

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Firelands)
Wind, LLC for a Certificate of Environmental)
Compatibility and Public Need to Construct a) Case No. 18-1607-EL-BGN
Wind-Powered Electric Generation Facility in)
Huron and Erie Counties, Ohio.)

**MOTION *IN LIMINE* TO STRIKE IMPROPER INTERVENOR TESTIMONY
AND MEMORANDUM IN SUPPORT OF FIRELANDS WIND, LLC**

Firelands Wind, LLC (“Firelands”) respectfully moves the Ohio Power Siting Board (“Board”) or its Administrative Law Judge (“ALJ”), pursuant to Ohio Administrative Code (“OAC”) 4906-2-27, 4906-2-09(B)(8) and 4906-2-12(D), *in limine* to strike from the record portions of the prefiled direct testimony submitted September 21, 2020, by Dennis Schreiner (“Schreiner”), who is offering testimony on behalf of intervening local residents opposing the Firelands application (“Local Resident Intervenors”), and Mark Shieldcastle (“Shieldcastle”), who is offering testimony on behalf of the Local Resident Intervenors and the Black Swamp Bird Observatory. Significant portions of the testimony is irrelevant, unreliable, and prejudicial with regard to the issues before the Board in this proceeding and, as a result, should be precluded from introduction at the hearing and admission into the evidentiary record.

As detailed in the attached Memorandum in Support, Ohio law outlines eight specific factors the Board considers when determining whether to grant a certificate for the construction, operation, and maintenance of a wind farm (“Certificate”). Schreiner’s written testimony contains hearsay and the bulk of the subject matter is not relevant to any of those factors because it does not relate to the specific facts regarding the Emerson Creek facility and, therefore, cannot inform

the Board's application of the factors in determining whether to grant a Certificate in this proceeding. Shieldcastle's testimony similarly contains irrelevant, unsupported, and prejudicial information, statements outside of the scope of his purported areas of expertise, as well as hearsay that should be excluded because it is unreliable and does not properly inform the Board's decision. The Board or ALJ should limit the witness testimony and the Local Resident Intervenors' participation to relevant matters the Board is authorized to consider under Ohio law and, accordingly, should exclude the improper material contained in Schreiner's and Shieldcastle's testimony from the evidentiary record and presentation at the hearing.

The reasons and authority in support of this Motion are set forth more fully in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. LEGAL AUTHORITY

Pursuant to OAC 4906-2-09(B)(8), the Board and ALJ may take such actions as are necessary to “[p]revent the presentation of irrelevant or cumulative evidence” and “[a]ssure the hearing proceeds in an orderly and expeditious manner.” Additionally, OAC 4906-2-12(D) provides requirements pertaining to intervention and states the Board or ALJ may grant “limited participation, which permits a person to participate with respect to one or more specific issues, if: (a) The person has no real and substantial interest with respect to the remaining issues.”

As discussed further below, because significant portions of Schreiner’s and Shieldcastle’s testimony is irrelevant, unreliable, prejudicial, and otherwise improper in relation to the issues actually before the Board, the testimony should be stricken from the record *in limine* and precluded from being presented at the hearing. The Board or ALJ should limit the witnesses’ and the Local Resident Intervenors’ participation to only relevant matters. They have no real or substantial interest with respect to the testimony that Firelands seeks to exclude.

Additionally, the Ohio Rules of Evidence may be considered in an advisory capacity in relation to an administrative hearing. *Board of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417 (1996). An administrative agency should not act on evidence that is clearly not admissible, competent, or probative of facts that the agency is to determine. *Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6 (2d Dist.1982); *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 162 (10th Dist.1969). Administrative agencies have a duty to base their conclusions on competent evidence. *State ex rel. Chrysler Plastic Products Corp. v. Industrial Comm.*, 39 Ohio App.3d 15, 16 (10th Dist.1987).

R.C. 4906.10 outlines the permissible grounds for Board decisions granting or denying a Certificate. The Board may grant a Certificate if it finds and determines all of the following:

(1) the basis of the need for the facility if the facility is an electric transmission line or gas pipeline; (2) the nature of the probable environmental impact; (3) that the facility represents the minimum adverse environmental impact ... (4) ... that the facility is consistent with regional plans for expansion of the electric power grid and ... will serve the interests of the electric system economy and reliability; (5) that the facility will comply with [other sections of Ohio law]; (6) that the facility will serve the public interest, convenience, and necessity; (7) ... what its impact will be on the viability as agricultural land of any land in an existing agricultural district...(8) that the facility incorporates ... water conservation practices.

Since the project at issue here is not a gas pipeline and does not include approval of an electric transmission line, the first factor regarding “the basis of the need for the facility” is not applicable.

II. PORTIONS OF SCHREINER’S TESTIMONY SHOULD BE STRICKEN

The bulk of Schreiner’s testimony is irrelevant to this proceeding. His testimony indicates that he is testifying on behalf of the Local Resident Intervenors.¹ These parties do not specify any purpose for his testimony, or how it relates to the Board’s consideration of the eight factors listed in R.C. 4906.10. In general, the significant majority of Schreiner’s testimony relates to the role of wind generation in the regional wholesale market and transmission grid, purporting to describe what “effects . . . intermittent energy sources” – including wind energy – “have on the PJM grid”² as well as the how the allegedly higher costs of wind generation compared to other energy sources “affect[s] the price of electricity for consumers.”³ Schreiner never provides discussion as to how these matters relate to Firelands’ Emerson Creek facility, let alone how they pertain to the factors relevant to the Board’s decision under R.C. 4906.10. Therefore, Firelands respectfully requests

¹ Written testimony of Schreiner filed on September 21, 2020 (“Schreiner Test.”).

² *Id.* at 6:6.

³ *Id.* at 11:8-9.

that the Board strike portions of Schreiner’s testimony – specifically, Questions 8-15 (pages 4:13-11:13) - to prevent the introduction of irrelevant evidence into the hearing record.

The only applicable statutory factors as to which this testimony regarding the effects of wind generation on the PJM grid might be relevant are R.C. 4906.10(A)(4) and (6), which respectively require the Board to consider whether “the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability,” and whether “the facility will serve the public interest, convenience, and necessity.” However, Schreiner’s testimony cannot be considered relevant to the Board’s consideration of either of these factors because he does not offer any testimony regarding the specific generation facility proposed by Firelands.

The questions and answers contained on pages 4-11 of Schreiner’s testimony appear to concern:

Q8: Schreiner’s experience with the PJM grid;

Q9-10: Schreiner’s definition of an “intermittent energy source”;

Q11-12: Schreiner’s experience with and views on “the impacts of intermittent energy sources on the PJM grid”;

Q13: The effects of intermittent energy sources on the availability of electricity;

Q14: The cost of electricity generation from wind turbines versus other energy sources; and

Q15: The influence of production costs for electricity on the price of electricity for consumers.

In none of these interchanges does Schreiner mention the Emerson Creek facility or assert any facts or opinions⁴ relating to the impacts of the Emerson Creek facility. He provides general discussion of basic operation of the transmission grid and wind turbines (pages 4-8), average statistics regarding electricity production from certain generation types in the 2012-2019 timeframe (pages 8-9), and assertions regarding the effects of renewable generation in California and Germany (pages 9-11). In other words, Schreiner does not offer any specific statements for the Board's consideration as to how the Emerson Creek facility would interact with "regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems," or affect "electric system economy and reliability" or "the public interest, convenience, and necessity." Absent such statements, Schreiner's testimony cannot inform the Board's determinations regarding R.C. 4906.10(A) and is not relevant to this proceeding.

Firelands accordingly urges the Board to strike pages 4:13-11:13 of Schreiner's testimony as irrelevant to this proceeding.

III. PORTIONS OF SHIELDCASTLE'S TESTIMONY SHOULD BE STRICKEN

Shieldcastle was disclosed to Firelands as a witness for expertise regarding birds, bats, and other wildlife issues.⁵ His prefiled written testimony indicates, in particular, the purpose of his testimony is to render purported expert opinions pertaining to the environmental impact of the Emerson Creek project on birds.⁶ His testimony far exceeds that purpose and the scope of his purported areas of expertise, however, and includes improper content that should be stricken from the record *in limine* and precluded from presentation at the hearing.

⁴ Any opinions expressed would be improper as Schreiner is not an expert witness qualified to render opinions, nor was he disclosed as an expert witness.

⁵ Answers to Interrogatories issued on 6/3/20, pp. 2-3.

⁶ Written testimony of Shieldcastle filed on September 21, 2020 ("Shieldcastle Test."), 1:17-1:24.

Specifically, Shieldcastle provided in response to Question 8 on page 5 of his testimony: “I was told by a former Chief of the Division of Wildlife in discussions on another wind facility project that each project must conduct its own field work and not utilize another project’s studies in response to trade secret concerns of that facility owner.”⁷ Shieldcastle fails to identify the alleged speaker of that information and the statement, as a whole, is inadmissible and prejudicial hearsay that should be stricken. That statement is inherently unreliable and Firelands cannot vet the statement because the alleged speaker is not identified.⁸ Further, Shieldcastle’s reference to other wind projects and concerns of other facility owners is irrelevant to the present assessment of the Emerson Creek facility.⁹

Shieldcastle also attempts to testify regarding “the importance of protecting the birds passing through the Project Area to the people residing in Huron County and Erie County, and along Lake Erie to the north of these counties.”¹⁰ Simply put, Shieldcastle cannot testify on behalf of others regarding their feelings and beliefs—let alone entire communities of thousands of people. Thus, Shieldcastle’s entire response to Question 18 on pages 31-35 should be stricken.¹¹

Furthermore, much of Shieldcastle’s testimony offered in response to Question 18 is irrelevant speculation for which he offers no evidentiary support. For instance, Shieldcastle states:

⁷ *Id.* at 5:11-5:13.

⁸ *See State v. May*, 2011-Ohio-6637, 970 N.E.2d 1029, ¶ 38 (7th Dist.) (“The purpose of the rule against hearsay is to keep unreliable evidence, particularly evidence that is not subject to cross-examination, away from the jury or trier of fact.”).

⁹ *See* OAC 4906-2-09(B)(8)(b) (regarding “actions as are necessary to: ... [p]revent the presentation of irrelevant or cumulative evidence.”).

¹⁰ *Shieldcastle Test.*, 31:14-35:8.

¹¹ *See Saum ex rel. Saum v. Kelly*, 3rd Dist. Hancock No. 5-04-53, 2005-Ohio-2895, ¶ 22 (“[W]e find that the trial court correctly disregarded... testimony... because it was not based on personal knowledge and constituted hearsay. [B]ecause such testimony would be inadmissible at trial, it would be improper to consider for the purposes of summary judgment.”).

[A] simple chance to watch a bright yellow and black bird at the feeder or to witness the great wingspan of a soaring symbol of our country float effortlessly by brings pleasure and a calming effect to everyday life.¹²

The Biggest Week in American Birding brings nearly a 100,000 people to enjoy these birds and with a conservative estimate of over 40 million dollars in economic benefit to the region (the actual estimated range of benefit is \$40 million to \$90 million).¹³

There is a direct connection between habitat conservation and the economic impact of birding tourism.¹⁴

Those are just a few of Shieldcastle's irrelevant statements for which he offers no evidentiary support. He makes claims "[b]ased on numerous studies" but fails to identify the referenced studies or attach them to his prefiled testimony.¹⁵ He also purports to opine on the health benefits of bird watching with statements, such as:

Birds enhance the quality of our lives in myriad ways.¹⁶

[S]ooner or later birds will lure us outdoors. Studies have shown that when we're outdoors, moving around and breathing fresh air, we tend to take deeper breaths. With more oxygen transported to all the cells of our bodies, including our brains, we become more alert and our mood is likely to be elevated.¹⁷

Shieldcastle is obviously not qualified to provide testimony regarding purported physiological benefits of bird watching. That testimony is wholly unsupported, in addition to being irrelevant, and should be stricken. Shieldcastle was identified as a witness for his purported expertise regarding birds, bats, and other wildlife issues. His testimony regarding purported health benefits

¹² *Shieldcastle Test.*, 31:23-32:3.

¹³ *Id.* at 32:6-32:9.

¹⁴ *Id.* at 35:4-35:5.

¹⁵ *Id.* at 32:19-32:20.

¹⁶ *Id.* at 33:3.

¹⁷ *Id.* at 33:9-33:12.

unrelated to the Emerson Creek facility is improper, beyond the scope of his purported areas of expertise regarding “wildlife issues,” and should not be considered.¹⁸

IV. CONCLUSION

In accordance with the foregoing, Firelands respectfully moves the Board or ALJ *in limine* to strike from the evidentiary record the portions of the prefiled direct testimony of Schreiner and Shieldcastle that are addressed herein, and to preclude that testimony from being presented at the hearing on this matter. For ease of reference the specific portions of Schreiner’s and Shieldcastle’s testimony that should be stricken are:

| Schreiner (LR Exhibit 1) | Shieldcastle (BSBO Exhibit 1) |
|--|--|
| Questions and Responses 8 through 15 Page 4, Line 13 through Page 11, Line 13 | Question and Response 8 Page 5, Line 11 through – the sentence beginning with “I was told...” and ending on line 13 with “...of that facility owner.” |
| | Question and Response 18 Page 31, Line 14 through Page 35, Line 8 |

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¹⁸ See *Early v. The Toledo Blade*, 130 Ohio App.3d 302, 318, 720 N.E.2d 107 (6th Dist.1998) (“The Supreme Court of Ohio has noted that a trial court is empowered, pursuant to Evid.R. 104(A), to make a ‘threshold determination’ concerning an expert witness’s qualifications to testify.”); *BSBO Ex. 1*, pp. 2-3; *Shieldcastle Test.*, 2:3-2:6 (“I obtained a Bachelor of Science degree in Wildlife Management from The Ohio State University in 1974. I had various statistical and study design workshops through my employment with the Ohio Division of Wildlife, DNR.”).

CERTIFICATE OF SERVICE

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Case No(s). 18-1607-EL-BGN

Summary: Motion in Limine to Strike Improper Intervenor Testimony and Memorandum in Support of Firelands Wind, LLC electronically filed by Christine M.T. Pirik on behalf of Firelands Wind, LLC