cross) at 1076-1174.

<sup>4</sup> See portions of Staff Ex 5 (Conway Direct) and Tr. Vol. VI (Conway Cross), each as identified in the Motion.

<sup>5</sup> 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."

<sup>6</sup> Page 4, Lines 1 through 4, ending with "determination" and Page 4, Line 15 through Page 5 Line 2.

<sup>7</sup> Staff Memo Contra at 1.

was based upon the statutory analysis of R.C. 4905.10(A), R.C. 4561.32, and R.C. 4561.341, as restated in the introduction of this Reply. The effect of the final and non-appealable *One Energy* decision was to provide additional authority in support of Republic's analysis: that ODOT-OA's authority is limited to the six imaginary surfaces in R.C. 4561.32. The March 10 determination letter and Staff witnesses' Stains' and Conway's September 9, 2020 testimony confirm as much.

Staff's claim that Republic relies "solely" on the *One Energy* decision to support its Motion is baseless.

**B. Staff's and ODOT-OA's consultation on the surfaces identified in 14 CFR 77.17(a)(1)-(3) do not comply with R.C. 4906.10(A)(5).**

Having admitted that ODOT-OA's authority is *limited* to the six imaginary surfaces identified in R.C. 4561.32, Staff nevertheless claims that R.C. 4906.10(A)(5) permits it to consult with ODOT-OA on the completely different surfaces identified in 14 CFR 77.17(a)(1)-(3). However, R.C. 4906.10(A)(5) restricts that consultation to the six imaginary surfaces identified in R.C. 4561.32 as well. R.C. 4906.10(A)(5) provides, in part, that OPSB may grant a certificate only if it finds:

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That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under section 4561.32 of the Revised Code. *In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation* of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

Emphasis supplied. Not only do R.C. 4561.32 and 4561.341 restrict ODOT-OA's authority to the six imaginary surfaces identified in R.C. 4561.32; R.C. 4906.10(A)(5) limits Staff's and ODOT-OA's consultation to those same six imaginary surfaces. Staff's claim lacks merit.

**C. The ultra vires Determinations, which never should have been made, cannot be “relevant” to OPSB’s consideration.**

Staff’s claim that the Determinations and supporting testimony are “relevant” to OPSB’s consideration completely misses the point of the Motion. As shown above, ODOT-OA’s R.C. 4906.10(A)(5) consultations and its R.C. 4906.341 Determinations are ultra vires ODOT-OA. Thus, they are invalid and void. Because they are invalid and void, the Determinations and testimony supporting them cannot be a part of the record and should be stricken. Because they should be stricken from the record, any question of “relevancy” is moot.

**D. Portions of Staff witness Stains’ testimony pre-filed on September 9, 2020 should be stricken.**

Staff apparently misunderstands that the Motion seeks to strike all of Staff witness Stains’ testimony pre-filed on September 9, 2020, and that all of it should be stricken because it constitutes legal opinion. Actually, Republic has requested that only a portion of Mr. Stains’ testimony be stricken, and that an even smaller portion be stricken because it constitutes legal opinion. Republic agrees with Staff that the entry of August 4, 2020, requested Staff (including Mr. Stains) to present testimony as to the effect of the *One Energy* decision and the March 10, 2020 determination letter on previously admitted testimony. The portions of Mr. Stains’ testimony that should not be stricken achieve that purpose.

Republic asks that the identified portions of Mr. Stains’ testimony be stricken because he uses it to attempt to support the ultra vires September 27 determination as to obstructions that are the subject of 14 CFR 77.17(a)(1)-(3).<sup>8</sup> As explained above, the September 27 determination is ultra vires ODOT-OA and is invalid and void. Testimony to support the determination therefore must be stricken.

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<sup>8</sup> Page 4, Lines 1 through 4, ending with “determination” and Page 4, Line 15 through Page 5 Line 2.

Republic also requests that a small portion of Mr. Stains' testimony be stricken because it constitutes legal opinion.<sup>9</sup> Mr. Stains is not an attorney. However, he rendered a legal opinion as to the "ambiguity" of R.C. 4561.32 in this testimony pre-filed on September 9, 2020. Staff assigns no significance to the term "ambiguity" and ignores that it is a legal term of art. See R.C. 1.49. Whether a statute is ambiguous is a legal issue, on which Mr. Stains is not qualified to opine.

### **III. CONCLUSION**

For the reasons set forth above and in its Motion, Republic Wind respectfully requests that OPSB strike the Determinations (Applicant Ex. 37, Staff Ex. 4), all of Mr. Stains' testimony pre-filed on October 28, 2019 (Staff Ex. 3), all of Mr. Stains' testimony on cross examination (Tr. Vol. V at 1076-1174), portions of Mr. Conway's testimony as identified in the Motion, and the portions of Mr. Stains' testimony pre-filed on September 9, 2020 as identified in the Motion.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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<sup>9</sup> 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."

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Reply to Staff's Memorandum Contra Motion to Strike was served upon the following parties of record via electronic mail this 28<sup>th</sup> day of September, 2020.



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Summary: Reply of Republic Wind, LLC to Staff's Memorandum Contra Republic Wind's Motion to Strike electronically filed by Teresa Orahod on behalf of Dane Stinson