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House Public Utilities Committee
Chairman James Hoops
Opponent Testimony on House Bill 118
Testimony of Rachael Estes, Senior Manager of Government and Regulatory Affairs
Apex Clean Energy
March 23, 2021

Chairman Hoops and Members of the House Public Utilities Committee:

My name is Rachael Estes, and I am Senior Government and Regulatory Affairs Manager for Apex Clean Energy. Thank you for the opportunity to provide written testimony to share our company's concerns about House Bill 118.

Apex is a U.S.-based renewable energy company that has created \$9 billion in clean energy opportunity. We are managing the operation of 2.2 GW of wind and solar facilities in the U.S. and Canada, and we currently have over 20 GW under development, more than 800 MW of which are in Ohio. Our three wind projects in northern Ohio would power more than 235,000 homes with clean, carbon-free energy. Apex expects these projects to bring about \$350 million in direct benefits to Ohio through landowner payments, school payments, and county and township payments. The total private investment of these three projects combined will equal about \$1.5 billion. These projects will create about 300 construction jobs and 30 long-term local operations jobs.

OPSB applications for Republic Wind and Emerson Creek Wind were filed in February 2018 and January 2019, respectively, after 10 years of development and \$30 million in investment. In February 2020, we announced a power purchase agreement with AEP Energy for Emerson Creek Wind.

The development work to prepare these projects for the OPSB included extensive studies and analysis of geotechnical; ecological (streams, wetlands, wildlife, and vegetation); cultural (archaeological and architectural); and other socioeconomic factors, including sound, shadow flicker, and viewshed. These studies required the hiring of expert third-party consultants and produced high-quality technical results. Each of the applications for Emerson Creek and Republic are in excess of 5,300 pages and cost millions of dollars to produce.

Allowing a township to hold a referendum on the survival of a project *after* this level of investment has been made adds significant risk to the process at a late stage, and we expect that this excess risk will simply prevent developers from exploring renewable energy projects at all—across the entire state of

Ohio. It will effectively act as a moratorium on wind and solar in Ohio, because no investor will ever make the necessary investments to study a project when they have so little certainty that well-designed, safe, responsible projects will be allowed to proceed.

This bill also sets a very problematic precedent for other energy generation technologies, not to mention every other infrastructure project in the state. In fact, last year, when this bill was introduced, it only applied to wind generation, but now this bill affects solar generation as well, confirming the fear that this kind of legislation can amount to a “slippery slope” of increasing regulation and commercial uncertainty.

Perhaps most dangerous of all, this year’s version of HB118 seeks to *retroactively* apply township referendums to existing projects under consideration before the OPSB. There is clear legal precedent to support the conclusion that projects that are under OPSB consideration have vested rights, making HB118 a capricious regulatory policy at best and, at worst, an illegal and unconstitutional taking.

Article II of Ohio’s constitution contains an explicit prohibition on the retroactive application of the law, which prevents the state from invalidating a vested right based on a subsequent legislative enactment. That Article reads:

“The General assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.”¹

A bill that requires the Emerson Creek and Republic Wind projects, which have already entered the OPSB process, to comply with a new township referendum process as described in HB118 would constitute an illegal, retroactive application of law, impairing a previously vested right and imposing a new obligation. There is substantial case law supporting this conclusion, including in *Gibson v. Oberlin*.

In *Gibson v. Oberlin*, the Ohio Supreme Court considered a case concerning the issuance of building permits, which can be analogized to the issuance of certificates by OPSB.² The Court held that “the law in effect at the time of the application for the permit controls the issuance thereof.”³ The Court explained that where the property owner complied with all legislative requirements for the permit, “he has a right to such permit,” and subsequent legislation cannot deprive him of that right. The Court held that the property owner’s right to build became vested “upon the filing of the application for the permit.”⁴ In order to be constitutional, HB118 must, at a minimum, remove the retroactive provision.

While the retroactive provision is extraordinarily problematic, so too is the township referendum provision. Combined with the already restrictive 2014 setback law, the township referendum, and the retroactive provision, Ohio would become one of the most unfriendly business climates to develop clean energy in the country.

¹ Ohio Const., Art. II, § 28

² *Gibson v. City of Oberlin*, 171 Ohio St. 1 (1960).

³ *Id.* at 6.

⁴ *Ibid.*

Whether or not the intended effect, HB118 will serve as a moratorium on present and future clean energy investments in Ohio. Apex alone has around 1,000 hard-working, rural landowners in Ohio currently receiving annual lease payments. Those landowners will lose that yearly income they've come to rely on should HB118 become law. Communities will be prevented from seeing renewable energy-generated funding for their schools, roads, and facilities. Corporations that are clamoring for access to renewable energy will chose to build their headquarters and manufacturing plants in other states. And thousands of Ohio businesses, from hotels and restaurants to steel, concrete, fencing, distribution, engineering, security, excavating, construction, boring, landscaping, and electrical suppliers, will lose a huge opportunity to profit from wind and solar development projects.

We understand that renewable energy projects impact a community, and we agree that locals should have a voice in that process. But the existing OPSB process appropriately balances the need for local input with the greater energy needs of the state and its businesses. The legislation we are discussing today goes too far. It amounts to a de facto ban on the nation's two fastest-growing, job-creating industries for the entire state of Ohio, and it represents a dangerous overreach of government, which is why it has drawn such strong opposition from business groups like the Ohio Chamber of Commerce. The precedent this bill sets is alarming for any business, developer, or job creator in the state.

The vast majority of Ohioans support renewables. They recognize that renewables are cheaper, safer, and cleaner. Renewables are the present and the future. And even more important, 85% of Ohioans believe property owners have a right to do what they want with their land. This bill fundamentally changes that right.

As a company, we strive to be strong community partners. Though we understand that there will always be some individuals who do not wish to see a wind or solar project in their community, we do not believe HB118 is the appropriate response to those community members' concerns.

In closing, HB118 creates a moratorium on wind and solar development in the state. It unjustly takes landowners' income away from them and denies personal property rights. It sets a dangerous precedent and, applied retroactively, conflicts with Ohio's Constitution. At a time when Ohio should be working to entice new businesses to the state, this bill completely shuts the door on two of the fastest-growing industries in the nation.

I appreciate the opportunity to provide feedback on HB118, and I welcome an open dialogue moving forward to ensure a prosperous and robust renewable energy future in Ohio that appropriately addresses community members' concerns.

Thank you,

Rachael Estes

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Apex Clean Energy