



Court Square Building
310 4th Street NE, Suite 300
Charlottesville, VA 22902
T 434.220.7595 / F 434.220.3712
apexcleanenergy.com

Senate Energy and Public Utilities Committee

Chairman Steve Wilson

Opponent Testimony on Senate Bill 234

Testimony of Rachael Estes, Manager of Government and Regulatory Affairs

Apex Clean Energy

February 11, 2020

Chairman Wilson, and Members of the Senate Energy and Public Utilities Committee, my name is Rachael Estes, and I am the Government and Regulatory Affairs Manager for Apex Clean Energy. Thank you for the opportunity to provide written testimony to share our company's opposition to Senate Bill 234.

Apex is a Virginia-based renewable energy company that has commercialized \$7 billion in renewable energy projects in the United States. We are managing the operation of 1,600 MW of wind and solar facilities in the U.S. and Canada, and we currently have 17 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 (or more than half of the households in Columbus) with clean, carbon-free energy. These projects represent a combined \$320 million in direct investment (\$1.5 billion of private investment over the life of the project), and they would create about 365 high-quality Ohio jobs. Apex will also be paying almost \$150 million to over 1,000 landowners in Ohio over the life of the project.

Apex has been working to develop our projects in Ohio since 2009. In 2014, the Ohio legislature inserted a setback amendment into a budget bill (HB 483). That legislation single-handedly killed these projects as they had been designed. It took us years to rework project plans to comply with the new law, which required that we cut the projects' capacities in half within the same land footprint.

After nearly 10 years of development, \$30 million in investment, and years of site studies and data collection, we were able to file OPSB applications for Republic Wind and Emerson Creek Wind in February 2018 and January of 2019, respectively. In February 2020, we announced a power purchase agreement with AEP Energy, which will use the clean power from Emerson Creek to serve load to Google's New Albany Data Center. Apex Clean Energy also has identified a buyer for the energy from the Republic Wind facility, and we hope to be announcing details on that power purchase agreement soon.

It took us years to prepare these projects for the OPSB, during which time we undertook extensive studies and analysis including geotechnical; ecological (streams, wetlands, wildlife, and vegetation); cultural resources (archaeological and architectural); and many other important factors such as socioeconomic, sound, shadow flicker, viewshed, and more. These studies required the hiring of expert third-party consultants and produced high-quality technical results. The applications for Emerson Creek and Republic are each 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** that kind of investment has been made adds significant risk to the process at a late stage, and we expect that it will simply prevent developers from exploring renewable projects at all. It will effectively act as a moratorium on wind in Ohio, because no investors will ever make the necessary investments to study a project when they can have so little certainty that even a well-designed, safe, responsible project will be allowed to proceed. And make no mistake, this bill sets a very problematic precedent for all generation technologies, not to mention every other infrastructure project in the state.

In conversations with landowners, we've heard concerns that this could mean any legal, yet potentially controversial land use, could be a decision taken away from a landowner and given to their neighbors. If every member of a township—from a landowner to their neighbor to folks miles away—has an equal say in how the landowner chooses to use their land, then that landowner has no property rights. They have been blatantly stripped away.

The Ohio Chamber of Commerce also opposes SB234, knowing that such an anti-business and anti-investment bill will threaten the state's ability to attract job creators and investment more broadly, and destroy opportunities for Ohio's local economies. Each year, wind projects pay more than \$1 billion to state and local governments and private landowners nationwide.¹ Wind projects have strong positive economic ripple effects throughout communities, from county and school district tax revenue and landowner lease payments to local construction jobs, business opportunities for local vendors, and restaurant and hotel occupancy. In fact, Paulding County, which has seen \$700 million in renewable energy investments since 2013, actually received a boost in its bond rating from an A1 to an Aa3 by Moody's Investor Service, largely due to the presence of its wind farms.²

You have been told by bill proponents that Ohioans broadly oppose wind projects in the communities in which they are proposed, and that "On average 30 percent of the turbines are on lands owned by absentee landowners." We saw no citation for this claim and for our projects, it is demonstrably false. Ninety-five percent of our landowners are locals.

But claims about participant residency are not the only inaccurate claims you have heard from bill proponents. There have also been claims that developers are not transparent or accessible and that we're dishonest or manipulative. These claims are also untrue. As mentioned previously, Apex has been working on Emerson Creek and Republic for over 10 years, and during that time, we have held numerous public information sessions, created a public website to share updates and information on the projects, run ads in local newspapers, conducted interviews with local media, presented at local government meetings, maintained an engaged presence on social media, offered numerous ways for people to contact us (including email, phone, and in person), and staffed a public office in the project area. This is not and has never been a hurried process done in secret. We strive to be communicative with all interested residents, and we work hard to address concerns in a transparent and timely fashion.

Finally, and perhaps most important, while we strongly believe that SB234 sets a dangerous precedent for all energy generation siting (and possibly all forms of development), and tramples on personal property rights, we also believe that SB234 and its companion, HB401, are unconstitutional in their current forms if applied to projects currently pending at OPSB.

¹ <https://www.awea.org/wind-101/basics-of-wind-energy/wind-facts-at-a-glance>

² https://www.moody.com/research/Moodys-upgrades-Paulding-County-OHs-GO-to-Aa3--PR_905632179

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 law 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.”³

A bill that seeks to require the Emerson Creek Wind and Republic Wind projects, which have already entered the OPSB process, to comply with a new township referendum process as described in SB234/HB401 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 Ohio Supreme Court precedent *Gibson v. Oberlin*.

In *Gibson*, the Court considered a case concerning the issuance of building permits, which can be analogized to the issuance of certificates by OPSB.⁴ The Court held that “the law in effect at the time of the *application for the permit* controls the issuance thereof.”⁵ (Emphasis added). 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.”⁶ Subsequent caselaw is equally strong on this point.

In order to pass constitutional muster, SB234 and HB401 must, at a minimum, apply prospectively, not retroactively. Language should be included to this effect that would grandfather projects that have already assembled land and spent millions of dollars in development costs and are now pending before the Ohio Power Siting Board. The Ohio Constitution demands as much.

In closing, SB234 threatens to severely harm Ohio's economy and denies personal property rights. It sets a dangerous precedent and, applied retroactively, conflicts with the state constitution.

I appreciate the opportunity to provide feedback on SB234 and welcome an open dialogue moving forward to ensure a prosperous and robust renewable energy future in Ohio.

Thank you,

Rachael Estes
Manager, Government and Regulatory Affairs
Apex Clean Energy

³ Ohio Const., Art. II, § 28

⁴ *Gibson v. City of Oberlin*, 171 Ohio St. 1 (1960).

⁵ *Id.* at 6.

⁶ *Id.*