IN THE SUPREME COURT OF OHIO

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Facility Located in Allen and Auglaize Counties, Ohio.	:	Case No. 2023-1011
	:	On direct appeal from the Power Siting Board
	:	Case No. 20-1605-EL-BGN

APPELLANT BIRCH SOLAR 1, LLC'S MERIT BRIEF

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    c. **The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B).**

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I. INTRODUCTION

This case presents an important question that will have long-lasting effects on every single case before the Ohio Power Siting Board: does the Board's consideration of public interest, as one of eight different factors it considers under R.C. 4906.10(A) approving an application, permit any local government to unilaterally veto any large-scale generation project and the investment it brings to Ohio? For decades, the answer from the Board has been no. But without any statutory change or any decision by this Court saying otherwise, the Board denied an application for a solar-powered energy facility proposed by Birch Solar solely because of unsworn statements by local government officials "whose constituents are impacted by the Project."

The Board's decision here is not only wrong and unsupported by the facts, but, more concerning, it upends the entire purpose of the statewide siting regime for large-scale generation projects. Perhaps a few local elected officials oppose the Project for reasons that are not specified, may be without merit, and are not analyzed by the Board. But such local elected officials should not have a veto over a large-scale generation project that benefits *all* Ohioans. The Board, unfortunately, ignored the benefit to many because of the opinions of a few. This is not a proper consideration of the public interest and ignores the plain language of the law, decades of precedent from the Board and the Court, and public policy.

There are a few problems with the Board's decision. First, the Board failed to apply its own long-standing precedent as to what "public interest" means in the context of the R.C. 4906.10(A) factors for considering a large-scale generation project application. Second, the Board relied upon unsworn claims that are not supported by the actual evidence in the record. Third, the Board exceeded the scope of its authority and violated separation of powers when it determined the environmental compatibility and public need of the Birch Solar Project. Finally, the Board distorted the application of a recently passed legislation by applying it retroactively to this case.

The Board's Order denying Birch Solar's application for a solar-powered energy facility, was unlawful and unreasonable. It should be reversed and remanded with instructions to grant Birch Solar a certificate to construct its solar project.

II. STATEMENT OF FACTS

The facts in this case are not particularly in dispute. While the Board misapplied the facts and considered unsworn testimony, what actually occurred before the Board is not in dispute. This brief will provide a short overview of the statewide siting regime and also provide the relevant facts for the Court's consideration.

A. R.C. Chapter 4906's Siting Regime.

Ohio law outlines a comprehensive, multi-phased certification process for siting projects that fall within the definition of a "major utility facility," which includes a solar farm of 50 megawatts (MW) or greater. *See generally* R.C. Chapter 4906; *see also* R.C. 4906.01(B)(1)(a).

Before a project developer can even file an application before the Ohio Power Siting Board, it must hold a public information meeting in the locality of the project.

Once a major utility facility application is submitted, the developer works with the Board's staff ("Staff") to provide any supplemental information requested. Once Staff is satisfied that all necessary information has been provided, it declares the application "complete" and schedules a public hearing in the locality of the project and the adjudicatory hearing. R.C. 4906.07(A). At this point, the project is required to provide notice to each municipal corporation, county, and township within the project area that, among other things, (1) a public hearing and adjudicatory hearing have been set, and (2) they have a right to intervene in the proceeding. O.A.C. 4906-3-09.

At the public hearing, the public is invited to offer testimony supporting or opposing the project. R.C. 4906.08(C). Prior to the public hearing, Staff submits a Staff Report of Investigation that provides a summary and analysis of the project, an application of the project against the R.C.

4906.10(A) factors after applying recommended conditions of approval, and an overall recommendation to the Board about the project application. R.C. 4906.10(A). In In the case of Birch Solar, the Staff Report was submitted a few weeks prior to the local public hearing.

Then, an adjudicatory hearing is held before an administrative law judge. O.A.C. 4906-2-09. Prior to that hearing, all parties may submit pre-drafted direct testimony from their witnesses. O.A.C. 4906-2-09(B)(7). The admission of evidence and any cross examination is accomplished at the hearing. At the conclusion of the hearing, the application, the Staff Report, and the evidentiary record are all submitted to the Board for consideration.

The General Assembly established eight certification determinations the Board must make when considering whether to grant or deny an application:

(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, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.

(4) That 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.

(5) 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.

(6) That the facility will serve the public interest, convenience, and necessity.

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site

of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

R.C. 4906.10(A)(1)-(8). The Board issues a decision on the application in light of these eight determinations.

Once the Board issues a decision, any party may file an application for rehearing within thirty days. R.C. 4903.10. The Board may grant and hold a rehearing "if in [the Board's] judgment sufficient reason therefor is made to appear." *Id.* A party is required to file an application for rehearing prior to appealing the Board's order to this Court. *Id.*

B. Birch Solar's Application.

Birch Solar submitted its Application to the Ohio Power Siting Board on February 12, 2021 and, on July 2021, the Board's Staff determined that the Application was complete. The Application sought to construct and operate an electric generating facility that uses photovoltaic ("PV") technology, commonly known as a solar farm. The Project Area would encompass PV solar panels (modules), trackers (racking system), inverters, collector lines, internal access roads, and a substation on approximately 1,410 acres of private land secured under option agreements for long-term leases with local farmers in Shawnee Township, Allen County and Logan Township, Auglaize County, Ohio. (Application Narrative, filed February 12, 2021 at 2, 6; Suppl. 016, 020.)

The Staff Report was filed on October 20, 2021. (Staff Report of Investigation Recommending Denial of Certificate, filed October 20, 2021, "Staff Report"; Suppl. 176.) The Staff Report found that the Project would protect the local agricultural land and heritage by maintaining "the existing agricultural land's typical low population densities by physically limiting

other types of concurrent land use development on the leased properties." (Staff Report, at 47; Suppl. 226.) However, the Staff Report recommended that the Project could not be safely developed due the potential for unmapped abandoned oil and gas wells in the area. (Staff Report, at 23-27; Suppl. 202-206.) Following additional work by Birch Solar to address this concern, Staff agreed that the Project could safely construct the arrays in proximity to abandoned wells. (Pre-filed Testimony of James S. O'Dell, filed May 11, 2022, at, 4: 9-14; Suppl. 405.) ("Applicant has * * * rectified these issues to Staff's satisfaction by filing sufficient information and analysis in the docket.")

C. The Local Public Hearing and the Hearing before the Board.

The Board held a local public hearing in this matter on November 4, 2021, where both supporters and opponents provided testimony. For example, the superintendent of the Shawnee School District explained the importance of the Project's payment in lieu of taxes ("PILOT") to the district, testifying that the "money would go directly to the school, we wouldn't lose any of our local state funding, and that money would be able to be allocated for gifted [students], for programs that meet student needs, for additional resources that our kids desperately need." (Local Public Hearing Tr. at 93, filed Nov. 10, 2021; Suppl. 244.)

On April 26, 2022 and May 16, 2022, the local opponents of the project, including the community group Against Birch Solar, resolved their concerns with the Project and withdrew from the proceeding. (Notice of Withdrawal from Intervention, filed May 16, 2022; Suppl. 439.)

On May 16, 2022, Birch Solar, the local community coalition Allen Auglaize Coalition for Reasonable Energy ("AACRE"), the Ohio Farm Bureau Federation ("OFBF"), the Auglaize County Commissioners, the Logan Township Trustees, and IBEW Local 32 filed a stipulation for adoption by the Board. (Joint Stipulation, filed May 16, 2022; Suppl. 442.) This stipulation was an agreement amongst the parties to "resolv[e] all matters pertinent to the certification and

construction" of the Birch Solar Project. (*Id.* at p.1; Suppl. 442.) More specifically, Birch Solar, AACRE, OFBF, and IBEW "recommend[ed] that the Board issue [a] Certificate of Environmental Compatibility and Public Need for the facility." (*Id.* at p.2; Suppl. 443.) The Auglaize County Commissioners and the Logan Township Trustees took "no position on whether a certificate should be issued for the facility" and agreed that certain conditions should be included in the Certificate if it were to issue. (*Id.*) Every party joined the stipulation except for two: (1) the Shawnee Township Trustees and (2) the Board's Staff.

The evidentiary hearing was called and continued on November 30, 2021, and then recommenced and concluded on May 18, 2022. At the hearing, only Birch Solar, AACRE, and the Board's Staff presented pre-filed direct testimony. (*See* Transcript for Hearing Held May 18, 2022, filed May 27, 2022; Suppl. 475.) The Shawnee Township Trustees did not submit any testimony at all. The Auglaize County Commissioners and Logan Township Trustees also did not submit any testimony, consistent with their representation in the stipulation that they took "no position on whether the project should be certified by the Board." (Order, at ¶ 39; Appx. 056.) The only other local government in the project area, the Allen County Commissioners, did not intervene and were never a party. In short, none of the four local jurisdictions submitted *any* evidence against the Birch Solar Project. One did not participate at all (Allen County), two were explicitly neutral (Auglaize County and Logan Township), and one did not submit any actual evidence or testimony (Shawnee Township).

After the hearing, the parties—including the favorable intervenors—filed post-hearing briefs. The Board's Staff also filed a post-hearing brief and, in a departure from its initial finding in the Staff Report, argued for denial of the Project "based on the opposition of the local elected officials" in Shawnee Township, Auglaize County, Allen County, and Logan Township. (Initial

Brief Filed on Behalf of the Staff of the Ohio Power Siting Board at 3, filed July 15, 2022; Suppl. 547.) The Board's Staff did not, and could not, have cited to any part of the record before the Board to support this proposition.

D. The Board's decision.

On October 20, 2022, the Board rejected the proposed stipulation and denied Birch Solar's Certificate. (Opinion & Order denying the application of Birch Solar 1, LLC for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of the proposed solar-powered electric generation facility, "Order," filed October 20, 2022; Appx. 051.)

In the Order, the Board only issued a decision on one of the eight statutory factors: public interest. (Order, ¶ 73; Appx. 072.) "Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 72; Appx. 071.) "As such, determinations as to the remaining R.C. 4906.10(A) factors – (A)(2), (A)(3), (A)(4), (A)(5), (A)(7), and (A)(8) – are unnecessary." (*Id.* at ¶ 73; Appx. 072.) The Board did note, however, that its Staff agreed that all other factors were met. (*Id.*)

E. The requests for a rehearing.

On November 21, 2022, Birch Solar, AACRE, and IBEW filed applications for rehearing. (Application for Rehearing of Birch Solar I, filed November 11, 2022; Appx. 80; Joint Petition for Rehearing and Memorandum in Support, filed November 21, 2022; Suppl. 560.) These applications were denied by the Board seven months later on June 15, 2023. (Order on Rehearing denying the applications for rehearing filed by Birch Solar, LLC and jointly filed by intervenors

Allen Auglaize Coalition for Reasonable Energy and the International Brotherhood of Electrical Workers, Local Union 32, filed June 15, 2023; Appx. 122.)

Birch Solar timely appealed. (Notice of Appeal, filed August 11, 2023; Appx. 001.)

III. LAW AND ARGUMENT

When considering a certificate for the construction of a large-scale utility generation project, the Board must make eight substantive determinations set forth in R.C. 4096.10(A). Only one is at issue here: "that the facility will serve the public interest, convenience, and necessity." R.C. 4906.10(A)(6). "As a creation of statute, the board may exercise only the powers granted to it by the General Assembly." *In re Application of Firelands Wind, L.L.C.*, Slip Opinion No. 2023-Ohio-2555, ¶ 10. The Board failed to properly consider the public interest and, in fact, distorted the very meaning of the public interest. As result, the Board's decision should be reversed and remanded with instruction that Birch Solar should be granted a certificate to construct its solar project.

The Court may reverse, modify, or vacate an order of the Board when, upon consideration of the record, the order "was unlawful or unreasonable." R.C. 4903.13; R.C. 4906.12. Birch Solar bears the burden of establishing that the Board's order here was unlawful or unreasonable. There are two considerations to this—both unlawful *and* unreasonable. Each has a different meaning.

When looking at whether the Board's order was unlawful, the Court looks at legal questions: "questions like what is the proper interpretation of a statutory term, or whether the board followed the procedures prescribed by statute, or by its own regulations." *In re Application of Firelands Wind, L.L.C.*, at ¶ 12. The review of these questions of law is de novo. And, important here, the Court "is *never* required to defer to an agency's interpretation of the law." *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, Slip Opinion No. 2022-

Ohio-4677, ¶ 3. *See also In re Application of Alamo Solar I, L.L.C.*, Slip Opinion No. 2023-Ohio-3778, ¶ 12.

The "unreasonable" part of the standard requires that the "agency's exercise of its implementation authority must fall within the zone of permissible statutory construction." *In re Application of Firelands Wind, L.L.C.* at ¶ 15. Additionally, the Court has "found an agency's decision unreasonable when the decision is manifestly contrary to the evidence in the record or when the evidence clearly isn't enough to support the decision." *Id.* at ¶ 16, citing *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 26, 41; *Schwerman Trucking Co. v. Pub. Util. Comm.*, 10 Ohio St.2d 253, 258, 227 N.E.2d 217 (1967). "The same goes for when an agency's order is internally inconsistent." *Id.*

The Board's decision here was both unlawful and unreasonable. As a result, the Court should reverse the Board's decision and remand with instructions to grant a certificate to Birch Solar to construct the solar project.

<u>ASSIGNMENT OF ERROR NUMBER ONE</u>: THE ORDER IS UNREASONABLE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT.

The crux of this case is the Board's misinterpretation and misapplication of the "public interest." The Board is required to decide whether the facility "will serve the public interest, convenience, and necessity." R.C. 4906.10(A)(6). But what is the "public interest"?

The General Assembly only mentioned "public interest" once in the siting-board statutes—when requiring the Board to determine whether the facility serves the public interest, convenience, and necessity. R.C. 4906.10(A)(6). There is nothing in R.C. Chapter 4906 that defines what public interest means.

The everyday definition is "the welfare or well-being of the general public, or "the public good" or a benefit or advantage to the general public. *See* Oxford English Dictionary, *available at* https://www.oed.com/search (last accessed October 8, 2023); *see also* Collins English Dictionary (2023). This tracks with how the phrase is commonly used—the common good.

Prior decisions from Ohio courts also offer some insight. Candidly, few courts have tried to define "public interest." The Eighth District attempted to, and looked at a decision from the Oklahoma Supreme Court for guidance. The public interest "means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as to the interest of the particulars localities, which may be affected by the matters in question." *State ex rel. Ross v. Guion*, 82 Ohio Law Abs. 1, 161 N.E.2d 800 (8th Dist.1959), quoting *State ex rel. Glenn v. Crockett*, 86 Okl. 124, 206 P. 816, 817 (1922).

In *In re Application of Duke Energy Ohio, Inc.*, this Court acknowledged that the "public interest" determination in R.C. 4906.10(A)(6) necessarily takes into account the public's desires. 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 30 (juxtaposing the "public interest" determination with the "need" determination requirement in R.C. 4906.10(A)(1)). There, the Court recognized that addressing safety concerns with a project were sufficient to satisfy the public interest. *Id.* at ¶ 53-71.

The Board long took this approach. For decades, the Board ruled that a major utility project's larger benefits to the general public—that is, for the common good of Ohioans generally—was the relevant consideration, not just local disapproval. *See, e.g., In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, Opinion and Order, 2019 OHIO PUC LEXIS 1497 at 82-83, November 21, 2019. Even when there were "thousands of comments" from local organizations,

local officials, and local residents in opposition, the benefit to the general welfare—that is, the public interest—prevailed. *Id.*; *see also In the Matter of the Application of Champaign Wind*, LLC, 12-160-EL-BGN, Opinion and Certificate, 2013 WL 2446463 at 3, May 28, 2013. Even in this case, the Board recognized this long-standing standard: "[T]he determination of public interest, convenience, and necessity must be examined through a broad lens." (Order, ¶ 68; Appx. 068-69.) So far, so good.

But that is not the standard the Board actually used here. The Board ignored actual (and robust) evidence in the record to show that the Birch Solar Project provides significant benefits to the general public, contrary to its obligations under R.C. 4906.10 and this Court's directive in *Duke Energy Ohio*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 30. And, instead of following the standard required by law, relied upon opposition from local governments—none of which was supported in the record. In doing so, the Board acted unlawfully, unreasonably, and against the manifest weight of the evidence in denying the Birch Solar Project.

1. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development.

In the past, the Board has routinely looked to the long-term importance of solar development in supporting and growing the local economy when making its public-interest determination. For example, the Board has concluded that "as energy and environment costs rise, and technology advances, solar-powered generation provides a sustainable, long-term, competitive energy solution to both residents and businesses." *See, e.g.*, *In re Hardin Solar Center II*, 18-1360, May 16, 2019, Opinion and Order, 2019 Ohio PUC LEXIS 548 at 25. In over thirty prior cases, the Board and its Staff have acknowledged that a solar facility would have an overall positive

impact on the local economy due to the increase in construction spending, wages, purchasing of goods and services, annual lease payments to the local landowners, and PILOT revenue.[1]

The record here is full of these economic benefits. The Project's Application and Socioeconomic Report (Exhibit G to the Application; Suppl. 106) set forth the following economic benefits:

- Approximately 400 to 500 jobs will be created during construction both onsite and with related services and 5-10 jobs during the O&M stage, (Application at 27; Suppl. 041; Exhibit G at 4; Suppl. 112.);
- Construction of the Project will result in a payroll of $32 million to $39 million during the 12-18 month construction window, (Application at 27; Suppl. 041; Exhibit G at 4; Suppl. 112.);
- During the 35-year operational life of the Project, payroll related to operations is expected to total $350,000 to $700,000 annually. The present value of the total payroll from operations, assuming a 9% discount rate and 2% escalation rate is between approximately $4.6 to $9.2 million, (Application at 27; Suppl. 041.);
- An additional approximately 225 to 300 jobs could be created within the supply chain and induced job markets during construction, in addition to the 400 to 500 direct construction jobs. Further, during operations, approximately 18 to 25 supply chain and induced jobs could be created from O&M activities, in addition to the direct on-site jobs, (Application at 28; Suppl. 042; Exhibit G at 4; Suppl. 112.);
- Based on direct, indirect, and induced jobs for the Project and associated multiplier effects during construction, the Project will have an economic output of between approximately $70 million and $90 million, (*id.*); and,
- During the O&M phase of the Project, the total annual economic benefit would be approximately $3.8 to $5.5 million, (*id.*).

Birch Solar also anticipates entering into a PILOT agreement in Allen and Auglaize Counties, with estimated payments of approximately $2.1 to $2.7 million annually and approximately $73.5 million to $94.5 million throughout the life of the Project. (Application

[1] *See, e.g., Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, 2021 WL 5496904 at ¶ 66. (*See also* Application for Rehearing, filed November 21, 2022, p. 7 at fn. 3; Appx. 089 (collecting prior cases.))

Exhibit G at 5; Suppl. 113.) The PILOT will, in part, provide funding to the Shawnee School District for badly needed school improvements. The superintendent of the Shawnee School District testified before the Board that the "money would go directly to the school, we wouldn't lose any of our local state funding, and that money would be able to be allocated for gifted [students], for programs that meet student needs, for additional resources that our kids desperately need." (Local Public Hearing Tr. at 93, filed Nov. 10, 2021; Suppl. 244.)

The Birch Solar Project also has the opportunity to economically benefit neighboring residents of the Project through Birch Solar's Neighboring Landowner Financial Benefit, where any home within 500 feet of the Project will receive a payment ranging from $10,000 to $50,000 depending on proximity. (Application Exhibit G at 6; Suppl. 114.) Birch has also committed to a $500,000 community development fund to be used at the community's discretion. (*Id.*)

The evidence in record—all uncontested—is that the Birch Solar Project would greatly benefit the local economy.

2. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide.

Once more, the evidence was uncontested and unrefuted that Birch Solar Project would provide significant economic benefits to the region and the State of Ohio as a whole. (Application Exhibit G at 6; Suppl. 114.) These benefits go straight to the "broad lens" public-interest analysis required by R.C. 4906.10(A)(6).

The Ohio Chamber of Commerce noted in this case[2] that "[t]he Birch Solar Project is consistent with our mission to champion free enterprise, economic competitiveness, and growth

[2] Birch does not believe that non-evidentiary Public Comments should have swayed the Board. However, in light of the Board's reliance on negative Public Comments in its Order, positive

for all Ohioans. Specifically, the Ohio Chamber notes the myriad of ways that Birch will serve the public interest and provide local, regional, and statewide economic benefits." (Ohio Chamber of Commerce Public Comment, filed September 23, 2022; Suppl. 554.) The Ohio Chamber also stressed that solar development generally, and the Birch Solar Project specifically, is critical for Ohio to compete nationwide: "Ohio is in a constant race against other states to attract business. Those businesses are increasingly demanding renewable energy—especially affordable solar energy—from the states in which they choose to locate." (*Id.*)

Similarly, the Lima/Allen County Chamber of Commerce supports the Project, noting that the "Birch Solar project will bring additional investment dollars into the community while helping to power area businesses and the local economy. Projects like Birch Solar allow for energy investment and other economic benefits to remain local." (Public Comments concerning the Birch Solar Project filed by Jed E. Metzger, filed December 7, 2020; Suppl. 579.)

A growing and critical industry in Ohio has likewise made these points. The Data Center Coalition, the national trade association for the data center industry, has urged the Board to "take all relevant public benefit factors, including, but not limited to, statewide economic development, job creation, reduced energy costs and emissions for Ohio ratepayers, and new local revenues, into consideration when making a public interest determination for new projects." *In the Matter of the Ohio Power Siting Board's Review of Ohio Adm. Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7*, Case No. 21-0902-GE-BRO, Comments filed on behalf of Data Center Coalition, filed August 5, 2022; Appx. 181.

The Birch Solar Project is in the economic interests of the entire State.

Public Comments from respected economic organizations should at least have been given similar consideration.

3. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture.

The Board was not faced with a choice between Ohio's agricultural heritage and a new solar industry. The two go hand-in-hand. The Board has long recognized that large-scale solar projects are a good fit for agricultural communities. This is because solar projects are "consistent with agricultural industry support, in that the facility would provide supplemental income to farmers and the land could be returned to agricultural production upon decommissioning."[3] In many cases, the Board and its Staff have indicated that a solar project's creation of a pollinator habitat would enhance the visual appeal of the project, enrich local wildlife habitat, benefit the local farming community, increase plant diversity, improve water quality, and discourage invasive species.[4]

Here, the Birch Solar Project presents numerous benefits that are consistent with and would provide a benefit to the local agricultural industry. The Project would preserve and enhance farmland over the long-term, something that Shawnee Township identified as a top priority in their Comprehensive Plan. (Response to Fourth Data Request from Staff of the Ohio Power Siting Board, filed April 12, 2021; Suppl. 119.) It would also provide critical income to farmers participating in or contracting with the Project, and diversify the local agricultural opportunities. (Application at 17-18; Suppl. 031-32.)

[3] *See, e.g., Hardin Solar Energy LLC*, 17-0773-EL-BGN, Staff Report, entered November 21, 2017, at 12. (*See also* Application for Rehearing, filed November 21, 2022, p. 11 at fn. 8; Appx. 093 (collecting prior cases.)

[4] *See, e.g., Hardin Solar Energy LLC*, 17-0773-EL-BGN, Opinion, Order, and Certificate, entered February 15, 2018, 2018 Ohio PUC LEXIS 157 at ¶ 36. (*See also* Application for Rehearing, filed November 21, 2022, p. 12 at fn. 9; Appx. 094 (collecting prior cases.))

As in the prior solar projects approved by the Board, the Project would protect the local agricultural land and heritage by maintaining "the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties." (Staff Report, at 47; Suppl. 226.) Further, the land would be restored upon decommissioning in measurably *better* farming condition than it is in today. As the Board and Staff have indicated in other cases, by allowing the land to rest under restorative pollinator-friendly groundcover, the soil would be healthier and more productive whenever farming operations resume.[5]

The Staff Report made this exact point:

> Based upon the Applicant's collective data responses and Staff's examination of existing land uses, Staff opines that the proposed project would reinforce the continued low population density levels in the project area. Solar projects maintain the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties (with the notable exception of some continuing agricultural activities) and employing very few operations personnel to burden community services. This continuation of low population density also benefits the adjacent higher population density areas as increased high-density land uses are not able to be physically adjacent and adverse aesthetic impacts are mitigated by landscape screening.

(Staff Report, at 47; Suppl. 226.)

The Shawnee Township Comprehensive Plan also designates the land within the Project Area as land to be used as agricultural in their Future Conceptual Land Use Map. (Application at 72; Suppl. 086.) Birch Solar took Shawnee Township's Comprehensive Plan into consideration when it designed the Project and sought to maintain the agricultural aesthetic of the area by incorporating cedar farm fencing, and desired to allow sheep grazing within the Project. (*Id.*) The

[5] *See, e.g., Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, 2021 WL 4974120 at ¶ 65. (*See also* Application for Rehearing, filed November 21, 2022, p. 14 at fn. 11; Appx. 096 (collecting prior cases.))

life of the Project corresponds with the long-term goals of the Comprehensive Plan: maintaining long-term agricultural use rather than industrial or residential zoning. (*Id.*)

The Birch Solar Project also partnered with The Ohio State University, College of Food, Agricultural and Environmental Sciences to conduct research relating to honey bee foraging in the Ohio agroecosystem. (Application at 63; Suppl. 077.) To facilitate this study, honey bee colonies (apiaries) would be established on the landscape through The Ohio State University and managed by local beekeepers. (*Id.*) Studies have shown that co-locating solar with pollinator friendly groundcover can expand habitat for the dwindling bee population and can also benefit local agriculture. (*Id.*)

The record establishes that the Birch Solar Project will enhance the local agricultural industry and heritage. The Board, despite the Staff Report setting forth the benefit of the Project and its own prior precedent recognizing this important benefit under R.C. 4906.10(A)(6) did not protect this benefit in its public-interest determination.

4. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply.

Solar projects, including the Birch Solar Project, benefit the public by providing increased, diversified, and affordable energy generation. The Board and its Staff have routinely recognized this benefit: "the facility would serve the public interest, convenience, and necessity by proving additional electrical generation to the regional transmission grid, would be consistent with plans for expansion of the regional power system, and would serve the interests of electric system economy and reliability."[6] The United States Department of Energy likewise recognizes that

[6] *See, e.g.*, *Hardin Solar Energy LLC*, 17-0773, Staff Report, entered November 21, 2017, at 25. (*See also* Application for Rehearing, filed November 21, 2022, p. 15 at fn. 12; Appx. 097 (collecting prior cases.))

homegrown, decentralized energy generated by solar farms is key to a stable power supply and to national security.[7]

The Board has also recognized that an "electric generation facility will provide a clean, sustainable source of electricity that will improve the quality and reliability of electric service in the area." *Hardin Solar Energy LLC*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at 2018 Ohio PUC LEXIS 157 at ¶31; *Vinton Solar Energy Facility*, 17-0774, Opinion, Order, and Certificate, entered September 20, 2018, 2018 Ohio PUC LEXIS 947 at ¶ 94. This is particularly important because, as the unchallenged testimony on behalf of Allen Auglaize Coalition for Reasonable Energy ("AACRE") set forth, "Allen County has often been classified by the USEPA as one of the top emitters of toxic air pollution among all Ohio's counties, at times topping the list." (Testimony of T. Rae Neal on Behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022, at ¶¶ 20-22; Suppl. 429.)

But, again, the Board ignored its prior precedent public-interest determinations and the evidence regarding this benefit in this case.

5. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells.

One understandable public-interest concern that was considered during the course of the Birch Solar Project was the Project's proximity to a historic oil and gas field. As Staff explained:

> This project is partially located within the mapped boundary of the Lima Consolidated Oil Field, which is a portion of * * * Lima Findlay Trenton Field. The project's proximity to this field is of importance due to the many orphan wells associated with the 1800's oil and gas drilling and development which took place during a period of no regulatory oversight

[7] United States Department of Energy Office of Energy Efficiency and Renewable Energy, *Energy Independence and Security,* available at: https://www.energy.gov/eere/energy-independence-and-security

(Staff Report, at 24; Suppl. 203.) This caused the initial Staff Report to note that the potential for unmapped abandoned oil and gas wells could present problems with safe development of the Project. (Staff Report, 23-27; Suppl. 202-206.) More specifically, a preliminary investigation of the Project area suggested that sixty oil and gas wells were potentially within the Project area. (*Id.* at 27; Suppl. 206.) In other words, Staff did not find a problem with the Project, but found that the property comprising the Project area itself was potentially unsuitable for any type of development.

Birch Solar spent significant resources and time to research—and fix—this issue raised by the Board's Staff. Birch Solar conducted extensive investigation of the Project area and, coordinating closely with the Ohio Department of Natural Resources, created a comprehensive Engineering Constructability Report. (Response to Staff Data Request 10, filed December 30, 2021, at Att. 1; Suppl. 251.) This Report found that, not only was the Project able to be safely constructed but, "during the 35-year operational life of the Project, the oil and gas wells within the Project area pose less of a human health risk than other potential land uses because of the minimal excavation for construction, minimal need for onsite operations or disruptions and secure nature of the facility with the Project fencing." (*Id.* at 5; Suppl. 257.) The report with ODNR acknowledged that solar facilities are typically good uses of properties littered with historic oil and gas locations because of the minimal earth moving involved with solar projects. (*Id.*) The ODNR report specifically noted that "[t]he Birch Solar Project development preserves the land and ensures limited additional development of the site for the next 35 years or more, which can reduce potential impacts that might be associated with other types of development that include more intense excavations, grading of the site and possible disruption of the historic oil and gas features." (*Id.* at 15; Suppl. 267.) (*See,* Direct Testimony of Thomas E. Stewart, filed May 4, 2022; Suppl. 392.)

Following Birch Solar's efforts, the Board's Staff changed its assessment and agreed that the Birch Solar Project addressed concerns regarding constructing the arrays in proximity to abandoned wells. (Order, at ¶ 49; Appx. 061.) (*See also* Pre-filed Testimony of James S. O'Dell, filed May 11, 2022, at, 4: 9-14; Suppl. 405) ("Applicant has * * * rectified these issues to Staff's satisfaction by filing sufficient information and analysis in the docket.")

The Birch Solar Project would not only uniquely benefit a property burdened with abandoned oil and gas wells; the Project ensured that *no* safety concerns existed because of those abandoned wells. The Board did not factor this safety provision into its public-interest determination, despite typically doing so. *See, e.g., In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472.

As set forth above, the Birch Solar Project provided unrefuted evidence of recognized public benefits, both local and statewide. Despite this, the Board diverged from decades of precedent to block private landowners from using their property for the Birch Solar Project based on nothing more than baseless complaints from (some of) their neighbors. The Order needlessly deprives the landowners of their property rights, the Birch Solar Project from constructing a technically and environmentally sound project, and Ohio as a whole from enjoying the public benefits that the Board is supposed to encourage and facilitate.

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT.

This Court has recently reinforced that the Board must look to the "evidence in the record" in making its R.C. 4906.10 determinations. *In re Application of Firelands Wind, L.L.C.*, Slip Opinion No. 2023-Ohio-2555, ¶ 16. The Board blindly relied upon unsupported and inconsistent opinions against the Project, even where the Board itself found that the allegations were unfounded

or untrue. This was done in error. The Board compounded this error by failing to consider any conditions to mitigate concerns regarding the Project, despite evidence in the record that such conditions would be appropriate and acceptable to the local governments.

1. It was unreasonable, unlawful for the Board to rely on allegations of Project unsuitability that were unsupported or disproven in the record.

The Board plainly stated that it denied the Birch Solar Project because it believed the local governments were opposed to the Project. When the Board determines that a local government's opinion about a solar project has no evidentiary basis, however, the Board cannot defer to that opinion. *See In re Application of Firelands Wind, L.L.C.*, 2023-Ohio-2555, ¶ 16 (declining to overturn a Board decision based on allegations of karst risk where "[t]he problem is that the record does not support the residents' assertion that the entire light-green-shaded area represents 'areas of moderate or high karst risk'".)

None of the four involved local governments offered evidence into the record. One did not participate at all (Allen County), two were explicitly neutral (Auglaize County and Logan Township), and one did not submit any actual evidence or testimony (Shawnee Township). So, the Board simply relied on their opinions expressed outside the record—current or not–and rejected the Project. For example, the Board noted that "the Auglaize County Board of Commissioners raised *concerns* regarding 'numerous potential impacts on users and property owners in the vicinity of such developments' and 'considered the potential impacts of development as well as the interest of property owners in making their land available for development.'" (Order, ¶ 64; Appx. 067.) The Board also pointed to Allen County officials' *concerns* regarding the "Project's (1) lack of dedicated local power, (2) impact on land use, (3) impact on property values, (4) decommissioning plan, (5) impact on drinking and groundwater, (6) road maintenance,

(7) drainage, and (8) communication regarding negotiations as to distributing PILOT to local governments." (*Id.* at ¶ 63; Appx. 066-67).

To be sure, Auglaize and Allen Counties did, at one point, express their opinions against the Project. (*Id.*) What they did not do, however, was submit any *evidence* supporting these opinions. The Auglaize County Commissioners did not participate in the adjudicatory hearing and, as the Board acknowledged, took "no position on whether the project should be certified by the Board" by the time of the hearing. (Order, at ¶ 39; Appx. 056.) The Allen County Commissioners were not even a party to the case. Staff, for its part, did not find any of these concerns to be credible in its own assessment of the Birch Solar Project. (*See generally,* Staff Report; Appx. 138.)

The lack of *any* evidence should have caused the Board to ignore mere opinions. The Board, after all, has done just that—holding opponents to their burden of proof and disregarding allegations of harm that had no evidentiary support. In *Ice Breaker Windpower, Inc.*, the Board noted that local opponents argued that the project would cause electricity costs to rise, but "provided no evidence demonstrating that * * *rates would increase as a result of the power purchase agreement, apart from the bare allegations proffered by Dr. Brown." *See, e.g.*, *In the Matter of Icebreaker Windpower, Inc.*, 16-1871-EL-BGN, Opinion, 2020 WL 12813749 at ¶ 189, May 21, 2020. The Board concluded that "the arguments proffered by the [opponents] to establish that the proposed project will not promote the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6) are misplaced." *Id.*

The Board's reliance on unsupported, unsubmitted concerns with no record evidentiary support whatsoever is not only misplaced, but unlawful and unreasonable. The Board could not find and did not find that a single local-government "concern" was supported by the evidence in the record because there was none. The Board's reliance on the unsupported opinions of certain

officials in the counties, particularly in light of the fact that one of the counties explicitly *changed* that opinion before the hearing, was clearly unreasonable and unlawful.

2. It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative public comments.

At the time of the hearing, the only local individuals and groups participating in the case were the members of Allen Auglaize Coalition of Reasonable Energy ("AACRE"). They testified in *favor* of the Project. (*See* Testimony of A. Chappell-Dick, Michael Wildermuth, Everett Lacy, T. Rae Nea, Frank Caprilla on behalf of Allen Auglaize Coalition of Reasonable Energy, filed May 12, 2022; Suppl. 410-438.) The Auglaize County Commissioners and Logan Township Trustees did not submit any evidence or testimony and took no position on the Birch Solar Project. (Order, at ¶ 39; Appx. 056.) The Shawnee Township Trustees did not submit any evidence or testimony, either. Against Birch Solar and its members intervened, but then settled and voluntarily withdrew from the case. (Notice of Withdrawal from Intervention, filed May 16, 2022; Suppl. 439.) The Allen County Commissioners never even intervened as a party. The only public opinion in the record properly before the Board was in *support* of the Birch Solar Project. There was no unanimous public opposition in the record before the Board and, as a result, should not have been relied upon by the Board in denying the Birch Solar Project. (Order, ¶ 72; Appx. 071)

The Board's error is that it did not differentiate between undisputed sworn evidence actually entered into the record and subject to cross-examination by the parties, and unsworn, often-anonymous public comments. In fact, the Board favored the latter. The Board simply tallied the number of public comments submitted for and against the Project. (*See* Order, ¶ 70; Appx. 070.) ("The Board takes notice of the large number of public comments filed in the case, which disfavor the Project at a ratio of approximately 80 percent to 20 percent."). But public comments aren't an election, and they can easily be manipulated in favor of one side. The Board seemed to

recognize this in principle; but nonetheless ignored it and noted that, even though they "are less reliable than the admitted evidence," the public comments in opposition are "relevant to our consideration of the matter." (*Id.*)

This flies directly in the face of the Board's prior precedent. The Board has specifically noted that, even though it may receive "thousands of comments from members of the general public, local organizations, and local officials" opposing a project, the Board will rely on the evidence actually in the record before it. *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, Order, Opinion, and Certificate, 2019 OHIO PUC LEXIS 1497 at 82-83, November 21, 2019. In a decision issued the same day as the Order in this case, the Board refused to accept unverifiable opposition that was not part of the evidentiary record. *In re the Application of Harvey Solar I, LLC*, 21-164-EL-BGN, Order, Opinion, and Certificate, 2022 WL 15476795 at ¶ 158, October 20, 2022. There, the Board ruled that petitions created by an opposition group were unreliable and, therefore, were not admissible evidence or appropriately considered.

Nonetheless, in this case, the Board turned this into a junior high student government election. Look at the most popular side—in this case, unverified and inadmissible public comments in opposition—and deem it to be the winner. During the past five decades of the Board's operation, many needed major utility facilities in this State would never had been built under this standard. The Board refused to acknowledge that many of the public comments were submitted by the *same* few individuals over and over. The Board did not acknowledge that many were members of a citizen group that intervened and then withdrew accounted for an outsized proportion of the negative public comments. Despite this, the Board still made it a popularity contest—to the detriment of the Project and in spite of the significant *evidence* to the contrary.

Such an approach not only creates error here; it presents a scary future for applicants before the Board. During the Board's ongoing five-year rulemaking process, numerous commenters directly asked the Board to stop this practice. Duke Energy Ohio, for example, argued that "as explained by numerous commenters, the Board has made its determination of 'public interest' in a variety of seemingly conflicting bases, including the mere counting of the number of comments filed in a docket, regardless of the merits of any of the comments, their possible duplicative content, their possible duplicative senders, or their possible overlap with community groups that may be actual intervenors in the proceeding." *In the Matter of the Ohio Power Siting Board's Review of Ohio Adm.Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7*, Case No. 21-902-GE-BRO, Application for Rehearing of Duke Energy Ohio, filed August 21, 2023; Appx. 186.

These commenters are referring, at least in part, to this case. The Board placed unwarranted weight on the number of negative public comments in reaching its decision that the Birch Solar Project does not serve the public interest. This was unreasonable error and sets dangerous precedent.

<u>ASSIGNMENT OF ERROR NUMBER THREE</u>: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A).

1. The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions

The Board denied the Project's Certificate for a single reason: it felt that the perceived local government opposition to the project did not serve the public interest. This approach is not

only a departure from the Board's past precedent, but it violates Ohio public policy, Ohio's Constitutional nondelegation doctrine, and multiple Ohio laws.

a. The Board's approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance.

The Board's approach in this case runs contrary to the General Assembly's entire purpose for creating the Ohio Power Siting Board over fifty years ago. The Board was created so a consortium of Ohio agencies could consider large energy projects on their merits under the diverse eight-part criteria mandated in R.C. 4906.10. As the Board states:

> Our mission is to support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens, promoting the state's economic interests, and protecting the environment and land use.

Ohio Power Siting Board, OPSB Mission.[8]

This type of holistic state-level review is necessary because *the public as a whole* has a stake in these projects. It is also mandated by the General Assembly: "the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself." R.C. 4906.02(C). It is not merely the local jurisdictions that touch or neighbor projects that must be considered under the law. If that were the case, any amount of localized NIMBYism could derail large-scale generation projects.

Many Ohioans are supportive of new and renewable energy source in Ohio. As part of the Birch Solar application process, polling was conducted in the area. Evidence was admitted in the record of this case that over 70% of local voters agreed it is important to bring new sources of clean energy to Ohio and nearly 75% of local voters saw solar farms as beneficial to the economy

[8] Available at: https://storymaps.arcgis.com/stories/9bf2d0fc20214ffdaa3ae83a1fc9faa5

and environment. (Supplemental Direct Testimony of Shanelle Montana, filed May 16, 2023, Att. SM-3; Suppl. 469-70.) The Board acknowledged these results, but disregarded them because these local voters, while strongly supporting solar development *somewhere* in Ohio, did not necessarily support development of the Project in their own backyard. (Order, ¶ 70; Appx. 070.)

That disconnect is precisely why the Board has ruled in other cases that a project's larger benefits to the state, the public, and the grid must outweigh local disapproval. The Board has approved projects even though there were "thousands of comments from members of the general public, local organizations, and local officials" and multiple local governments had intervened in the case. *See, e.g., In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, Order, Opinion, and Certificate, 2019 OHIO PUC LEXIS 1497 at 82-83, November 21, 2019. The Board has also found projects serve the public interest even though multiple opposing local governments intervened and actually presented witnesses at the adjudicatory hearing. *See, e.g., In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, Order, Opinion, and Certificate, 2013 WL 2446463 at 3, May 28, 2013. The Board has historically taken a broad view and ruled "that, in considering whether the proposed project is in the public interest, convenience, and necessity, we have taken into account that the renewable energy generation by the proposed facility will benefit the environment and consumers." *Id.* at 72.

The Board was tasked with considering whether the Birch Solar Project furthered the public interest goals embodied in the Board's overall mission and the goals of its member state agencies. The close alignment of the Birch Solar Project with Ohio's top statewide policy priorities (*i.e.*, water conservation, statewide economic development, pollinator habitat, generation capacity, beneficial use of historic oil and gas fields, etc.) should have been considered by the Board in evaluating the impact on the public interest. But the Board did not consider any of those things.

Instead, the Board deferred its sole and plenary authority to make a statewide public interest decision to the whims of divided local jurisdictions, choosing to listen to only the opinions of the opposition. As the Ohio Chamber of Commerce commented in this case:

> While legitimate local concerns should be carefully evaluated, local opposition based on hyperbole and allegations without supporting evidence and testimony should not dictate the outcome of the OPSB permitting process. Allowing it to do so undermines the fundamental purpose of the OPSB to balance a variety of interests when siting important energy infrastructure.

(Ohio Chamber of Commerce Public Comment, filed September 23, 2022; Suppl. 554.)

The Board's reliance on baseless local opposition in determining that the Project failed to serve the public interest under R.C. 4906.10(A)(6) was made in error. There is no reason for a statewide permitting regime staffed with diverse subject matter experts, like the Ohio Power Siting Board, if untested and disproven local prejudices carry the day. As a result of the Board's abrogation of its authority, the State's best interests were not represented (or even considered) by the Board. This is unreasonable and unlawful.

b. The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine.

The Board improperly delegated its exclusive regulatory powers to private residents and local jurisdictions—offering them the ability to unilaterally veto the Birch Solar Project without any authority whatsoever. (Order, ¶ 72; Appx. 071.) This allowed these local governments to determine and interfere with the use of over 1,400 acres of privately-owned property.

This is unconstitutional. Under the nondelegation doctrine, it is a violation of due process for the state government to empower "a few citizens to deny an individual the use of his property"—precisely what the Board did here. *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 664 (4th Cir. 1989). The United States Supreme Court has long placed limits on the manner and extent to which a state legislature may delegate to others powers which the legislature

might admittedly exercise itself." *McGautha v. California,* 402 U.S. 183, 272 n. 22 (1971) (Brennan, J., dissenting), citing *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). This is particularly true where the power delegated relates to the ability to develop and use property. *See, e.g., Eubank v. City of Richmond*, 226 U.S. 137 (1912) (setting of property line by adjacent owners); *Embree v. Kansas City & Liberty Blvd. Road Dist*., 240 U.S. 242 (1916) (determination of boundary for road district by petition of landowners); *Browning v. Hooper*, 269 U.S. 396 (1926) (same as *Embree*); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (zoning variance only by consent of adjacent owners). "[A] legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion." *Gen. Elec. Co. v. New York State Dep. of Lab*., 936 F.2d 1448, 1455 (2d Cir. 1991).

The nondelegation doctrine is as applicable to the Board as it is to the state legislature. *See Hubbard Broad., Inc. v. Metro. Sports Facilities Comm.*, 381 N.W.2d 842, 847 (Minn. 1986) ("The question is not whether the legislature unlawfully delegated its powers to the Commission, but whether the Commission unlawfully delegated its powers to a private entity."). Under both situations, "the policy considerations that underlie the delegation doctrine are applicable * * * and the inquiry is the same: whether adequate legislative or administrative safeguards exist to protect against the injustice that results from uncontrolled discretionary power." *Id.*

In *Geo-Tech*, the Fourth Circuit struck down a West Virginia law that permitted a state agency to deny a permit if a project is "significantly adverse to public sentiment," even though the project in question had inspired hundreds of letters in opposition. *Id.* at 663 (holding that the law "violated due process by impermissibly delegating legislative authority to local citizens."). Such deference by the state to public sentiment, the United States Supreme Court explained, is repugnant

because it empowers neighbors "to withhold consent for selfish reasons or arbitrarily" block otherwise lawful development. *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116 (1928). Further, even the if the state retains the *ability* to exercise its authority, it is nonetheless a violation of the nondelegation doctrine if the State does not *actually* exercise that discretion and instead defers to public opinion. *Gen. Elec. Co*., 936 F.2d at 1458.

The Board's decision here fully delegated its regulatory authority to the sentiment of local opponents without placing such safeguards in place. Whether or not the Board nominally retains the authority to exercise its siting power is not the question. The question is whether the Board actually exercised that power, or whether it empowered private citizens and local jurisdictions to make the decision on its behalf. Clearly, it is the latter. The Board did not exercise *any* independent analysis or fact-finding to test the opinions of the local residents and jurisdictions regarding the Project. To the contrary, the Board relied on local opposition, despite its own findings that objections regarding the suitability of the Birch project were baseless. In so doing, the Board denied other local residents their constitutionally-protected property rights.

The Board should not be permitted to delegate veto authority to local governments absent statutory or constitutional authority to do so. None exists here. The Board's decision doing otherwise is unconstitutional.

c. The Board's approach is a violation of Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B).

Ohio law is clear that the Board, and *only* the Board, is authorized to determine the permissibility of a large-scale solar project. R.C. 4906.10(A), for example, speaks only in terms of findings regarding the Certificate that *the Board* must make. No one else. *See also* R.C. 4906.02(C) ("[T]he board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself."). This

is confirmed in R.C. 4906.13(B), which provides that "[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code." The Board, however, did just this.

The Board, in denying the Project's Certificate, sought, and apparently, required the approval and consent of the local political subdivisions. In fact, the Board made clear that it denied the Birch Solar Project solely because of the purported opposition by the local governments. This is unlawful.

2. The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute.

The Board may exercise only those powers that the General Assembly confers on it. *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. The General Assembly specifically outlined in R.C. 4906.10(A) the eight determinations the Board must make when considering an application

What the General Assembly did *not* include in R.C. 4906.10(A) is a requirement for the approval of local governments. It did just the opposite and forbade such a consideration. R.C. 4906.13(B).

Yet the Board added a consideration to reflect its own desired policy outcome by deferring to local governments. This deference is not, as the Board tries to make it, a public interest consideration. The opinion of local governments not only isn't found in R.C. 4906.10(A), it is expressly prohibited by R.C. 4906.13(B).

"[I]f an administrative policy exceeds the statutory authority granted by the General Assembly, the agency has usurped the legislative function, thereby violating the separation of

powers established in the Ohio Constitution." *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 24. The Board setting aside the law and deciding on its own that there is a single decisive factor (statements of public opposition) "violates the fundamental precept that the power of lawmaking and law exposition should not be concentrated in the same hands." *In re Application of Alamo Solar I, L.L.C.*, Slip Opinion No. 2023-Ohio-3778, ¶ 14.

Thus, policies promulgated by administrative agencies are unenforceable if they are in conflict with statutory enactments covering the same subject matter. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 18; *see also State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21 ("[T]he General Assembly is the ultimate arbiter of public policy."); *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App.3d 108, 110, 460 N.E.2d 704 (10th Dist.1983) ("In the absence of clear legislative authorization, declarations of policy * * * are denied administrative agencies and are reserved to the General Assembly"). When an agency goes so far as to create its own standards and policies contrary to enacted law, it acts unconstitutionally as well. *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 24.

That is exactly what occurred here—the Board sought to (1) add an additional determination in R.C. 4906.10(A) by giving local governments veto power of the project and (2) disregarded this clear prohibition found in R.C. 4906.13(B).

The Board rewriting Ohio law to focus solely on local public opposition was unlawful and unconstitutional.

<u>ASSIGNMENT OF ERROR NUMBER FOUR</u>: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52").

In 2021, the General Assembly adopted significant changes to the power-siting landscape and the future development of wind and solar energy in Ohio. Senate Bill 52 created a two-level system of approval for large-scale utility wind and solar projects—first at the county and then at the state. If a developer desires to construct a large-scale utility project, it must start with the county. That county has 90 days to adopt a resolution that prohibits altogether or reduces the size of the proposed project. R.C. 303.61, as amended. Once the county process is complete, the developer then must submit its application to the Power Siting Board. For each project, the Board adds two new voting ad hoc members: (1) the chair of the board of township trustees where the facility is located and (2) the president of the board of county commissioners where the facility is located. R.C. 4906.02, as amended. The General Assembly quite clearly created a revamped power-siting process that *does* take into consideration local governments.

But, understandably, not every project was made subject to this new process under SB 52. The General Assembly chose to include a robust two-tiered grandfathering scheme in the law in order to provide certainty to many projects already pending approval by the Board, including Birch Solar. It is uncontested that Birch is a *fully* grandfathered project. The Board acknowledged this. (Order, ¶ 69, fn. 9; Appx. 069.). But, it decided to go ahead and essentially apply Senate Bill 52's local-government-veto option anyways.

The Board's decision discussed the local government's Senate Bill 52 actions throughout its opinion. (Order, ¶¶ 39, 61, 63, 65, 69; Appx. 056, 065-67, 068, 069.) The Board often supported its reasoning that the Project did not serve the public interest by arguing that the Project

would likely be barred by the local jurisdictions under Senate Bill 52 but for the grandfathering provisions. (Order, ¶¶ 39, 61, 63, 65, 69; Appx. 056, 065-67, 068, 069.)

There is another issue with the Board's application of Senate Bill 52 here. The Board's approach is not even a faithful application of the new law. The Board took the General Assembly's intent behind Senate Bill 52—enhanced local control over large-scale solar projects– and stretched it to the extreme. In so doing, the Board denied Birch Solar any of the procedural safeguards that the General Assembly built into the new law:

- While Senate Bill 52 requires that the county take an official position on a project before it undergoes the expense of filing an application and beginning the state-level siting process, the Board here deferred to opinions offered at any point in the proceeding – even on the eve of hearing, (Order, ¶¶ 48, 49, 63-66; Appx. 060-61, 066-68);

- While Senate Bill 52 requires the county to properly pass a resolution rejecting the project, the Board here deferred to unsworn public comments, correspondence, and emails, (Order, ¶¶ 48, 49, 63-66; Appx. 060-61, 066-68);

- While Senate Bill 52 empowers only counties to veto a project during the local approval process, the Board created a hyper-local process and did not differentiate between counties and townships, (*Id*.); and,

- While Senate Bill 52 empowers county and township designees to participate in an official capacity as de facto Board members, the Board gave full deference to unsworn and disproven complaints and emails from any county or township official. (*Id*.).

The General Assembly heard significant testimony, debate, amendments, and held multiple hearings regarding Senate Bill 52. Over eight months, the Senate Energy and Public Utilities Committee held six hearings, the House Public Utilities Committee held five hearings, and hundreds of witnesses provided testimony either supporting or opposing the bill.[9] The General Assembly ultimately determined the appropriate level and means of control for local jurisdictions over utility-scale solar projects. But the Board's decision here undoes that legislative directive.

[9] The Ohio Legislature, 134th General Assembly, Senate Bill 52 (details available at: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-52)

This has not been an uncommon occurrence before the Board. It has caused key legislators involved in passing Senate Bill 52 to weigh in on the Board's misapplication of the law. Representatives Bill Seitz, the Majority Floor Leader, filed a letter in the still-pending *Circleville Solar* case urging the Board to stop deferring to even perceived public opposition against grandfathered projects:

> As a co-sponsor of Senate Bill 52, I understand the desire of local governments to govern the scope of projects that occur in their jurisdictions. However, when the General Assembly passed SB 52, there was also a desire to grandfather in late-stage projects that have followed the proper channels in their development. The Circleville Solar facility fits the bill to be grandfathered. Thus, while localized opposition to a grandfathered project may be of some relevance, it is by no means determinative as it would otherwise be if the project had not been protected by the grandfathering clauses of SB 52.

In re Circleville Solar, LLC, Case No. 21-1090-EL-BGN, Letter from Majority Floor Leader Bill Seitz, the Ohio House of Representative, filed April 6, 2023; Appx. 199. State Senator Kent Smith and Representative James Hoops have filed similar letters. Representative Hoops explained:

> I served as the Chair of the House Public Utilities Committee during the Senate Bill 52 debate. The goal of this legislation was to allow more local input into the Ohio Power Siting Board ("OPSB") process while ensuring that late-stage projects are grandfathered and protected. The Circleville Solar project fits the bill to be grandfathered, other than the addition of two ad-hoc members to the OPSB. Thus, while reasonable local input into a project is important and warranted, it is by no means determinative.

Id. at Public Comment of Representative James Hoops, Ohio House of Representatives, filed May 9, 2023; Appx. 202; *see also id.* at Public Comment of Ohio State Senator Kent Smith, filed April 13, 2023; Appx. 201.

The Board's decision unlawfully and unconstitutionally attempts to hold the Birch Solar Project to an even stricter standard than Senate Bill 52. This agency lawmaking violates both the

directive and the intention of the General Assembly. It is unreasonable, unlawful, and unconstitutional.

IV. CONCLUSION

For the foregoing reasons, Birch Solar respectfully requests that the Court reverse the Ohio Power Siting Board's denial of its Certificate of Environmental Compatibility and Public Need.

Respectfully submitted,

/s/Kara Herrnstein

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IN THE SUPREME COURT OF OHIO

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Facility Located in Allen and Auglaize Counties, Ohio.	:	Case No. 2023-1011
	:	
	:	On direct appeal from the Ohio Power Siting Board
	:	
	:	Case No. 20-1605-EL-BGN

APPENDIX TO MERIT BRIEF OF APPELLANT BIRCH SOLAR 1, LLC

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IN THE SUPREME COURT OF OHIO

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BIRCH SOLAR 1, LLC'S NOTICE OF APPEAL

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IN THE SUPREME COURT OF OHIO

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Facility Located in Allen and Auglaize Counties, Ohio.	) Case No.) On Appeal from) The Ohio Power Siting Board) Case No. 20-1605-EL-BGN	

BIRCH SOLAR 1, LLC'S NOTICE OF APPEAL

Pursuant to R.C. 4903.11, 4903.13, and R.C. 4906.12, Appellant Birch Solar 1, LLC ("Birch") hereby gives notice of its appeal to the Supreme Court of Ohio from the Opinion and Order ("Order") issued by the Ohio Power Siting Board ("Board") on October 20, 2022, in Case No. 20-1605-EL-BGN. On November 21, 2022, Birch filed an Application for Rehearing of the Order. On June 15, 2023, the Board denied the Application for Rehearing.

Birch submits that the Board's Order denying Birch a certificate of environmental compatibility and public need for a solar-powered electric facility located in Allen and Auglaize Counties, Ohio is unlawful, unjust, unreasonable, unconstitutional, and unwarranted based on the following grounds:

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT. (Raised as Ground for Rehearing One before the Power Siting Board, discussed at pages 5-18 of the attached Application for Rehearing)

1. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development** (Discussed at pages 7-10 of the attached Application for Rehearing)

2. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide** (Discussed at pages 10-11 of the attached Application for Rehearing)

3. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture** (Discussed at pages 11-15 of the attached Application for Rehearing)

4. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply** (Discussed at pages 15-16 of the attached Application for Rehearing)

5. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells** (Discussed at pages 17-18 of the attached Application for Rehearing)

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT. (Raised as Ground for Rehearing Two before the Power Siting Board, discussed at pages 18-25 of the attached Application for Rehearing)

1. **It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record** (Discussed at pages 19-21 of the attached Application for Rehearing)

2. **It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments** (Discussed at pages 21-23 of the attached Application for Rehearing)

3. **It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions** (Discussed at 23-25 of the attached Application for Rehearing)

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A). (Raised as Ground for Rehearing Three before the Power Siting Board, discussed at pages 25-32 of the attached Application for Rehearing)

1. **The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and**

public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions (Discussed at pages 25-32 of the attached Application for Rehearing)

a. The Board's approach is a violation of Ohio public policy regarding largescale energy generation and other matters of statewide importance (Discussed at pages 25-28 of the attached Application for Rehearing)

b. **The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine** (Discussed at pages 28-30 of the attached Application for Rehearing)

c. The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B) (Discussed at pages 30-31 of the attached Application for Rehearing)

2. The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute (Discussed at pages 31-32 of the attached Application for Rehearing)

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52"). (Raised as Ground for Rehearing Four before the Power Siting Board, discussed at pages 32-36 of the attached Application for Rehearing)

WHEREFORE, Birch respectfully requests that the Board's Order be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I undersigned hereby certifies that, on August 11 2023, a copy of the foregoing Notice of Appeal was served upon the Chairperson of the Ohio Power Siting Board, Jenifer French, by leaving a copy at her office at 180 East Broad Street, Columbus, Ohio 43215, and upon the following counsel of record by regular U.S. mail, postage prepaid, and by electronic mail:

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CERTIFICATE OF FILING

Pursuant to S.Ct.Prac.R. 3.11(D)(2) and 10.02(A)(2), the undersigned certifies that, on August 11, 2023, a copy of the foregoing Notice of Appeal was filed with the Docketing Division of the public Utilities Commission and the Power Siting Board at 180 East Broad Street, Columbus, Ohio 43215, pursuant to R.C. 4903.13, R.C. 4906.12, and Ohio Admin. Code §§ 4901-I-02(A), 4901-1-36, 4906-2-02, and 4906-2-33.

Kara Herrnstein (0088520)

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Facility Located in Allen and Auglaize Counties, Ohio.	) Case No.))))	On Appeal from The Ohio Power Siting Board Case No. 20-1605-EL-BGN

ATTACHMENTS TO BIRCH SOLAR 1, LLC'S NOTICE OF APPEAL

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Generating Facility in Allen and Auglaize Counties, Ohio	)))))	Case No. 20-1605-EL-BGN

BIRCH SOLAR 1, LLC'S APPLICATION FOR REHEARING

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BIRCH SOLAR 1, LLC'S
APPLICATION FOR REHEARING

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Birch Solar 1, LLC ("Birch") requests rehearing of the Opinion and Order issued in this proceeding on October 20, 2022 ("Order"). Birch submits that the Board's Order is unlawful, unjust, unreasonable, unconstitutional, and unwarranted based on the following grounds:

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT.

1. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development**

2. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide**

3. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture**

4. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply**

5. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells**

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT

1. **It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record**

2. **It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments**

3. **It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions**

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A)

1. **The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions**

    a. **The Board's approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance**

    b. **The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine**

    c. **The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B)**

2. **The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute**

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52")

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I. INTRODUCTION

The Ohio Power Siting Board's ("OPSB") Order is inconsistent on its face. On one hand, the Board restates the familiar and wide-ranging standard that "the determination of public interest, convenience, and necessity must be examined through a broad lens." (Order, ¶ 68.) But, on the other hand, the Board admits to only considering *one* factor in making its public interest determination: opposition (or perceived opposition) to the Project by local government entities. (*Id.* at ¶ 72.)

This myopic approach is not just inconsistent, it violates established Board precedent, Ohio Supreme Court precedent, Ohio public policy, Ohio's Constitution, and Ohio's laws. The Board holds sole and plenary authority to site utility-scale solar projects, in recognition of important statewide policies that go far beyond the local project area. The Board's total deference here to baseless opposition by certain local government entities—which is not based on evidence in the record— abrogates its authority and responsibility under Ohio's system of government. The Board's Order prioritizes the whims of a few vocal opponents over the best interests of the public.

The Board's Order, specifically its finding that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6), is unlawful, unjust, unreasonable, unconstitutional, and unwarranted. The Board should reconsider its Order, grant this application for rehearing, and apply the "broad lens" standard as required.

II. STANDARD OF REVIEW

After the Board enters an order, the parties to a proceeding have a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[1] An application for

[1] R.C. 4903.10. R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23 are applicable to Board proceedings pursuant to R.C. 4906.12.

rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." R.C. 4903.10(B). *See also* O.A.C. 4901-1-35(A).

In considering an application for rehearing, R.C. 4903.10 provides that the Board may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the Board may "abrogate or modify" the order in question if it "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted." R.C. 4903.10(B).

Here, the Order is unlawful, unreasonable, unjust, unconstitutional, and unwarranted under R.C. 4903.10. The Board should grant this application for rehearing and abrogate or modify the Order consistent with this application for rehearing.

III. GROUNDS FOR REHEARING

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT

The Board has recently explained that "[t]o determine that projects serve the public interest, convenience, and necessity, that projected benefits of the projects should be balanced against the magnitude of potential negative impacts on the local community." (Order, *In the Matter of the Application of American Transmission Systems, Inc. for a Certificate of Environmental Compatibility and Public Need to Construct the Lincoln Park-Riverbend Line in Mahoning County*, 19-1871-EL-BTX, ¶ 58, May 19, 2022).

The question here, therefore, is what factors constitute the "projected benefits" of the Project. In past cases, the Board has ruled that a project's larger benefits to the state, the public, and the grid outweigh local disapproval, even if there are "thousands of comments from members of the general public, local organizations, and local officials" and opposing intervention from

multiple local governments. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, at 82-83, November 21, 2019). Under this same standard, the Board has also ruled that a project benefits the public even where opposing local governments intervened and presented nine witnesses at the adjudicatory hearing. (Order, Opinion, and Certificate, *In the Matter of the Application of Champaign Wind*, LLC, 12-160-EL-BGN, at 3, May 28, 2013). In applying this standard, the Board looks to and relies on the *record* – the evidence guides and controls the result. (*Id.* at 72-73.)

Consistent with this long-standing and well-established standard, the Board indicated in its Order that "the determination of public interest, convenience, and necessity must be examined through a broad lens." (Order, ¶ 68.)

But that is not the standard the Board used here. Ignoring the record and its own prior precedent, the Board failed to consider the evidence before it and the benefits to the public as a whole in making its determination under R.C. 4906.10(A)(6). Similarly, the Board failed to consider the Staff Report's positive analysis of the Project under R.C. 4906.10(A)(6). (*Id.* at ¶¶ 49-50.) The Board ignored that the Project used design standards which were beyond current Board precedent.[2] In particular, by way of example, the Board unreasonably disregarded the Project's uncontested evidence that it would provide significant benefits to:

1) local economic development;

2) regional and statewide economic development;

3) the local agricultural industry and culture;

[2] The the Project boundary was at least 300 feet from the public rights-of-way/easements of public roads; at least 100 feet from the top of the banks of streams; at least 300 feet from the property lines of nonparticipating landowners and at least 300 feet from the nearest wall of each nonparticipating landowner's residence as of the filing date of the Application. (Noticed of Enhanced Commitments for Setbacks and Screenings, filed October 19, 2022.)

4) the reliability, affordability, and diversification of Ohio's electrical supply; and

5) the beneficial use of a historic oil and gas field.

1. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development

In prior cases, the Board has recognized the long-term importance of solar development in supporting and growing the local economy. For example, the Board has concluded that "as energy and environment costs rise, and technology advances, solar-powered generation provides a sustainable, long-term, competitive energy solution to both residents and businesses." (Opinion, Order, and Certificate, *Hardin Solar Center II*, 18-1360, May 16, 2019, at 25.) In over thirty prior cases, the Board and its Staff have acknowledged that a solar facility would have an overall positive impact on the local economy due to the increase in construction spending wages, purchasing of goods and services, annual lease payments to the local landowners, and PILOT revenue.[3]

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[3] *Vinton Solar Energy Facility*, 17-0774, Staff Report, entered July 5, 2018, at 22; *Hillcrest Solar Farm*, 17-1152, Opinion, Order, and Certificate, entered February 15, 2018, at ¶44; Staff Report, entered November 15, 2017, at 22; *Willowbrook Solar Farm*, 18-1024, Staff Report, entered February 4, 2019, at 23; *Highland Solar Farm*, 18-1334, Opinion, Order, and Certificate, entered May 16, 2019, at ¶36; Staff Report, entered March 4, 2019, at 19; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶39; Staff Report, entered February 26, 2019, at 20; *Nestlewood Solar Facility*, 18-1546, Opinion, Order, and Certificate, entered April 16, 2020, at ¶49; Staff Report, entered May 15, 2019, at 24; *Alamo Solar Farm*, 18-1578, Opinion, Order, and Certificate, entered June 24, 2021, at ¶70; Staff Report, entered May 28, 2019, at 22; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶52; Staff Report, entered on December 22, 2020, at 23; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶60; Staff Report, entered October 7, 2020, at 26; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶55; Staff Report, entered November 18, 2020, at 25; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶56; Staff Report, entered March 15, 2021, at 23; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶43; Staff Report, entered November 30, 2020, at 24; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶52; Staff Report, entered January 11, 2021, at 23; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶53; Staff Report, entered March 16, 2021, at 24; *New Market Solar*, 20-1288, Opinion, Order, and Certificate, entered March 18, 2021, at ¶48; Staff Report, entered January 4, 2021, at 21; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶73; Staff Report, entered May 24, 2021, at 27; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶85; Staff Report,

Those same benefits are present here. The Project's Application and Socioeconomic Report (Ex. G to the Application) set forth the following economic benefits:

- Approximately 400 to 500 jobs will be created during construction both onsite and with related services and 5-10 jobs during the O&M stage. (Application at 27; Exhibit G at 4.)
- Construction of the Project will result in a payroll of $32 million to $39 million during the 12-18 month construction window. (Application at 27; Exhibit G at 4.)
- During the 35-year operational life of the Project, payroll related to operations is expected to total $350,000 to $700,000 annually. The present value of the total payroll from operations, assuming a 9% discount rate and 2% escalation rate is between approximately $4.6 to $9.2 million. (Application at 27.)
- An additional approximately 225 to 300 jobs could be created within the supply chain and induced job markets during construction, in addition to the 400 to 500 direct construction jobs. Further, during operations, approximately 18 to 25

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entered March 22, 2021, at 24; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶67; Staff Report, entered May 19, 2021, at 24; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶60; Staff Report, entered June 22, 2021, at 29; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶52; Staff Report, entered on May 10, 2021, at 23; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶82; Staff Report, entered June 14, 2021, at 26; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶60; Staff Report, entered June 28, 2021, at 27; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 30; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 29; *Union Ridge Solar*, 20-1757, Opinion, Order, and Certificate, entered January 20, 2022, at ¶73; Staff Report, entered August 16, 2021, at 29; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶53, Staff Report, entered August 24, 2021, at 28; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶68; Staff Report, entered July 7, 2021, at 25; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶72; Staff Report, entered October 8, 2021, at 31; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶66; Staff Report, entered September 13, 2021, at 29; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 31; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 30.

supply chain and induced jobs could be created from O&M activities, in addition to the direct on-site jobs. (Application at 28; Exhibit G at 4.)

- Based on direct, indirect, and induced jobs for the Project and associated multiplier effects during construction, the Project will have an economic output of between approximately $70 million and $90 million. (Application at 28; Exhibit G at 4.)
- During the O&M phase of the Project, the total annual economic benefit would be approximately $3.8 to $5.5 million. (Application at 28; Exhibit G at 4.)

Further, above and beyond these workforce and payroll benefits, Birch anticipates entering into a payment in lieu of taxes ("PILOT") in Allen and Auglaize Counties, with estimated payments of approximately $2.1 to $2.7 million annually and approximately $73.5 million to $94.5 million throughout the life of the Project. (Application Exhibit G at 5.) The PILOT will provide funding, which would be available to the Shawnee School District for school improvements, which as seen in the testimony from Frank Caprilla on behalf of Allen Auglaize Coalition for Renewable Energy, is greatly needed and could otherwise be paid for by residents through potential levies.[4] Likewise, at the local public hearing, the superintendent of the Shawnee School District explained the importance of the PILOT to the district, testifying that the "money would go directly to the school, we wouldn't lose any of our local state funding, and that money would be able to be allocated for gifted [students], for programs that meet student needs, for additional resources that our kids desperately need." (Local Public Hearing Tr. at 93, filed Nov. 10, 2021.)

[4] Testimony of Frank Caprilla on behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022. Mr. Caprilla is the Capital Campaign Manager of the Shawnee Football Parents Association, a member of the Community Advisory Team (CAT) for the Shawnee Local Schools Building Project, and a parent and volunteer at Shawnee Local Schools in Shawnee Township. *Id.* at 9-22.

The Project also has the opportunity to economically benefit neighboring residents of the Project through Birch Solar's Neighboring Landowner Financial Benefit, where any home within 500 feet of the Project will receive a payment ranging from $10,000 to $50,000 depending on proximity. (Application Exhibit G at 6.) Birch has also committed to a $500,000 community development fund to be used at the community's discretion. (*Id.*)

Therefore, the uncontested evidence in record is that the Project would greatly benefit the local economy. But, in an unexplained deviation from many prior cases, the Board did not meaningfully consider the local economy in analyzing public interest under R.C. 4906.10(A)(6). Surely, if the Board is going to consider the potential local negative impacts of a Project, the proven local positive economic impacts also must be part of that analysis.

2. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide

Looking outside of the immediate Project locality, the evidence was uncontested and unrefuted that Project would provide significant economic benefits to the region and the State of Ohio as a whole. (Application Exhibit G at 6.) These benefits should have been considered by the Board under R.C. 4906.10(A)(6) in a "broad lens" analysis but were not.

The Ohio Chamber of Commerce noted in this case[5] that "The Birch Solar Project is consistent with our mission to champion free enterprise, economic competitiveness, and growth for all Ohioans. Specifically, the Ohio Chamber notes the myriad of ways that Birch will serve the public interest and provide local, regional, and statewide economic benefits."[6] The Ohio Chamber

[5] Birch does not believe that nonevidentiary Public Comments, including those filed by the Ohio Chamber of Commerce and the Lima/Allen County Chamber of Commerce, should sway the Board. However, in light of the Board's reliance on negative Public Comments in its Order, positive Public Comments from respected economic organizations should at least be given similar consideration.

[6] Ohio Chamber of Commerce Public Comment, filed September 23, 2022.

also stressed that solar development generally, and the Project specifically, is critical for Ohio to compete: "Ohio is in a constant race against other states to attract business. Those businesses are increasingly demanding renewable energy—especially affordable solar energy—from the states in which they choose to locate." (*Id.*) Similarly, the Lima/Allen County Chamber of Commerce supports the Project, noting that "Birch Solar project will bring additional investment dollars into the community while helping to power area businesses and the local economy. . . . Projects like Birch Solar allow for energy investment and other economic benefits to remain local."[7]

Nonetheless, despite the economic importance of the Project to the State as a whole, the Board failed to consider these critical regional and statewide public benefits.

3. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture

The Board is not faced with a choice between Ohio's agricultural heritage and a new solar industry. The two go hand-in-hand. In prior cases, the Board has recognized that solar projects are a good fit for agricultural communities. For example, as indicated in numerous other projects, a solar project is "consistent with agricultural industry support, in that the facility would provide supplemental income to farmers and the land could be returned to agricultural production upon decommissioning."[8] In many cases, the Board and its Staff have indicated that a solar project's

[7] Public Comments concerning the Birch Solar Project filed by Jed E. Metzger, filed December 7, 2020.

[8] *Hardin Solar Energy Facility*, 17-0773, Staff Report, entered November 21, 2017, at 12; *Willowbrook Solar Farm*, 18-1024, Staff Report, entered February 4, 2019, at 12; *Highland Solar Farm*, 18-1334, Staff Report, entered March 4, 2019, at 10; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶24; Staff Report, entered February 26, 2019, at 11; *Nestlewood Solar Facility*, 18-1546, Opinion, Order, and Certificate, entered April 16, 2020, at ¶28; Staff Report, entered May 15, 2019, at 12; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶34; Staff Report, entered on December 22, 2020, at 10; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶43; Staff Report, entered October 7, 2020, at 12; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶38; Staff Report, entered November 18, 2020, at 12; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶29; Staff Report, entered March 15, 2021, at 9; *Yellowbud Solar*, 20-

creation of pollinator habitat would enhance the visual appeal of the project, enrich local wildlife habitat, benefit the local farming community, increase plant diversity, improve water quality, and discourage invasive species.[9]

0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶25; Staff Report, entered November 30, 2020, at 10; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶29; Staff Report, entered January 11, 2021, at 10; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶33; Staff Report, entered March 16, 2021, at 10; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶73; Staff Report, entered March 22, 2021, at 20; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶41; Staff Report, entered May 19, 2021, at 10; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶36; Staff Report, entered June 22, 2021, at 10; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶79; Staff Report, entered on May 10, 2021, at 10; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶42; Staff Report, entered June 14, 2021, at 10; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶41; Staff Report, entered June 28, 2021, at 10; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 10; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 12; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶33, Staff Report, entered August 24, 2021, at 10; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶38; Staff Report, entered July 7, 2021, at 9-10; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 10; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶30; Staff Report, entered September 13, 2021, at 9; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 28.

[9] *Hardin Solar Energy Facility*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at ¶36; Staff Report, entered November 21, 2017, at 18; *Hillcrest Solar Farm*, 17-1152, Opinion, Order, and Certificate, entered February 15, 2018, at ¶39; Staff Report, entered November 15, 2017, at 20; *Willowbrook Solar Farm*, 18-1024, Opinion, Order, and Certificate, entered April 4, 2019, at ¶34; Staff Report, entered February 4, 2019, at 20; *Highland Solar Farm*, 18-1334, Opinion, Order, and Certificate, entered May 16, 2019, at ¶31; Staff Report, entered March 4, 2019, at 17; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶34; Staff Report, entered February 26, 2019, at 17; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶47; Staff Report, entered on December 22, 2020, at 20; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶55; Staff Report, entered October 7, 2020, at 23; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶50; Staff Report, entered November 18, 2020, at 23; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶38; Staff Report, entered November 30, 2020, at 21; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶46; Staff Report, entered January 11, 2021, at 20; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶47; Staff Report, entered March 16, 2021, at 21; *New Market Solar*, 20-1288, Opinion, Order, and Certificate, entered March 18, 2021, at ¶41; Staff Report, entered January 4, 2021, at 18; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶60; Staff Report, entered May 19, 2021, at 21; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶54; Staff Report, entered June 22, 2021, at 26; *Mark Center Solar Project*, 20-

Here, the Project is likewise consistent with the local agricultural industry. The Project would preserve and enhance farmland over the long-term (something that Shawnee Township has identified as a top priority in their Comprehensive Plan),[10] provide critical income to farmers participating in or contracting with the Project, and diversify the local agricultural opportunities. (Application at 17-18.)

As in the prior solar projects approved by the Board, the Project would protect the local agricultural land and heritage by maintaining "the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties." (Staff Report, at 47.) Further, the land would be restored upon decommissioning in measurably *better* farming condition than it is in today. As the Board and Staff have indicated in other cases, by allowing the land to rest under restorative pollinator-friendly

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1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶46; Staff Report, entered on May 10, 2021, at 20; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶72; Staff Report, entered June 14, 2021, at 22; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 29; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 27; *Union Ridge Solar*, 20-1757, Opinion, Order, and Certificate, entered January 20, 2022, at ¶63; Staff Report, entered August 16, 2021, at 25; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶50, Staff Report, entered August 24, 2021, at 26; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶64; Staff Report, entered July 7, 2021, at 24; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶69; Staff Report, entered October 8, 2021, at 29; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶63; Staff Report, entered September 13, 2021, at 28; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 28; *Harvey Solar Project*, 21-0164, Staff Report, entered February 25, 2022, at 27; *Nottingham Solar*, 21-0270, Staff Report, entered May 2, 2022, at 27; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 30; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 29; *Wild Grains Solar*, 21-0823, Staff Report, entered April 18, 2022, at 26; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶48; Staff Report, entered March 15, 2021, at 20; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered June 28, 2021, at 26; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 27.

[10] Response to Fourth Data Request from Staff of the Ohio Power Siting Board, filed April 12, 2021.

groundcover, the soil would be healthier and more productive whenever farming operations resume.[11]

The Staff Report in this case made this point:

> Based upon the Applicant's collective data responses and Staff's examination of existing land uses, Staff opines that the proposed project would reinforce the continued low population density levels in the project area. Solar projects maintain the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties (with the notable exception of some continuing agricultural activities) and employing very few operations personnel to burden community services. This continuation of low population density also benefits the adjacent higher population density areas as increased high density land uses are not able to be physically adjacent and adverse aesthetic impacts are mitigated by landscape screening.

(Staff Report, at 47.)

Further, within Allen County, the Shawnee Township Comprehensive Plan designates the land within the Project Area as land to be used as agricultural in their Future Conceptual Land Use Map. (Application at 72.) Birch took the Comprehensive Plan into consideration in Project design, and maintained the agricultural aesthetic of the area by incorporating cedar farm fencing and is also working towards allowing sheep grazing within the Project. (*Id.*) The life of the Project corresponds with the long-term goals of the Comprehensive Plan, maintaining long-term agricultural use rather than industrial or residential zoning. (*Id.*)

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[11] *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶73; Staff Report, entered March 22, 2021, at 20; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶60; Staff Report, entered May 19, 2021, at 22; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶46; Staff Report, entered on May 10, 2021, at 20; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶72; Staff Report, entered June 14, 2021, at 23; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered June 28, 2021, at 26; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 27; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶50, Staff Report, entered August 24, 2021, at 26; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶64; Staff Report, entered July 7, 2021, at 24; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶63; Staff Report, entered September 13, 2021, at 28.

The Project is also partnering with Ohio State University, College of Food, Agricultural and Environmental Sciences on research relating to honey bee foraging in the Ohio agroecoystem. (Application at 63.) To facilitate this study, honey bee colonies (apiaries) will be established on the landscape through The Ohio State University and managed in collaboration with local beekeepers. (*Id.*) Studies have shown that co-locating solar with pollinator friendly groundcover can expand habitat for the dwindling bee population and can also benefit local agriculture. (*Id.*)

In short, the uncontested evidence establishes that the Project will enhance the local agricultural industry and heritage. The Board, despite the Staff Report setting forth the benefit of the Project and its own prior precedent recognizing this important benefit under R.C. 4906.10(A)(6), failed to consider evidence of this benefit here. This is unreasonable error that should be corrected on rehearing.

4. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply

Solar projects, including the Project here, benefit the public by providing increased, diversified, and affordable energy generation. In many past cases, the Board and its Staff have recognized this benefit: "the facility would serve the public interest, convenience, and necessity by proving additional electrical generation to the regional transmission grid, would be consistent with plans for expansion of the regional power system, and would serve the interests of electric system economy and reliability."[12] Similarly, the Board has recognized that an "electric generation

[12] See *Hardin Solar Energy Facility*, 17-0773, Staff Report, entered November 21, 2017, at 25; *Vinton Solar Energy Facility*, 17-0774, Staff Report, entered July 5, 2018, at 25; *Alamo Solar Farm*, 18-1578, Opinion, Order, and Certificate, entered June 24, 2021, at ¶79; Staff Report, entered May 28, 2019, at 25; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶57; Staff Report, entered on December 22, 2020, at 28; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶59; Staff Report, entered November 18, 2020, at 29; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶61; Staff Report, entered March 15, 2021, at 26; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶48;

facility will provide a clean, sustainable source of electricity that will improve the quality and reliability of electric service in the area."[13] This is particularly important because, as the unchallenged testimony on behalf of Allen Auglaize Coalition for Reasonable Energy ("AACRE") set forth, "Allen County has often been classified by the USEPA as one of the top emitters of toxic air pollution among all Ohio's counties, at times topping the list."[14]

But, again, the Board ignored its prior precedent under R.C. 4906.10(A)(6) and disregarded the evidence regarding this benefit in this case. This was unreasonable and should be corrected on rehearing.

Staff Report, entered November 30, 2020, at 29; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶57; Staff Report, entered January 11, 2021, at 25; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶58; Staff Report, entered March 16, 2021, at 28; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶78; Staff Report, entered May 24, 2021, at 32; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶97; Staff Report, entered March 22, 2021, at 28; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶72; Staff Report, entered May 19, 2021, at 28; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶64; Staff Report, entered June 22, 2021, at 35; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered on May 10, 2021, at 28; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶65; Staff Report, entered June 28, 2021, at 31; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 35; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 34; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶58, Staff Report, entered August 24, 2021, at 33; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶74; Staff Report, entered July 7, 2021, at 30; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 33; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶76; Staff Report, entered October 8, 2021, at 36; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 34; *Harvey Solar Project*, 21-0164, Staff Report, entered February 25, 2022, at 33; *Nottingham Solar*, 21-0270, Staff Report, entered May 2, 2022, at 31; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 36; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 35; *Wild Grains Solar*, 21-0823, Staff Report, entered April 18, 2022, at 32.

[13] *Hardin Solar Energy Facility*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at ¶31; *Vinton Solar Energy Facility*, 17-0774, Opinion, Order, and Certificate, entered September 20, 2018, at ¶94.

[14] Testimony of T. Rae Neal on Behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022, at ¶¶ 20-22.

5. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells

The Project is in proximity to a historic oil and gas field. As Staff explained:

> This project is partially located within the mapped boundary of the Lima Consolidated Oil Field, which is a portion of . . . Lima Findlay Trenton Field. The project's proximity to this field is of importance due to the many orphan wells associated with the 1800's oil and gas drilling and development which took place during a period of no regulatory oversight

(Staff Report, at 24.)

As a result, the Staff Report recommended that the Project Area could not be safely developed due to an unfortunately common problem in much of Ohio: the potential for unmapped abandoned oil and gas wells. (Staff Report, 23-27.) More specifically, a preliminary investigation of the Project Area suggested that sixty oil and gas wells were potentially within the Project Area. (*Id.* at 27.) In other words, Staff did not find a problem with the Project, but found that the property comprising the Project Area itself was potentially unsuitable for beneficial development.

In response, the Project conducted extensive investigation of the Project Area and, coordinating closely with the Ohio Department of Natural Resources ("ODNR"), created a comprehensive Engineering Constructability Report. (Response to Staff Data Request 10, filed December 30, 2021, at Att. 1.) This Report found that, not only was the Project able to be safely constructed but, "during the 35-year operational life of the Project, the oil and gas wells within the Project area pose less of a human health risk than other potential land uses because of the minimal excavation for construction, minimal need for onsite operations or disruptions and secure nature of the facility with the Project fencing." (*Id.* at 5.) "Solar facilities, in many ways are ideal for historic oil and gas locations which could be harmed if additional more extensive infrastructure was created or a higher population density was established." (*Id.*) "The Birch Solar Project development preserves the land and ensures limited additional development of the site for the next

35 years or more, which can reduce potential impacts that might be associated with other types of development that include more intense excavations, grading of the site and possible disruption of the historic oil and gas features." (*Id.* at 15.) This Report was supported by the testimony of Thomas Stewart at the adjudicatory hearing. (Direct Testimony of Thomas E. Stewart, filed May 4, 2022.)

Following the Project's efforts, Staff agreed that the Project had addressed its concerns regarding constructing the arrays in proximity to abandoned wells, as the Board acknowledged in its Order. (Order, at ¶ 49.) (*See also* Prefiled Testimony of James S. O'Dell, filed May 11, 2022, at, 4: 9-14) ("Applicant has . . . rectified these issues to Staff's satisfaction by filing sufficient information and analysis in the docket.")

Accordingly, the Project submitted evidence that it would provide a uniquely beneficial use for property burdened with abandoned oil and gas wells—property that the Staff originally deemed unsafe for development, and property that is all too common in Ohio. The Board, however, ignored this evidence. This was unreasonable and should be corrected on rehearing.

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT.

The Board acknowledged that "[t]he record is uncontroverted as to the determination that Birch Solar's application satisfies the statutory requirements in R.C. 4906.10(A) in every respect except as to whether the Project serves the public interest, convenience, and necessity." (Order, at ¶ 45.) The Board did not identify a single concern regarding the technical suitability, safety, or environmental impact of the Project. (*Id.*) In other words, no *evidence* in the record casts any doubt on the suitability on the Project.

Nonetheless, in its Order, the Board blindly accepted opposition from local governments raising nothing more than disproven allegations of potential harm. The Board compounded this error by failing to consider any conditions to mitigate potential impacts to the public interest, despite evidence in the record that such conditions would be appropriate and acceptable to the local governments. These errors were unreasonable and should be corrected on rehearing.

1. It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record

In the face of the many proven public benefits of the Project, the opposition offered little (if any) contrary evidence in the record. For example, the Board noted that "the Auglaize County Board of Commissioners raised *concerns* regarding 'numerous potential impacts on users and property owners in the vicinity of such developments' and 'considered the potential impacts of development as well as the interest of property owners in making their land available for development.'" (Order, ¶ 64.) The Board also pointed to Allen County officials' *concerns* regarding the "Project's (1) lack of dedicated local power, (2) impact on land use, (3) impact on property values, (4) decommissioning plan, (5) impact on drinking and groundwater, (6) road maintenance, (7) drainage, and (8) communication regarding negotiations as to distributing PILOT to local governments." (*Id.* at ¶ 63.)

What Auglaize and Allen County did not do, however, was submit any supporting *evidence* of the truth of these potential impacts or the validity of these concerns. The Auglaize County Commissioners did not submit any pre-filed testimony or enter an appearance at the adjudicatory hearing. In fact, as the Board acknowledged, Auglaize County took "no position on whether the project should be certified by the Board" by the time of the hearing. (Order, at ¶ 39.) The Allen County Commissioners did not intervene and, as such, is not even a party in this case.

This, in itself, should have been enough for the Board to disregard the Counties' allegations of potential harm. In prior cases, the Board has done just that— holding opponents to their burden of proof and disregarding allegations of harm that had no evidentiary support. In *Ice Breaker Windpower, Inc.*, for example, the Board noted that local opponents argued that the project would cause electricity costs to rise, but "provided no evidence demonstrating that . . . rates would increase as a result of the power purchase agreement, apart from the bare allegations proffered by Dr. Brown." (Order, *In the Matter of Icebreaker Windpower, Inc. for a Certificate of Environmental Compatibility and Public Need*, 16-1871-EL-BGN, ¶ 189, May 21, 2020.) The Board therefore concluded, "[a]s such, the arguments proffered by the [opponents] to establish that the proposed project will not promote the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6) are misplaced." (*Id.*)

Here, as the Board itself made clear, there are *no* valid technical concerns with the suitability of the Project. **"**The record is uncontroverted as to the determination that Birch Solar's application satisfies the statutory requirements in R.C. 4906.10(A) in every respect except as to whether the Project serves the public interest, convenience, and necessity." (Order, at ¶ 45.) More granularly, Birch's Reply Brief laid out examples of the uncontested evidence in the record that directly addressed and resolved each of the Counties' concerns,[15] now resurrected in the Order. Further, the Ohio Department of Health has analyzed a number of potential negative impacts of a solar facility to public health and convenience – noise, electromagnetic fields, heat, glare, toxicity of materials – and determined that each of these concerns is unsubstantiated.[16]

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[15] Reply Brief of Birch Solar 1, LLC, filed September 29, 2022, at 12-14.

[16] Health Assessment Section Bureau of Environmental Health and Radiation Protection Ohio Department of Health, Ohio Department of Health Solar and Photovoltaics Summary and Assessment, April 22, 2022. (Available at: https://odh.ohio.gov/wps/wcm/connect/gov/fc124a88-62b4-4e91-b30bbc1269d0dde5/ODH+Solar+Farm+and+PVs+Summary+Assessments_2022.04.pdf/)

While two Counties may have raised concerns regarding the Project to justify their opposition, the Board was well aware that these concerns were unfounded and disproven – by the Ohio Department of Health, by the uncontroverted evidence in the record, and by the findings in the Order itself. The Board's reliance on these proven-false concerns in its Order was thus unreasonable and should be corrected on rehearing.

2. It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments

In this case, the only party representing local residents that provided pre-filed testimony and participated in the hearing is Allen Auglaize Coalition of Reasonable Energy ("AACRE"), which is in *favor* of the Project.[17] The Auglaize County Commissioners and Logan Township Trustees did not submit any pre-filed testimony—and, as the Board acknowledged, they now "take no position on whether the project should be certified by the Board." (Order, at ¶ 39.) The Shawnee Township Trustees likewise did not submit any testimony. Against Birch Solar and its members voluntarily withdrew from the case.[18] The Allen County Commissioners did not intervene and, as such, were never even a party.

In its Order, however, the Board did not differentiate between sworn evidence from parties and unsworn Public Comments. In fact, the Board favored the latter. Rather than rely on testimony that was subject to cross-examination, the Board relied on the breakdown of the Public Comments, simply tallying the number of comments for and against the Project. "The Board takes notice of the large number of public comments filed in the case, which disfavor the Project at a ratio of approximately 80 percent to 20 percent." (Order, ¶ 70.) "While we recognize that public

[17] *See* Testimony of A. Chappell-Dick, Michael Wildermuth, Everett Lacy, T. Rae Nea, Frank Caprilla on behalf of Allen Auglaize Coalition of Reasonable Energy, filed May 12, 2022.

[18] Notice of Withdrawal from Intervention electronically filed by Mr. Jack A. Van Kley on behalf of Against Birch Solar, LLC and Members, filed May 16, 2022.

comments are not evidence that has been admitted to the case, and thus, are less reliable than the admitted evidence, we nevertheless uphold that they are relevant to our consideration of the matter." (*Id.*)

This is a departure from past Board precedent and improperly turns a merit-based siting process into a popularly contest divorced from the merits of the Application. Until recently, negative comments have not been reason enough to deny a Certificate. In past cases, the Board has received "thousands of comments from members of the general public, local organizations, and local officials" opposing a project, but nonetheless looked to the underlying merits of the project and relied on the record. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, at 82-83, November 21, 2019).

Further, in a decision issued the very same day as the Order here, the Board stressed the importance of *evidence*, and explained that unverifiable opposition should not be considered. (Order, Opinion, and Certificate, *In re the Application of Harvey Solar I, LLC*, 21-164-EL-BGN, at ¶ 158, October 20, 2022). In *Harvey Solar*, the Board ruled that certain petitions created by an opposition group were unreliable and, therefore, were not admissible evidence: "the Board finds that the reliance on petitions for which the identity of the denoted individuals cannot be confirmed is not appropriate for consideration relative to the ultimate determination in this case." (*Id.*)

In these other cases, regardless of the number or proportion of negative comments, the Board still undertook its duty to review the actual evidence in the case to and determine the merits of a project. Nonetheless, in this case, the Board simply chose to count hands raised for against and the Project in the Public Comments,[19] none of which were evidence in the record.

[19] Notably, in counting the Public Comments, the Board did not acknowledge that many Public Comments were submitted by the same few individuals. Further, the Board did not acknowledge that members of Against Birch Solar who voluntarily withdrew from the case were among the most frequent commenters and accounted for an outsized proportion of the negative Public Comments. While the Board should not

Here, the Board placed unwarranted weight on the sheer number of unsworn and untested negative Public Comments in reaching its decision that the Project does not serve the public interest. This was unreasonable error, sets dangerous precedent, and incentivize vexatious and false submissions. The Board should correct this error on rehearing.

3. It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions

The Ohio Supreme Court has held that the Board does not need to resolve each and every issue prior to issuing a certificate because R.C. 4906.10(A) "expressly allows the board to issue a certificate subject to such conditions as it considers appropriate." *In re the Application of Icebreaker Windpower, Inc.*, Slip Opinion, 2022-Ohio-2742, ¶ 40. *See, e.g., In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 16-18); *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 52.

Therefore, in prior cases, the Board has considered the ability of certificate conditions to mitigate potential negative impacts of a project. In the Icebreaker Windpower demonstration project, for example, the Board addressed potential wildlife harm through conditions rather than an outright denial. "Rather than requiring Icebreaker to resolve those matters before issuing the certificate, the board determined that the conditions on its grant of the certificate were sufficient to protect birds and bats and to ensure that the facility represented the minimum adverse environmental impact." *In re the Application of Icebreaker Windpower, Inc.*, Slip Opinion, 2022-Ohio-2742, ¶ 37. (*See also* Order, Opinion, and Certificate, *In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013, ruling that "[T]he Board finds that,

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have granted Public Comments such great weight, it should not have granted these Public Comments any weight at all.

with respect to health and safety concerns, such as setbacks (including blade shear, ice throw, shadow flicker, and noise), these concerns have been thoroughly considered and appropriately addressed in the conditions contained in the Conclusions and Conditions section of this Opinion, Order, and Certificate.")

More recently, the Board applied this approach to a solar project in order to address concerns related to public opposition – the same and *only* issue identified in the Order here. In *Dodson Creek*, the Board adopted a stipulation approving the project but, noting general opposition and "concerns raised by the public relative to the proposed Project," imposed conditions incorporating upgraded fencing and enlarged setbacks from non-participating parcels, residences, and paved roads. (Order, Opinion, and Certificate, *In the Matter of Dodson Creek Solar LLC for a Certificate of Environmental Compatibility and Public Need*, 20-1814-EL-BGN, ¶ 114, May 21, 2020.) These conditions, the Board determined, addressed the public's concerns. (*Id.*)

Here, contrary to this precedent, the Board did not consider any conditions to address its concerns related to public opposition. This failure is especially striking because Auglaize County and Logan Township, two of the four local jurisdictions identified in the Order as opposing the Project, have already agreed to 40 draft conditions. (Order, at ¶ 71.) In so doing, these jurisdictions have made it clear what conditions they want to see put into place if the Project goes forward — but the Board flatly refused to even consider these agreed-to conditions. (*Id.*) ("We reject the conclusion that Partial Stipulating Parties have waivered in their opposition to the Project.") The Board denies the Certificate based entirely on perceived public sentiment of local jurisdictions, but refuses to consider the express sentiment from these same jurisdictions when it comes to conditions.

Again, the Board departed from its prior precedent and ignored the evidence in the record regarding the availability of conditions to mitigate any potential harm in this case, all in order to reject the Certificate. This was unreasonable error.

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A)

1. The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions

The Board denied the Project's Certificate for a single reason: "Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project,[20] the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order, ¶ 72.)

As set forth below, this myopic approach is not only an unreasonable departure from past Board precedent, but it violates Ohio public policy, Ohio's Constitutional nondelegation doctrine, and multiple Ohio laws. These errors must be corrected on rehearing.

a. The Board's approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance

The Boards approach in this case runs contrary to the very purpose of the Ohio Power Siting Board. The Board was created so a consortium of Ohio agencies could consider large energy projects on their merits under the diverse criteria set forth in R.C. 4906.10. As the Board states:

> Our mission is to support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens,

[20] Birch notes that the Board elsewhere acknowledges that opposition is less than "unanimous and consistent," as Auglaize County and Logan Township "take no position on whether the project should be certified by the Board." (Order, at ¶ 39.) Allen County did not even intervene.

> promoting the state's economic interests, and protecting the environment and land use.

(Ohio Power Siting Board, OPSB Mission.[21])

This type of holistic state-level review is necessary because *the public as a whole* has a stake in these projects. It not merely the local jurisdictions that touch or neighbor projects that must be considered. If that were the case, any amount of localized NIMBYism could derail large-scale solar generation projects.

Here, for example, in polling conducted in the Lima area, 70% of local voters agreed it is important to bring new sources of clean energy to Ohio and nearly 75% of local voters saw solar farms as beneficial to the economy and environment. (Application Exhibit 30A, Att. SM-3.) The Board acknowledged these results, but disregarded them because these local voters, while strongly supporting solar development *somewhere* in Ohio, did not necessarily support development of the Project in their own backyard. (Order, ¶ 70.) Early local polling support for the Project, despite little information about the Project and its potential benefits being known, was "only 45 percent." (*Id.*) In short, polling indicated that locals had a kneejerk negative reaction to the Project despite having little information and before looking into the benefits.

That disconnect is precisely why the Board has ruled in other cases that a project's larger benefits to the state, the public, and the grid outweigh local disapproval. The Board, in *In re Duke Energy Ohio,* approved a project even though there were "thousands of comments from members of the general public, local organizations, and local officials" and opposing intervention from multiple local governments. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc*., 16-253-GA-BTX, at 82-83, November 21, 2019). Similarly, in *In re Champaign Wind*, the Board

[21] Available at: https://storymaps.arcgis.com/stories/9bf2d0fc20214ffdaa3ae83a1fc9faa5

ruled that a project benefited the public even though multiple opposing local governments intervened and presented nine witnesses at the adjudicatory hearing. (Order, Opinion, and *Certificate, In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013). In that case, the Board took a broad view and ruled "that, in considering whether the proposed project is in the public interest, convenience, and necessity, we have taken into account that the renewable energy generation by the proposed facility will benefit the environment and consumers." (*Id.* at 72.)

As in the *Duke Energy Ohio* and *Champaign Wind* cases, the Board in this case is tasked with considering whether the Project furthers the goals embodied in the Board's overall mission and the goals of its member state agencies. Therefore, the close alignment of the Project with Ohio's top statewide policy priorities (*i.e.*, water conservation, statewide economic development, pollinator habitat, generation capacity, beneficial use of historic oil and gas fields, etc.) should have been considered by the Board in evaluating the impact on the public interest.

But the Board did not consider any of those things.

Instead, the Board deferred its sole and plenary authority to make a statewide public interest decision to the whims of local jurisdictions. As the Ohio Chamber of Commerce noted in this case:

> While legitimate local concerns should be carefully evaluated, local opposition based on hyperbole and allegations without supporting evidence and testimony should not dictate the outcome of the OPSB permitting process. Allowing it to do so undermines the fundamental purpose of the OPSB to balance a variety of interests when siting important energy infrastructure.

(Ohio Chamber of Commerce Public Comment, filed September 23, 2022.)

The Board failed to look beyond baseless local opposition in determining that the Project failed to serve the public interest under R.C. 4906.10(A)(6). There is no reason for a statewide

permitting regime staffed with diverse subject matter experts, like the Ohio Power Siting Board, if untested local prejudices carry the day.

As a result of the Board's abrogation of its authority, the best interests of Ohio and Ohioans as a whole are not represented (or even considered) in the Board's Order. This is unreasonable and unlawful.

b. The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine

In denying the Certificate and preventing the beneficial use of privately-owned property, the Board improperly delegated its regulatory powers to private residents and local jurisdictions: "Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order, ¶ 72.)

Under the Constitutional nondelegation doctrine, it is a violation of due process for the state government to empower "a few citizens to deny an individual the use of his property" – precisely as the Board did here. *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 664 (4th Cir. 1989).

"At least since *Yick Wo v. Hopkins*, 118 U.S. 356 [6 S.Ct. 1064, 30 L.Ed. 220] (1886)," the Supreme Court teaching is that the due process clause "places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself." *McGautha v. California*, 402 U.S. 183, 272 n. 22, 91 S.Ct. 1454, 1473 n. 22, 28 L.Ed.2d 711 (1971) (Brennan, J., dissenting). This is particularly true where the power delegated relates to the ability to develop and use property. *See, e.g., Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) (setting of property line by adjacent owners); *Embree v. Kansas City & Liberty Blvd. Road Dist.*, 240 U.S. 242, 36 S.Ct. 317, 60 L.Ed. 624 (1916)

(determination of boundary for road district by petition of landowners); *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330 (1926) (same as *Embree*); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) (zoning variance only by consent of adjacent owners). "These opinions still stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion." *Gen. Elec. Co. v. New York State Dep't of Lab.*, 936 F.2d 1448, 1455 (2d Cir. 1991).

In *Geo-Tech*, for example, the court struck down a West Virginia law that permitted a state agency to deny a permit if a project is "significantly adverse to public sentiment," even though the project in question had inspired hundreds of letters in opposition. *Id.* at 663 (holding that the law "violated due process by impermissibly delegating legislative authority to local citizens.") Such delegation to public sentiment, the Supreme Court has explained, is repugnant because it empowers neighbors "to withhold consent for selfish reasons or arbitrarily" to block otherwise lawful and beneficial development. *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122, 49 S. Ct. 50, 52, 73 L. Ed. 210 (1928). Further, even the if the State remains able to exercise its authority, it is nonetheless a violation of the nondelegation doctrine and unconstitutional if, in fact, the State does not actually exercise that discretion. *Gen. Elec. Co.*, 936 F.2d at 1458.

The nondelegation doctrine is as applicable to the Board as it is to the legislature. *See Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 381 N.W.2d 842, 847 (Minn. 1986) ("The question is not whether the legislature unlawfully delegated its powers to the Commission, but whether the Commission unlawfully delegated its powers to a private entity.") Under both

situations, "the policy considerations that underlie the delegation doctrine are applicable . . . and the inquiry is the same: whether adequate legislative or administrative safeguards exist to protect against the injustice that results from uncontrolled discretionary power." *Id.*

Here, the Board has delegated its authority to the local residents and jurisdictions without placing any such safeguards in place. Whether or not the Board nominally retains the authority to exercise its siting power is not the question. The question is whether the Board chose to exercise that power in fact, or whether it has chosen instead to empower a few private citizens and local jurisdictions to make the decision on its behalf. Clearly, it is the latter. The Board, despite being bestowed with plenary authority over the certification process by the Ohio General Assembly, did not exercise *any* independent analysis or fact-finding to test the allegations and complaints made by the local residents and jurisdictions regarding the Project. As set forth above, the Board merely accepted the complaints of the opponents at face value, despite overwhelming contrary evidence in the record, and adopted their opposition wholesale to prevent the development of the Project on private property.

The Ohio General Assembly itself would be unable to establish such a siting standard and pass constitutional muster. Surely, the Board cannot establish such a standard for itself. Accordingly, the Order is unlawful, unreasonable, and unconstitutional. It must be reconsidered.

c. <u>The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B)</u>

In addition to being a violation of Ohio's public policy and Constitution, the Board's total reliance on the opinions of the local jurisdictions violates Ohio law. Ohio law is clear that the Board, and *only* the Board, is authorized to determine the permissibility of a large-scale solar project. Chapter 4906.10(A), for example, speaks only in terms of findings regarding the Certificate that *the Board* must make. No one else.

This exclusive and plenary authority is made explicit under R.C. 4906.13(B), which provides that "[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code." The Board, however, did just this. The Board, in denying the Project's Certificate, required the approval and consent of the local political subdivisions. In fact, the presence or absence of this local subdivision approval is the *only* factor the Board seems to have considered.

Accordingly, the Order is unlawful and must be reconsidered.

2. The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute

The Board, as a creature of statute, may exercise only those powers that the General Assembly confers on it. *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. The General Assembly, in R.C. 4906.10, provides the certification criteria the Board must consider in granting a certificate for the construction, operation, and maintenance of a solar-powered electric generation facility unless 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.[22]
>
> (2) The nature of the probable environmental impact.
>
> (3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.
>
> (4) That the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and

[22] As this Project is a proposed electric generating facility, this criterion is not applicable.

interconnected utility systems and that the facility will serve the interests of electric system economy and reliability.

(5) 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 sections 1501.33, 1501.34, and 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.

(6) That the facility will serve the public interest, convenience, and necessity.

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

However, instead of relying on these factors as required by the Ohio Revised Code, the Board invented its own single-factor standard. The Board relied on a single consideration in denying the Project a Certificate: public opposition from local jurisdictions. This single determinative factor appears nowhere in R.C. 4906.10(A). And it is not for good reason. As set forth above, simply because there is local opposition to a project does not mean that a project is not in the public interest.

The Board rewriting the statute to focus solely on local public opposition was unreasonable and unlawful.

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND

PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52")

The Board's Order is unreasonable and unlawful because it attempts to impermissibly legislate in the place of the Ohio General Assembly. In addition to impermissibly modifying R.C. 4906.10(A) as set forth above, the Board's Order violates and purports to *de facto* amend SB 52 as enacted by the General Assembly. Because this Board action conflicts with the directive of the General Assembly regarding the siting of utility-scale solar projects, it is in violation of the separation of powers in the Ohio Constitution.

"[I]f an administrative policy exceeds the statutory authority granted by the General Assembly, the agency has usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution." *McFee v. Nursing Care Mgt. of Am., Inc.*, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 24. Policies promulgated by administrative agencies are unenforceable if they are in conflict with statutory enactments covering the same subject matter. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 18. *See, e.g., State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis,* 2002-Ohio-7041, 781 N.E.2d 163, at ¶ 21 ("the General Assembly is the ultimate arbiter of public policy"); *Carroll v. Dept. of Adm. Servs.* (1983), 10 Ohio App.3d 108, 110, 460 N.E.2d 704 ("In the absence of clear legislative authorization, declarations of policy . . . are denied administrative agencies and are reserved to the General Assembly").

The General Assembly, in enacting SB 52, drastically changed the siting landscape and future of solar development in Ohio. Under this new law, utility-scale solar projects are subject to two levels of permitting approval: county and state. First, at the county level: At least 90 days prior to applying to the Board for a certificate, a project must hold a public meeting in each county where the facility is to be located. Following the public meeting, the county board of

commissioners has 90 days to adopt a resolution prohibiting or reducing the proposed project in size.

Second, at the State level: If the County Commissioners either approve, reduce, or take no action regarding the project, the project may file its application before the Board. S.B. 52 creates two new voting ad hoc members of the Board, the chairperson of the township board of trustees and the president of the county board of commissioners, or their designees.

By design, not every project is subject to SB 52. The General Assembly chose to include a robust two-tiered grandfathering scheme in the law in order to provide certainty to the many projects already pending approval by the Board that this new level of local control would not apply to their applications.[23] It is uncontested that Birch is a fully grandfathered project, meaning it is not subject to any component of SB 52. "The Board acknowledges that this case is not impacted by SB 52, which subjects solar projects that are filed after October 11, 2021 to increased county-level and township-level review and participation in the Board's certification process." (Order, ¶ 69, fn. 9.)

However, despite Birch's status as a fully grandfathered project and the Board's admission that SB 52 should not apply to this case, the Board in fact fashioned and applied its own version of SB 52 to the Project, relying entirely on the opinion of local political subdivisions in reaching its permitting decision. At multiple points in the Order, the Board made this application explicit. The Board often supported its reasoning that the Project did not serve the public interest by arguing that the Project *would* be barred by the local jurisdictions under SB 52 if not for grandfathering. (Order, ¶¶ 39, 61, 63, 65, 69.) In other words, although the Board acknowledged that SB 52 is not

[23] The grandfathering provisions for solar projects are set forth at sections 4 and 5 of S.B. 52.

supposed to apply to the Project, it nonetheless denied the Certificate based on how it believed SB 52 would have applied. That is just another way of applying the new law to the Project.

As a grandfathered project, Birch is entitled to participate in the prior statewide siting process that explicitly prohibits a local approval requirement. R.C. 4906.13(B). That is the compromise the General Assembly enacted. The Board's imposition of SB 52 on a grandfathered project like Birch is a violation of its mandate from the General Assembly and, as a result, a violation of the Ohio Constitution.

There is an even larger issue, however. The Board's approach in the Order (whether the Board acknowledges its approach as the application of SB 52 or not) is not a faithful application of SB 52. The Order is inconsistent with the spirit and text of the law passed by the General Assembly. The Board took the General Assembly's policy behind SB 52—enhanced local leverage over large-scale solar projects– and stretched it to the extreme. In so doing, the Board denied Birch any of the necessary procedural safeguards that the General Assembly built into SB 52:

- While SB 52 requires that projects receive an official decision from the county before undertaking the expense of filing their application and beginning the state-level siting process, the Board here deferred to unsworn public comments, correspondence, and emails from any political subdivision provided at any point in the proceeding – even after the Staff Report was issued and on the eve of hearing. (Order, ¶¶ 63-66.)
- While SB 52 empowers a single county and township designee to participate in an official capacity as de facto Board members, the Board here gave full deference to unsworn and disproven complaints and emails from any county or township official. (*Id.*)

- While SB 52 requires counties to make a final determination on suitability within 90 days of the county-level meeting, the Board here allowed endless leeway for local governments to change their positions as often as they wished and at any point, inserting uncertainty late into the permitting process. The Board's Staff itself changed its recommendation regarding the public interest criteria between the issuance of the Staff Report and the adjudicatory hearing due to last-minute local opposition, creating an impossible moving target for the Project and unworkable precedent for future developers. (*Id.* at ¶¶ 48, 49.)

Under the Board's approach in this case, it was enough that any official from any level of local government expressed dissatisfaction with the Project in any form. SB 52 itself does not go nearly so far. The General Assembly, in enacting SB 52 after much testimony, debate, amendments, and multiple hearings,[24] determined the appropriate level and means of control for local jurisdictions over utility-scale solar projects. The Board's Order here violated that legislative directive. The Board rewrote the General Assembly's enactment into an unworkable standard.

The Board's Order is unreasonable, unlawful, and unconstitutional. These errors must be corrected on rehearing.

IV. CONCLUSION

For the foregoing reasons, Birch requests that the Board grant this application for rehearing.

Respectfully submitted,

BRICKER & ECKLER LLP

[24]Over eight months, the Senate Energy and Public Utilities Committee held six hearings, the House Public Utilities Committee held five hearings, and hundreds of witnesses provided testimony either supporting or opposing the bill. The Ohio Legislature, 134th General Assembly, Senate Bill 52 (details available at: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-52)

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 21st of November, 2022.

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Case No(s). 20-1605-EL-BGN

Summary: Application for Rehearing of Birch Solar I, LLC electronically filed by Teresa Orahood on behalf of Herrnstein, Kara

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF BIRCH SOLAR 1, LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT A SOLAR-POWERED ELECTRIC GENERATION FACILITY IN ALLEN AND AUGLAIZE COUNTIES, OHIO.	**CASE NO. 20-1605-EL-BGN**

OPINION AND ORDER

Entered in the Journal on October 20, 2022

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application of Birch Solar 1, LLC, for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of the proposed solar-powered electric generation facility.

II. INTRODUCTION

{¶ 2} In this Opinion and Order, the Ohio Power Siting Board (Board) denies the application of Birch Solar 1, LLC (Birch Solar or Applicant) to construct, maintain, and operate the proposed solar-powered electric generation facility. Specifically, the Board concludes that Birch Solar does not satisfy R.C. 4906.10(A)(6), which requires that, in order to receive Board certification, a project must serve the public interest, convenience, and necessity.

III. PROCEDURAL BACKGROUND

{¶ 3} All proceedings before the Board are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906-1, et seq.

{¶ 4} Birch Solar is a person as defined in R.C. 4906.01.

{¶ 5} Pursuant to R.C. 4906.04, no person shall construct a major utility facility without first having obtained a certificate from the Board. In seeking a certificate, applicants

must comply with the filing requirements outlined in R.C. 4906.06, as well as Ohio Adm.Code Chapters 4906-3 and 4906-5.

{¶ 6} On October 16, 2020, Birch Solar filed a motion for waiver and a request for expedited ruling requesting an alternative method, as opposed to an in-person meeting, for the public information meeting required pursuant to Ohio Adm.Code 4906-3-03(B), for a yet to be proposed solar generation facility in Allen and Auglaize counties, Ohio.

{¶ 7} By Entry issued on October 26, 2020, the administrative law judge (ALJ) granted Birch Solar's motion for limited waiver of Ohio Adm.Code 4906-3-03(B).

{¶ 8} On November 3, 2020, Birch Solar, a wholly owned subsidiary of Lightsource Renewable Energy US, LLC (Lightsource US), filed a preapplication notification letter with the Board for a yet to be proposed project to construct, operate, and maintain an up to 300-megawatt (MW) solar-powered electric generation facility in Shawnee Township, Allen County, Ohio, and Duchouquet and Logan townships, Auglaize County, Ohio. In the letter, Birch Solar stated that it planned to hold its web-based and teleconference public information meetings on November 20 and 23, 2020. Applicant also explained that it expected to file its application with the Board within 90 days of its public information meetings and commence construction of the facility as early as the fourth quarter of 2021, resulting in commercial operations in the second quarter of 2023.

{¶ 9} Also on November 3, 2020, Birch Solar filed its notice of the public information meeting, in compliance with Ohio Adm.Code 4906-3-03(B)(2), to affected property owners and tenants within the project area. Birch Solar also sent the notice to local public officials, local agencies, local first responders, the local school district, and the local library.

{¶ 10} On November 18, 2020, Birch Solar filed its proof of publication for the public information meetings in both the *Lima News,* and the *Wapakoneta Daily News* on November 3 and November 7, 2020, respectively.

{¶ 11} On February 12, 2021, as supplemented on March 25, 2021, March 31, 2021, April 5, 2021, October 5, 2021, February 17, 2022, and May 4, 2022, Birch Solar filed its application for a certificate to construct an up to 300 MW solar-powered electric generation facility on approximately 1,410 acres in Shawnee Township in Allen County and Logan township in Auglaize County, Ohio (Project or Facility).[1]

{¶ 12} Pursuant to Ohio Adm.Code 4906-3-06, within 60 days of receipt of an application for a major utility facility, the Chair of the Board must either accept the application as complete and compliant with the content requirements of R.C. 4906.06 and Ohio Adm.Code Chapters 4906-1 through 4906-7 or reject the application as incomplete.

{¶ 13} On April 13, 2021, Staff filed a motion for an extension of time for determining completeness of Birch Solar's application. On April 30, 2021, the ALJ granted Staff's motion.

{¶ 14} On June 2, 2021, counsel for Against Birch Solar LLC (Against Birch Solar), filed a petition to intervene on behalf of Linda M. Beckstedt, Jesse M. Bott & Kacie L. Rison, Ryan & Stacy Brenneman, Patricia A. Buzard, Cheryl M. Counts, Ann Marie R. & Christopher H. Fisher, Deed Hall, Allyshia & Kyle Kuhbander (Kuhbanders), Angie M. & Kenneth R. McAlexander, Alexandra & Timothy Rostorfer, Susan & William Walters, Althea A. and Mark Wellman, and Ellen Wieging.

{¶ 15} On June 9, 2021, Against Birch Solar filed a motion for an in-person informational meeting and postponement of the Staff completeness determination. On June 11, 2021, Birch Solar filed a memorandum contra Against Birch Solar Solar's motion.

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1 Birch Solar's application indicates that it reduced the size of the proposed Facility by 1,190 acres after the initial public information meetings and the filing of the preapplication letter on November 3, 2020. As a result, the proposed Project would no longer include Duchouquet Township in Auglaize County. (App. Ex. 1 at 1.)

{¶ 16} On June 14, 2021, the ALJ ordered that the deadline for Staff to make its completeness determination be stayed from June 14, 2021.

{¶ 17} On June 21, 2021, Against Birch Solar filed a notice of withdrawal from representation of Kuhbanders. The notice provided that Kuhbanders intended to remain as intervenors in the case.

{¶ 18} On July 7, 2021, the ALJ ordered that Against Birch Solar and Kuhbanders be granted intervention, that Birch Solar be required to conduct an in-person public information meeting, and that Staff file its completeness determination by July 14, 2021.

{¶ 19} On July 14, 2021, Staff filed correspondence regarding the completeness of the application, as supplemented.

{¶ 20} On August 5, August 6, and August 10, 2021, Birch Solar filed: a certificate of service of the accepted, complete application; notice of the third public information meeting; and, notice of payment of the application fee, respectively.

{¶ 21} On August 13, 2021, the ALJ ordered that a local public hearing be held on November 4, 2021, and that an evidentiary hearing commence on November 30, 2021.

{¶ 22} On August 19, 2021, both the Board of Township Trustees of Logan Township (Logan Township), and the Board of County Commissioners of Auglaize County (Auglaize County) filed notices of intervention.

{¶ 23} On September 8, 2021, the Kuhbanders filed a notice of withdrawal.

{¶ 24} On September 29, 2021, counsel for the Ohio Farm Bureau Federation (OFBF) filed a motion to intervene and accompanying memorandum.

{¶ 25} Also on September 29, 2021, Ryan and Michelle Kalnins (Kalnins) filed a motion to intervene and accompanying memorandum.

{¶ 26} On October 1, 2021, both the Allen Auglaize Coalition for Reasonable Energy (AACRE), and the International Brotherhood of Electrical Workers, Local Union 32 (IBEW) filed petitions to intervene and accompanying memoranda.

{¶ 27} On October 20, 2021, the Shawnee Township Board of Trustees (Shawnee Township) filed a motion to intervene.

{¶ 28} Also on October 20, 2021, Staff filed its report of investigation (Staff Report).

{¶ 29} On November 2, 2021, the ALJ ordered (1) that Auglaize County, Logan Township, OFBF, AACRE, IBEW, Shawnee Township, and the Kalnins be granted intervention, and (2) that the Kuhbanders be removed as intervenors in the case.

{¶ 30} On November 4, 2021, the local public hearing was held as scheduled, during which 59 members of the public testified.

{¶ 31} On November 12, 2021, Birch Solar filed a motion to call and continue the evidentiary hearing and to extend the existing deadlines for filing of testimony and any stipulations in the case.

{¶ 32} Also on November 12, 2021, the ALJ ordered that (1) the deadlines for filing testimony be stayed, (2) the deadline for filing lists of litigation issues be extended to November 19, 2021, and (3) the hearing scheduled for November 30, 2021, be called and continued.

{¶ 33} On November 30, 2021, the evidentiary hearing was called and continued.

{¶ 34} On December 7, 2021, the ALJ ordered that the evidentiary hearing be rescheduled on February 9, 2022, and that new procedural deadlines be established in the case.

{¶ 35} On December 30, 2021, Birch Solar, OFBF, AACRE, Against Birch Solar, IBEW, and the Kalnins filed a joint motion to extend the procedural schedule as set in the Entry of December 7, 2021.

{¶ 36} On January 12, 2022, the ALJ ordered that the procedural schedule as set in the Entry of December 7, 2021, be modified such that the evidentiary hearing should recommence on May 18, 2022.

{¶ 37} On April 26, 2022, the Kalnins filed a notice of withdrawal as intervenors in the case.

{¶ 38} On May 4, May 11, May 12, and May 16, 2022, various witness testimony was filed by Birch Solar, AACRE, and Staff.

{¶ 39} On May 16, 2022, Against Birch Solar filed a notice of withdrawal on behalf of its members. Also on May 16, 2022, Birch Solar, Auglaize County, Logan Township, AACRE, OFBF, and IBEW filed a joint stipulation and recommendation (Stipulation). In the Stipulation, Birch Solar, AACRE, and IBEW (Stipulating Parties) recommend that the Board issue a certificate approving the Project. Auglaize County, Logan Township, and OFBF[2] (Partial Stipulating Parties) take no position on whether the Project should be certificated by the Board, though they request that conditions of the Stipulation be adopted if the Board issues a certificate. Further, Auglaize County and Logan Township indicate to the Board that the Project would be restricted from approval if Substitute Senate Bill 52 (SB 52), which gives local governments authority to restrict unincorporated areas from large wind and solar projects, were effective as to Birch Solar's application. (Stipulation at 2-3; Attachment A.) Further, Shawnee Township did not join in the Stipulation.

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2 OFBF's position regarding the Stipulation is complex in that OFBF recommends that the Board issue a certificate for the Project subject to the Stipulation's conditions. Though OFBF joins Auglaize County and Logan Township in not agreeing to the Stipulation's Recommended Findings. Based on the lack of agreement to the Recommended Findings, the Board recognizes OFBF as a Partial Stipulating Party in its assessment of the case. (Joint Ex. 1 at 2-3.)

{¶ 40} On May 18, 2022, the evidentiary hearing resumed. During the hearing, Shanelle Montana, Vice President of Development at Lightsource US, testified in support of the Stipulation (Birch Solar Ex. 30A). Additionally, James O'Dell, a Senior Siting Specialist with the Power Siting Department, testified in opposition to the Stipulation (Staff Ex. 2). Further, at the hearing, the ALJ admitted multiple exhibits as submitted by Applicant, AACRE, and Staff, as well as the Joint Stipulation. (Tr. at 3-9; Joint Ex. 1.)

{¶ 41} On June 10 and June 16, 2022, counsel for AACRE filed a motion for admission pro hac vice and an amended motion for admission pro hac vice, respectively. Through these filings, Eric L. Christensen seeks permission to appear as co-counsel in the case. The attorney examiner has reviewed the filings, which are unopposed, and finds that they are sufficient to support attorney Christensen's request. Accordingly, Eric L. Christensen is permitted to appear pro hac vice in this proceeding.

{¶ 42} In accordance with the briefing schedule established at the close of the May 18, 2022 hearing, Birch Solar, AACRE, IBEW, and Staff filed timely initial post-hearing briefs on July 15, 2022. Further, Birch Solar, AACRE, IBEW, and Staff filed timely reply briefs on July 29, 2022.

IV. PROJECT DESCRIPTION

{¶ 43} Birch Solar seeks certification to build a 300 MW solar-powered electric generation facility in Shawnee Township, Allen County, and in Logan Township, Auglaize County, Ohio. The Project would consist of large arrays of ground-mounted photovoltaic modules, commonly referred to as solar panels, on a racking system on approximately 1,410 acres within a 2,345-acre project area. The Project would also include associated facilities including 22.5 miles of gravel access roads, a possible operations and maintenance building, underground and aboveground electric collection lines, meteorological towers/weather stations, inverters and transformers, a collector substation, point of interconnection switchyard, and a 345 kilovolt generation interconnection electric transmission line. The Project would be secured by six-foot cedar post perimeter fencing. Applicant would ensure

that solar modules are setback a minimum of 300 feet from adjacent non-participating residences and Breese Road, and will provide for evergreen screening in order to limit impacts to neighboring viewsheds. (App. Ex. 1 at 2, 6-9; App. Ex. 30 at 6-7.)

V. CERTIFICATION CRITERIA

{¶ 44} Pursuant to R.C. 4906.10(A), the Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless 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 a gas or natural gas transmission line;

(2) The nature of the probable environmental impact;

(3) The facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that 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;

(5) The facility will comply with R.C. Chapters 3704, 3734, and 6111, as well as all rules and standards adopted under those chapters and under R.C. 4561.32;

(6) The facility will serve the public interest, convenience, and necessity;

(7) The impact of the facility on the viability as agricultural land of any land in an existing agricultural district established under R.C. Chapter 929 that is located within the site and alternate site of any proposed major facility; and

(8) The facility incorporates maximum feasible water conservation practices as determined by the Board, considering available technology and the nature and economics of various alternatives.

VI. SUMMARY OF EVIDENCE AND PUBLIC COMMENTS

A. Summary of Evidence Other Than Local Public Hearing Testimony

{¶ 45} The record is uncontroverted as to the determination that Birch Solar's application satisfies the statutory requirements in R.C. 4906.10(A) in every respect except as to whether the Project serves the public interest, convenience, and necessity (Staff Ex. 1 at 40, 43, 48-49; Staff Ex. 2 at 4; Tr. at 29, 39; Stipulation at 17-18). As to that issue, Staff recommends a finding that the Project does not serve the public interest, convenience, and necessity (Staff Ex. 2 at 4; Tr. at 29, 39). Stipulating Parties recommend a finding that the Project does serve the public interest, convenience, and necessity (Joint Ex. 1 at 17-18). Partial Stipulating Parties and Shawnee Township, which did not participate in the Stipulation, do not make a recommendation as to this determination (Joint Ex. 1 at 2-3). Though, as described below, Auglaize County, Allen County, Shawnee Township, and Logan Township have each filed resolutions or correspondence indicating their opposition to either the Project, specifically, or the installation of large industrial solar facilities such as the Project, generally, outside of industrial areas in the communities that surround the Project. (*See* Paragraphs 63-66.)

{¶ 46} Consistent with R.C. 4906.07, Staff completed its investigation of the application and submitted the Staff Report. As described in the Staff Report, Staff initially recommended that the Board deny Birch Solar's application due to (1) concerns as to the

Project's probable environmental impact (and minimization thereof) with respect to locating and avoiding construction and operation impacts in areas where historic, unrecorded, oil and gas wells might exist, and (2) Applicant's failure to provide sufficient analysis to determine and mitigate potential adverse impacts to cultural resources. Staff explained that should the Project encounter one of these latent oil and gas wells, it could result in the release of petroleum or brine that could affect vegetation, ground water, or surface water, in the form of odors, gas vapors, or oil leakage. (Staff Ex. 1 at 23-29, 35-38; R.C. 4906.10(A)(2); R.C. 4906.10(A)(3).)

{¶ 47} In addition to the environmental impact concerns, Staff also described concerns regarding whether the Project serves the public interest, convenience, and necessity, as required by R.C. 4906.10(A)(6). Staff described that Birch Solar engaged the community using virtual and in-person public informational meetings where attendees could ask questions and provide feedback. Further, Birch Solar offered adjacent landowners a neighboring landowner financial benefit from $10,000 to $50,000 depending on proximity, for any home located within 500 feet of the Project. Applicant also offered a home value agreement for residences located closest to the Project. (Staff Ex. 1 at 44-47.)

{¶ 48} Despite Birch Solar's communication efforts and concessions to property owners in proximity to the Project, Staff described continued public opposition to the Project. Staff noted concerns regarding the opposition expressed by local elected officials, as described by the filings in public comment docket of (1) a Shawnee Township Resolution No. 91-20 opposing the Project on November 20, 2020, (2) a Logan Township Resolution opposing the Project on November 20, 2020, and (3) correspondence signed by the Allen County Commissioners expressing concerns regarding the Project filed on June 30 and July 6, 2021. In spite of its concerns, Staff ultimately recommended a finding that the Project satisfies the test as to public interest, convenience, and necessity, provided that it is subject to Staff's recommended certificate conditions. (Staff Ex. 1 at 44-47, 50-58.)

{¶ 49} Following the issuance of the Staff Report, Applicant submitted additional information addressing Staff's cultural resources concerns and an Engineering Constructability Report (ECR) that addressed Staff's environmental concerns resulting from the potential for the Project encountering and impacting latent oil and gas wells. Following its review of the ECR and additional cultural resources information, Staff concluded that Applicant sufficiently remedied those concerns such that the Project complies with the requirements of R.C. 4906.10 (A)(2) and (A)(3), subject to proposed conditions, as Applicant demonstrated improved awareness of the well locations within the project area and an acceptable plan for managing the construction and operation of the Project should it encounter any latent oil and gas wells. Nevertheless, Staff testified at the evidentiary hearing that it remains opposed to the Project, citing to local government opposition as evidenced by the intervention and filing of correspondence in opposition in the case by Shawnee Township, Logan Township, Auglaize County, and Allen County. (Staff Ex. 2 at 4-5.)

{¶ 50} Stipulating Parties[3] maintain that Staff's recommendation is deficient because (1) Staff fails to adequately consider the Project's favorable impact to the state and local community, (2) Staff disregards the mitigation impacts to the Project that result from the 40 conditions contained in the Stipulation; and (3) Staff's conclusion regarding the local community opposition to the Project is not supported by the evidence in the case. Stipulating Parties stress the Project's economic benefits, which include generating (1) approximately 900 construction jobs, (2) approximately 35 operation jobs, and (3) approximately $2.5 million in annual PILOT payments to Allen and Auglaize counties. (Staff. Ex. 1 at 17-18.) Further, Stipulating Parties assert that the 40 conditions contained in the Stipulation are consistent with and build upon the recommendations in the Staff Report

[3] The Board recognizes that Stipulating Parties are joined in the Stipulation by Partial Stipulating Parties, who advocate for the inclusion of the 40 conditions included in the Stipulation if the Board issues a Project certificate. But as Partial Stipulating Parties did not (1) support the Stipulation's Recommended Findings, and (2) file briefs in support of the Project or Stipulation, the Board finds that their position does not align with Stipulating Parties as to the identified challenges to Staff's recommendation.

such that the Project compares favorably with similar projects that the Board has considered and approved (App. Br. at 50-54). Further, Stipulating Parties note that, other than Staff, no party participated in the evidentiary hearing or admitted evidence contra the Project such that the record evidence supporting the Stipulation outweighs Staff's recommendation, which was based on non-evidentiary public comments in the case docket (App. Reply Br. at 15-23; AACRE Reply Br. at 4-10; IBEW Br. at 5-8).

B. Summary of Local Public Hearing Testimony

{¶ 51} During the local public hearing on November 4, 2021, 59 witnesses testified under oath and subject to the right of cross examination, with 21 witnesses supporting the Project, and 38 persons opposing the Project.[4]

{¶ 52} The witnesses testifying in opposition to the Project raised various concerns, including, but not necessarily limited to: the Project's impact to the viewshed (Public Hearing Tr. at 13, 20, 148, 249); the alleged lack of local input regarding the Project, and the long-term impact on local property values (Public Hearing Tr. at 13, 20, 40, 94, 171, 187, 202, 223, 246); doubts as to the number and quality of construction jobs and permanent employees (Public Hearing Tr. at 84); dangers of solar facilities attributable to chemical use and panel attachment (Public Hearing Tr. at 28, 151, 187, 230, 246); concerns that the Project's power will not be locally used (Public Hearing Tr. at 119); concerns for preserving the rural, rather than industrial, character of the community (Public Hearing Tr. at 171, 189); and, impacts to wildlife (Public Hearing Tr. at 13, 28, 130, 202, 220, 230, 249). Moreover, we note that two local elected officials, Allen County Commissioner Cory Noonan and Shawnee

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4 The Board acknowledges that the number of opponent witnesses changed following Against Birch Solar's withdrawal from the case on May 16, 2022, as five Against Birch Solar members provided testimony adverse to the Project at the local public hearing. Despite the removal of that opposition testimony, the summary of issues discussed in witness testimony remains accurate, as each of the summarized positions were provided by multiple witnesses such that the removal from consideration of testimony of former Against Birch Solar members does not materially alter the arguments raised at the public hearing.

Township Trustee David Belton, testified under oath in opposition to the Project (Public Hearing Tr. at 119-124, 269-275).

{¶ 53} Witnesses testifying in support of the Project raised benefits including, but not necessarily limited to: increased funding to schools and local governments (Public Hearing Tr. at 61, 73, 84, 90, 238); the benefits of renewable energy and energy independence (Public Hearing Tr. at 77, 81, 141, 143); increased investment in the local economy through job creation and lease payments (Public Hearing Tr. at 61, 113, 132, 135, 158, 238); increasing the state's ability to attract business investments (Public Hearing Tr. at 238); and protecting the rights of individual landowners (Public Hearing Tr. at 35, 155).

C. Summary of Public Comments

{¶ 54} In addition to the testimony provided at the public hearing, 450 public comments regarding the proposed Facility were received by the Board as of September 1, 2022.[5] A review of those comments demonstrates that (1) approximately 82 percent (371 comments) were in opposition to the Project, and (2) the issues raised in support and opposition to the Project are consistent with those raised during the local public hearing. Further, to the extent a commentor's proximity to the Project can be ascertained, it appears that opposition commentors are generally those who reside closer to the Project.

{¶ 55} Further, we note that state elected officials provided opposition statements in the public comments on behalf of their constituents. Specifically, Senate President Matt Huffman wrote in opposition to the Project on October 28, 2021, May 20, 2022, and September 26, 2022. Further, Representative Susan Manchester filed correspondence on July

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5 The Board notes that while 450 public comments were docketed in the case, the actual number of opinions rendered by these comments is much higher, as several of the docketed comments contained rosters of signatures of persons expressing support or opposition to the Project. For example, Shawnee Township filed comments on July 29, 2022, which purported to represent 884 signatures in opposition to the Project (note that Against Birch Solar filed correspondence in the public comments docket on September 6, 2022, in which it described that 32 of those signatures should be disregarded because they were from persons whose opposition to the Project had ended). Similarly, AACRE filed comments on July 11, 2022, which purported to represent 267 signatures in support of the Project.

22, 2022, in which she expressed her strong opposition to the Project based on her representation of constituents and community leaders that would be impacted by the Project.

VII. STATUTORY CRITERIA

{¶ 56} In order for the Board to issue a certificate to construct a major utility facility, the Board must make findings and determinations regarding each of the relevant factors outline in R.C. 4906.10(A). As noted in the Introduction, the Board finds that Birch Solar's application does not satisfy the statutory requirements of R.C. 4906.10(A)(6). Accordingly, the Board will address its reasoning for that determination.

1. PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

{¶ 57} Pursuant to R.C. 4906.10(A)(6), the Board must determine that the facility will serve the public interest, convenience, and necessity.

a. Arguments of the Parties

i. Project Supporters

{¶ 58} As described in the Stipulation, Stipulating Parties unanimously support the application subject to the 40 conditions contained in the Stipulation. Further, Partial Stipulating Parties joined in the Stipulation as to requesting that, should the Board issue a certificate for the Project, the certificate should be subject to the 40 conditions described in the Stipulation.

{¶ 59} In addition to their support of the Stipulation, Stipulating Parties assert that the local and state government opposition to the Project should not scuttle the Board's approval of the Project. The positions of the three Stipulating Parties are closely aligned and focus on claims that (1) the Project enjoys widespread community support that outweighs any claims of opposition, (2) the Project, subject to the Stipulation conditions, sufficiently mitigates opposition concerns as to aesthetic and visual impacts, health and safety, agricultural and land uses, drainage and runoff, wildlife, property values, fencing and

lighting, setbacks, drinking and surface water, decommissioning, and population density, (3) the record in the case lacks evidence regarding local government opposition to the Project, and (4) Staff's recommendation contra certificating the Project errs in using unauthenticated hearsay in the public comments section of the docket in assessing the public interest, convenience, and necessity of the Project. (App. Reply Br. at 6-22; AACRE Br. at 5-8, 11; IBEW Br. at 5-11.)

{¶ 60} In terms of community support for the Project, Stipulating Parties claim that Staff mischaracterizes the level of local opposition to the Project. In addition to highlighting traditional benefits of renewable energy development, Birch Solar also emphasizes many of the Project's beneficial aspects to the local community, some of which include: protecting nearby property owners using neighboring landowner financial agreements for homes within 500 feet of solar panels; reducing the Project's footprint; increasing state and local business and labor opportunities, as well as revenues to local governments and schools; improving the long-term agricultural character of the area; and, ensuring safer development of areas where latent oil and gas wells might exist. (Birch Solar Br. at 43-47.) Moreover, Birch Solar stresses that its communications with local government entities were the impetus for Project modifications that address; additional screening and setbacks, Project layout modifications, fencing aesthetic changes, road use and maintenance agreements, and drainage changes. Further, Birch Solar expresses frustration with Shawnee Township's unwillingness to engage in discussions regarding the Project that might lead to some form of agreement about the Project. (Birch Solar Br. at 48-49.)

{¶ 61} In addition to highlighting beneficial aspects of the Project, Stipulating Parties also dispute the local government opposition claims of constituency opposition to the Project. Stipulating Parties rely heavily on a public opinion poll that Birch Solar conducted before filing the application, which supports that, in the Lima area, 59 percent of voters support solar development and welcome it in their community. (Birch Solar Br. at 50; App. Ex. 30A, Att. SM-3; AACRE Br. at 6-7; IBEW Reply Br. at 8-9.) Further, Stipulating Parties claim that the Project has "widespread support" in the community, a claim that they

support, in part, through the filing of 250 signatures that AACRE admitted into the case record. Stipulating Parties also argue that denying certification of the Project is improper because that result is essentially a retroactive application of SB 52, which is impermissible because the Project is grandfathered from that legislation. (IBEW Reply Br. at 6; AACRE Ex. 2, Ex. 2.)

{¶ 62} Additionally, Stipulating Parties draw from the local public hearing testimony and comments filed in the case docket to support their claims that the Project is viewed favorably by the local community. IBEW describes that, following Against Birch Solar's withdrawal from the case, which negates at least 5 opposing testimonies at the local public hearing, that the remaining local public hearing testimony reflected 32 opponents and 21 supporters of the Project. Further, IBEW discredits public comments in the case because they (1) are not evidence, (2) are sometimes duplicative, and (3) disregard bulk Project proponent signatures that were admitted as evidence in the case. (IBEW Reply Br. at 2-4.)

b. Local Government Opposition

ii. Opposition by affected counties

{¶ 63} Initially, we note that in this case there is some form of uniform opposition to the Project from each of the local governments where the Project would be located. The Allen County Commissioners and Auglaize County Commissioners have each indicated their opposition to the Project both prior to and following the issuance of the Staff Report in this case. Allen County officials filed correspondence in the case docket on June 30 and July 6, 2021, wherein they described that there are 1,278 residences, 4 schools, and 6 churches within one mile of the project area, and that "many" of the residents have shared concerns about the Project's (1) lack of dedicated local power, (2) impact on land use, (3) impact on property values, (4) decommissioning plan, (5) impact on drinking and groundwater, (6) road maintenance, (7) drainage, and (8) communication regarding negotiations as to distributing PILOT to local governments. Allen County's leadership reiterated its

opposition to the Project on May 10, 2022, when it filed correspondence and Resolution No. 238-22, which reaffirmed the county's opposition to the Project, indicating "our shared concerns that the large projects pose to Allen County" and declaring that "[i]t is important to note that if it were not for the grandfather provisions of SB 52, the Birch Solar 1 project would not be eligible for consideration, as it is located in an area that is now restricted for the development of such facilities." Further, Allen County's Commissioners joined in correspondence with the Shawnee Township Board of Trustees, filed as public comments on June 9, 2022, wherein they renewed their opposition to the Project.

{¶ 64} Auglaize County also expressed its formal opposition to large solar facility development such as is at issue in this case pursuant to its public comment filing on April 27, 2022. That filing was a resolution that Auglaize County's Board of Commissioners adopted on April 26, 2022, in which the county, in consideration of the input from all fourteen townships within the county's unincorporated areas, restricted the future development of large utility facilities such as the one at issue in this case. In adopting the resolution, the Auglaize County Board of Commissioners cited to the "numerous potential impacts on users and property owners in the vicinity of such developments" and "considered the potential impacts of development as well as the interest of property owners in making their land available for development." In consideration of these factors, pursuant to meetings that were open to the public in full compliance with applicable legal requirements, including R.C 121.22, the Board of County Commissioners determined that all of its unincorporated areas should be restricted from development such as what is contemplated by the Project in this case. (Resolution No. 22-208 (Apr. 26, 2022).) In addition to its resolution, Auglaize County's participation in the Stipulation as to the case is also noteworthy in that the county took no position as to whether the Project should receive Board certification, instead agreeing only as to the need for the 40 recommended conditions that the Board should impose if the Project is certificated.

iii. Opposition by affected townships

{¶ 65} In addition to the lack of support from the two counties that are impacted by the Project, there was also opposition from the two townships impacted by the Project. Initially, Shawnee Township passed Resolution 91-20 on November 9, 2020, in which the township voted unanimously to oppose the Project.[6] Next, Shawnee Township's three trustees each filed separate correspondence opposing the Project on May 10, 2022. Further, Shawnee Township's trustees joined Allen County's commissioners in correspondence to the Board on June 7, 2022, in which the county and township reiterated their opposition to the Project due to its proposed location outside of the industrial solar zones that the Allen County Commissioners recognized following the passage of SB 52. And on July 27, 2022, Missy VanMeter, acting through a township email address and copying the three township trustees, filed further correspondence opposing the Project, which included 884 signatures of persons who purportedly signed petitions opposing the Project.[7]

{¶ 66} Further, on November 20, 2021, Logan Township also filed a unanimous resolution "to defeat the proposed solar project instituted by Birch Solar *** for the reason that the construction of the same will be adverse to the residents of the [t]ownship."[8]

c. Board Conclusion

{¶ 67} With respect to R.C. 4906.10(A)(6), the Board finds that the Project does not serve the public interest, convenience, and necessity.

{¶ 68} As we have indicated in recent decisions, the determination of public interest, convenience, and necessity must be examined through a broad lens and in

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6 Shawnee Township's resolution is filed in the public comments docket on November 20, 2020, as the testimony of Mr. Russ Holly, et al.

7 The email communication described only that the Shawnee Township Board of Trustees was forwarding information that it received without further information as to the manner in which the signatures were obtained. Further, as described earlier herein, Against Birch Solar filed subsequent comments in the case describing that 32 of the filed signatures attributable to its members should be disregarded as opposition in the case.

8 This resolution is filed in the public comments docket on behalf of David Kritis and Sam Kellerman.

consideration of impacts, local and otherwise, from the Project. *In re Republic Wind,* Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate (June 24, 2021) at ¶91; *In re American Transmission Systems, Inc.,* Case No. 19-1871, Opinion, Order and Certificate (May 19, 2022) at ¶79. As with all proposed solar facilities, the Board acknowledges that there are numerous public benefits including (1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements relative to transitioning from fossil fuels to renewable energy resources, (4) protecting landowner rights, and (5) preserving agricultural land use. Juxtaposed against these benefits is the need to fully consider the impact on individuals who are most directly affected by a proposed project, primarily residents living near the project. Assessing these sometimes-competing interests is required in order to determine whether a project satisfies the requirement of R.C. 4906.10(A)(6).

{¶ 69} The primary concern surrounding the Project results from the uniform public opposition expressed by the local government entities whose constituents are impacted by the Project.[9] As described above, all four government entities with physical contacts to the Project acted to oppose its certification. Moreover, government opposition has remained consistent even after the Staff Report was issued in the case on October 20, 2021. Since that date, (1) Auglaize County filed a resolution on April 27, 2022, wherein the county, in consideration of input from each of its 14 townships, prohibited future large solar farm development in all unincorporated areas; (2) Allen County filed a resolution on May 10, 2022, wherein it reiterated that but for the grandfathering provisions in SB 52, the Project would be legally prohibited by the county, and correspondence together with Shawnee

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9 The Board acknowledges that this case is not impacted by SB 52, which subjects solar projects that are filed after October 11, 2021 to increased county-level and township-level review and participation in the Board's certification process. Nevertheless, the Board's obligation to determine a project's compliance with the public interest, convenience, and necessity remains in effect as to Birch Solar's application. R.C. 4906.10(A)(6). Accordingly, the Board must consider, independent of SB 52, the manner and degree of opposition of the local governments impacted by the Project as it relates to whether the Project is in the public interest, convenience, and necessity.

Township on May 10 and June 9, 2022, wherein the two bodies expressed their continued opposition to the Project; (3) Shawnee Township filed various forms of correspondence on three occasions, May 10, June 10, and July 27, 2022, indicating continued opposition to the Project. (*See* Paragraphs 62-65.) In fact, the only local government entity that has not filed comments reinforcing its opposition to the Project is Logan Township, whose position is known to the Board based on its resolution from November 20, 2020, as well as its refusal to join in the Stipulation as to the recommended findings to the Board.[10]

{¶ 70} Additionally, the Board takes notice of the large number of public comments filed in the case, which disfavor the Project at a ratio of approximately 80 percent to 20 percent. While we recognize that public comments are not evidence that has been admitted to the case, and thus, are less reliable than the admitted evidence, we nevertheless uphold that they are relevant to our consideration of the matter. In so finding, we note that the opposition public comments reinforce issues raised in both the local public hearing and the local government communications that oppose the Project. Hence, the public comments reinforce, rather than contradict, the conclusions of government bodies that were formally considered at the local level, as well as those who testified at the local public hearing. Further, we note that the ratio of unfavorable versus favorable public comments is not necessarily inconsistent with Applicant's polling claims. While Applicant's polling demonstrates general support for alternative energy and solar development, the polling data does not demonstrate the Project's favorable reception at the state and local level in that (1) only 23 percent of those polled in the Lima area were even aware of the Project, (2) even after viewing information about the Project, local polling support for the Project increased to only 45 percent, (3) at 45 percent of support for the Project, the Project measures substantially below the community's measure of general support for local solar

[10] The Board notes the arguments in briefs that, as Partial Stipulating Parties, Auglaize County and Logan Township demonstrated their support for the Project (App. Br. at 61; AACRE Reply Br. at 6). The Board rejects these arguments, finding that the actions of Partial Stipulating Parties demonstrate only their interest in ensuring that, should the Board certificate this Project, the Project would be subject to the community protections provided in the stipulated conditions.

development, which is measured at 59 percent,[11] and (4) in terms of statewide support for the Project, only 10 percent of those polled were even somewhat familiar with the Project (App. Ex. 30A, Attach. SM-2, SM-3 at pdf 42, 47, 54, 55). Thus, the Board concludes that the polling data that was submitted as evidence in the case reinforces the reliability of the public comments filed in the case, which was generally unfavorable to the Project.

{¶ 71} Further, the Board disagrees with Stipulating Parties regarding the claim that local government opposition to the Project has waned. In support of this claim, Stipulating Parties point to the fact that Auglaize County and Logan Township partially joined in the Stipulation. (App. Br, at 61; AACRE Reply Br. at 6.) We reject the conclusion that Partial Stipulating Parties have waivered in their opposition to the Project. As noted above, Auglaize County enacted a further resolution on April 27, 2022, in consultation with all 14 of its local townships, including Logan Township, in which it reiterated its opposition to solar facility development in non-industrial areas. Further, we find that the limited joinder in the Stipulation is telling as to the positions of both Auglaize County and Logan Township. Obviously, each of those communities could have clearly delivered notice of their changed opposition to the Project by fully executing the Stipulation. By refusing to do so and only joining in the Stipulation as to including the protections provided by the 40 conditions should the Board certificate the Project, the two governmental Partial Stipulating Parties have expressed, at least, their continued lack of support for the Project.

{¶ 72} Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

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[11] This approval disparity is even more pronounced when compared with statewide approval of solar development within local communities, which is measured at 76 percent (App. Ex. 30A, Attach. 3 at pdf 33).

2. REMAINING STATUTORY CRITERIA

{¶ 73} Pursuant to R.C. 4906.10(A), the Board shall not issue a certificate for the construction, operation, and maintenance of a major utility facility unless it finds and determines all of the factors outlined in R.C. 4906.10(A)(1) through (8). Considering our conclusion regarding R.C. 4906.10(A)(6), the Board cannot issue a certificate for the construction, operation, and maintenance of this proposed electric generation facility. As such, determinations as to the remaining R.C. 4906.10(A) factors – (A)(2), (A)(3), (A)(4), (A)(5), (A)(7), and (A)(8) – are unnecessary. Moreover, we note that, while Staff did not join in the Stipulation, Staff's only objection to the Project was in regard to R.C. 4906.10(A)(6).

VIII. STIPULATION CONSIDERATION

{¶ 74} At the adjudicatory hearing, the Stipulation between Stipulating Parties and Partial Stipulating Parties was admitted into evidence, as was testimony in support of the Stipulation by 8 expert witnesses who testified on Applicant's behalf, 5 witnesses who testified on AACRE's behalf, and 8 Staff witnesses[12] (App. Ex. 30-37, 30A-34A; AACRE Ex. 1-5; Staff Ex. 2-10). Pursuant to the Stipulation, Stipulating Parties recommend that the Board issue the certificate requested by Birch Solar subject to 40 conditions contained in the Stipulation. Further, Partial Stipulating Parties did not join in the Stipulation as to whether a certificate should be issued by the Board, instead focusing on the propriety of the 40 conditions to the Stipulation that should be adopted should the Board issue the certificate. Further, Staff did not participate in the Stipulation based on its recommendation to deny the certification of the Project.

{¶ 75} Pursuant to Ohio Adm.Code 4906-2-24, parties before the Board are permitted to enter into stipulations concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding. In accordance with Ohio Adm.Code 4906-2-24(D), no stipulation is binding on the Board. However, the Board

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12 Staff presented testimony from 9 witnesses. Only witness James O'Dell testified in opposition to the Stipulation (Staff Ex. 2).

affords the terms of the stipulation substantial weight. The standard of review for considering the reasonableness of a stipulation has been discussed in numerous Board proceedings. See, e.g. *In re Hardin Wind, LLC*, Case No. 13-1177-EL-BGN (Mar. 17, 2014); *In re Northwest Ohio Wind Energy, LLC*, Case No. 13-197-EL-BGN (Dec. 16, 2013); *In re AEP Transm. Co., Inc.*, Case No. 12-1361-EL-BSB (Sept. 30, 2013); *In re Rolling Hills Generating LLC*, Case No. 12-1669-EL-BGA (May 1, 2013); *In re American Transm. Systems Inc.*, Case No. 12-1727-EL-BSB (Mar. 11, 2013). The ultimate issue for the Board's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Board has used the following criteria:

(a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(b) Does the settlement, as a package, benefit ratepayers and the public interest?

(c) Does the settlement package violate any important regulatory principal or practice?

{¶ 76} Upon review, the Board finds that the Stipulation does not meet the criteria used by the Board to evaluate and adopt a stipulation. Specifically, the Board's conclusion that the Project does not comply with R.C. 4906.10(A)(6) results in the conclusion that the Stipulation criteria are not fully satisfied.

{¶ 77} Initially, the Board concludes that the record evidence supports a finding that the Stipulation meets the first part of the three-part test. We note that all the parties were afforded the opportunity to participate in the negotiation of the Stipulation, were knowledgeable about the issues presented in this case, and were represented by counsel. Furthermore, many of the issues raised at the public hearing are addressed in the Stipulation. Accordingly, we find that the Stipulation is the product of serious bargaining among capable, knowledgeable parties. (Joint Ex. 1 at 2-3; App. Ex. 30A at 7.)

{¶ 78} While the Stipulation satisfies the bargaining test, the Board concludes that the second and third criteria of the three-part test are not satisfied. As described above, our determination that the Project fails to comply with the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6) necessitates findings that (1) the Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Stipulation would violate an important regulatory principle or practice.

{¶ 79} As the Stipulation does not comply with parts two and three of the three-part test, the Board denies Birch Solar's application for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of the solar-powered electric generation facility.

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 80} Birch Solar is a person under R.C. 4906.01(A).

{¶ 81} The proposed solar-powered electric generation facility is a major utility facility as that term is defined in R.C. 4906.01(B).

{¶ 82} On October 16, 2020, Birch Solar filed a motion for waiver of the requirement to conduct an in-person public information meeting. By Entry issued on October 26, 2020, the motion was granted.

{¶ 83} On November 3, 2020, Birch Solar filed a preapplication notification letter informing the Board of a public information meeting for a facility to be proposed.

{¶ 84} On November 3, 2020, Birch Solar filed its confirmation of notification to property owners and affected tenants of the date of the public informational meetings.

{¶ 85} On November 18, 2020, Birch Solar filed its proof of publication for the public information meetings in the *Lima News* and *Wapakoneta Daily News*.

{¶ 86} Birch Solar held two initial public information meetings using virtual technology regarding the proposed Project on November 20 and November 23, 2020.

{¶ 87} Pursuant to a motion filed by Against Birch Solar on June 9, 2021, the ALJ ordered that Birch Solar conduct a third public information meeting pursuant to an Entry on July 7, 2021. Birch Solar complied with legal notice requirements, and the third public information meeting was held as scheduled on August 19, 2021.

{¶ 88} On February 12, 2021, Birch Solar filed its application for a certificate of environmental compatibility and public need to construct the proposed solar-powered electric generation facility. Following its filing of the application, Birch Solar filed a total of six supplements to the application, with the sixth supplement being filed on May 4, 2021.

{¶ 89} By letter dated July 14, 2021, the Board notified Birch Solar that its application, as supplemented, had been found to be sufficiently complete to permit Staff to commence its review and investigation pursuant to Ohio Adm.Code Chapter 4906-1, et seq.

{¶ 90} On August 5, 2021, Applicant filed its proof of service that copies of the application had been served upon local public officials and libraries pursuant to Ohio Adm.Code 4906-3-07(A) and (B).

{¶ 91} On August 10, 2021, Applicant also filed notice that the application fee had been submitted to the Board pursuant to Ohio Adm.Code 4906-3-07(A).

{¶ 92} By Entry issued on August 13, 2021, the effective date of the application was established as August 13, 2021, and a procedural schedule was established in the case, with the local public hearing scheduled for November 4, 2021; and the evidentiary hearing scheduled to commence on November 30, 2021.

{¶ 93} On September 3, 2021, Birch Solar filed its first proof of publication of the proposed Project. The notice was published in the *Wapakoneta Daily News* and *Lima News* on August 21, and August 27, 2021, respectively. Further, Birch Solar declared that written

notice of the accepted, complete application to local officials, libraries, and affected property owners and tenants, pursuant to Ohio Adm.Code 4906-3-09(A)(1), was provided on August 18, 2021.

{¶ 94} Between June 2, 2021 and October 20, 2021, timely intervention pleadings were filed by Against Birch Solar, Kuhbanders, Auglaize County, Logan Township, OFBF, Kalnins, AACRE, IBEW, and Shawnee Township. By Entries on July 7 and November 2, 2021, the ALJ granted intervention to the pleading parties. Subsequently, Kuhbanders, Kalnins, and Against Birch Solar withdrew from the case on September 8, 2021, April 26, 2022, and May 16, 2022, respectively.

{¶ 95} The Staff Report was filed on October 20, 2021.

{¶ 96} On November 1, 2021, Applicant filed its proof of publication of the second public notice, in the *Wapakoneta Daily News* and *Lima News* on October 21, 2021, in compliance with Ohio Adm.Code 4906-3-09(A)(2). In addition, Birch Solar stated that written notice of the accepted, complete application to local officials, libraries, and affected property owners and tenants, pursuant to Ohio Adm.Code 4906-3-09(A)(2), was provided on October 26, 2021.

{¶ 97} The local public hearing was held, as scheduled, on November 4, 2021, in Lima, Ohio. Fifty-nine people testified at the hearing.

{¶ 98} On November 30, 2021, the evidentiary hearing was called and continued in response to a joint motion of the parties filed on November 12, 2021.

{¶ 99} On May 16, 2021, Applicant, AACRE, IBEW, OFBF, Auglaize County, and Logan Township filed a Stipulation in the case. In the Stipulation, Applicant, AACRE, and IBEW recommend that the Board issue the Project a certificate subject to 40 conditions set forth in the Stipulation. Auglaize County, Logan Township and OFBF take no position on whether the Project should receive a certificate, instead requesting that any certificate be subject to the 40 conditions described in the Stipulation. Along with the Stipulation, Birch

Solar filed the direct supplemental testimony of six witnesses in support of the application and Stipulation.

{¶ 100} On May 18, 2022, the evidentiary hearing was resumed and concluded, where the Stipulation was presented for the Board's consideration. The prefiled testimony of witnesses on behalf of Birch Solar, AACRE, and Staff were admitted into evidence, together with exhibits proffered by Birch Solar and the Staff Report. Further, witnesses Shanelle Montana, on behalf of Birch Solar, and Jim O'Dell, on behalf of Staff, testified in-person at the hearing.

{¶ 101} Adequate data on the proposed generation facility has been provided to make the applicable determinations required by R.C. 4906.10(A). The record evidence in this matter provides sufficient factual data to enable the Board to make an informed decision.

{¶ 102} The record establishes that the Project is not an electric transmission line or gas pipeline and, therefore, R.C. 4906.10(A)(1) is not applicable.

{¶ 103} The record establishes that the Project fails to serve the public interest, convenience, and necessity, consistent with R.C. 4906.10(A)(6).

{¶ 104} Based on the record, the Board finds that the Project should not receive a certificate of environmental compatibility and public need, pursuant to R.C. Chapter 4906, for the construction, operation, and maintenance of the solar-powered electric generation facility.

X. ORDER

{¶ 105} It is, therefore,

{¶ 106} ORDERED, That AACRE's motion for admission pro hac vice of counsel, Eric L. Christensen, is granted as provided in Paragraph 41. It is, further,

{¶ 107} ORDERED, That Birch Solar's application for a certificate be denied and, accordingly, the Stipulation be rejected consistent with this Opinion and Order. It is, further,

{¶ 108} ORDERED, That a copy of this Opinion and Order be served upon all parties and interested persons of record.

BOARD MEMBERS:
Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Markee Osborne, Designee for Lydia Mihalik, Director
Ohio Department of Development

Brittney Colvin, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

Gregory Slone
Public Member

MLW/dmh

Summary: Opinion & Order denying the application of Birch Solar 1, LLC, for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of the proposed solar-powered electric generation facility. electronically filed by Ms. Mary E. Fischer on behalf of Ohio Power Siting Board

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Generating Facility in Allen and Auglaize Counties, Ohio	)))))	Case No. 20-1605-EL-BGN

BIRCH SOLAR 1, LLC'S APPLICATION FOR REHEARING

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Attorneys for Birch Solar 1, LLC

November 21, 2022

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BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Generating Facility in Allen and Auglaize Counties, Ohio	)))))	Case No. 20-1605-EL-BGN

BIRCH SOLAR 1, LLC'S
APPLICATION FOR REHEARING

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Birch Solar 1, LLC ("Birch") requests rehearing of the Opinion and Order issued in this proceeding on October 20, 2022 ("Order"). Birch submits that the Board's Order is unlawful, unjust, unreasonable, unconstitutional, and unwarranted based on the following grounds:

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT.

1. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development**

2. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide**

3. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture**

4. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply**

5. **It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells**

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT

1. **It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record**

2. **It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments**

3. **It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions**

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A)

1. **The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions**

    a. **The Board's approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance**

    b. **The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine**

    c. **The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B)**

2. **The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute**

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52")

Respectfully submitted,

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I. INTRODUCTION

The Ohio Power Siting Board's ("OPSB") Order is inconsistent on its face. On one hand, the Board restates the familiar and wide-ranging standard that "the determination of public interest, convenience, and necessity must be examined through a broad lens." (Order, ¶ 68.) But, on the other hand, the Board admits to only considering *one* factor in making its public interest determination: opposition (or perceived opposition) to the Project by local government entities. (*Id.* at ¶ 72.)

This myopic approach is not just inconsistent, it violates established Board precedent, Ohio Supreme Court precedent, Ohio public policy, Ohio's Constitution, and Ohio's laws. The Board holds sole and plenary authority to site utility-scale solar projects, in recognition of important statewide policies that go far beyond the local project area. The Board's total deference here to baseless opposition by certain local government entities—which is not based on evidence in the record— abrogates its authority and responsibility under Ohio's system of government. The Board's Order prioritizes the whims of a few vocal opponents over the best interests of the public.

The Board's Order, specifically its finding that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6), is unlawful, unjust, unreasonable, unconstitutional, and unwarranted. The Board should reconsider its Order, grant this application for rehearing, and apply the "broad lens" standard as required.

II. STANDARD OF REVIEW

After the Board enters an order, the parties to a proceeding have a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[1] An application for

[1] R.C. 4903.10. R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23 are applicable to Board proceedings pursuant to R.C. 4906.12.

rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." R.C. 4903.10(B). *See also* O.A.C. 4901-1-35(A).

In considering an application for rehearing, R.C. 4903.10 provides that the Board may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the Board may "abrogate or modify" the order in question if it "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted." R.C. 4903.10(B).

Here, the Order is unlawful, unreasonable, unjust, unconstitutional, and unwarranted under R.C. 4903.10. The Board should grant this application for rehearing and abrogate or modify the Order consistent with this application for rehearing.

III. GROUNDS FOR REHEARING

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT

The Board has recently explained that "[t]o determine that projects serve the public interest, convenience, and necessity, that projected benefits of the projects should be balanced against the magnitude of potential negative impacts on the local community." (Order, *In the Matter of the Application of American Transmission Systems, Inc. for a Certificate of Environmental Compatibility and Public Need to Construct the Lincoln Park-Riverbend Line in Mahoning County*, 19-1871-EL-BTX, ¶ 58, May 19, 2022).

The question here, therefore, is what factors constitute the "projected benefits" of the Project. In past cases, the Board has ruled that a project's larger benefits to the state, the public, and the grid outweigh local disapproval, even if there are "thousands of comments from members of the general public, local organizations, and local officials" and opposing intervention from

multiple local governments. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc*., 16-253-GA-BTX, at 82-83, November 21, 2019). Under this same standard, the Board has also ruled that a project benefits the public even where opposing local governments intervened and presented nine witnesses at the adjudicatory hearing. (Order, Opinion, and Certificate, *In the Matter of the Application of Champaign Wind*, LLC, 12-160-EL-BGN, at 3, May 28, 2013). In applying this standard, the Board looks to and relies on the *record* – the evidence guides and controls the result. (*Id.* at 72-73.)

Consistent with this long-standing and well-established standard, the Board indicated in its Order that "the determination of public interest, convenience, and necessity must be examined through a broad lens." (Order, ¶ 68.)

But that is not the standard the Board used here. Ignoring the record and its own prior precedent, the Board failed to consider the evidence before it and the benefits to the public as a whole in making its determination under R.C. 4906.10(A)(6). Similarly, the Board failed to consider the Staff Report's positive analysis of the Project under R.C. 4906.10(A)(6). (*Id.* at ¶¶ 49-50.) The Board ignored that the Project used design standards which were beyond current Board precedent.[2] In particular, by way of example, the Board unreasonably disregarded the Project's uncontested evidence that it would provide significant benefits to:

1) local economic development;

2) regional and statewide economic development;

3) the local agricultural industry and culture;

[2] The the Project boundary was at least 300 feet from the public rights-of-way/easements of public roads; at least 100 feet from the top of the banks of streams; at least 300 feet from the property lines of nonparticipating landowners and at least 300 feet from the nearest wall of each nonparticipating landowner's residence as of the filing date of the Application. (Noticed of Enhanced Commitments for Setbacks and Screenings, filed October 19, 2022.)

4) the reliability, affordability, and diversification of Ohio's electrical supply; and

5) the beneficial use of a historic oil and gas field.

1. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development

In prior cases, the Board has recognized the long-term importance of solar development in supporting and growing the local economy. For example, the Board has concluded that "as energy and environment costs rise, and technology advances, solar-powered generation provides a sustainable, long-term, competitive energy solution to both residents and businesses." (Opinion, Order, and Certificate, *Hardin Solar Center II*, 18-1360, May 16, 2019, at 25.) In over thirty prior cases, the Board and its Staff have acknowledged that a solar facility would have an overall positive impact on the local economy due to the increase in construction spending wages, purchasing of goods and services, annual lease payments to the local landowners, and PILOT revenue.[3]

[3] *Vinton Solar Energy Facility*, 17-0774, Staff Report, entered July 5, 2018, at 22; *Hillcrest Solar Farm*, 17-1152, Opinion, Order, and Certificate, entered February 15, 2018, at ¶44; Staff Report, entered November 15, 2017, at 22; *Willowbrook Solar Farm*, 18-1024, Staff Report, entered February 4, 2019, at 23; *Highland Solar Farm*, 18-1334, Opinion, Order, and Certificate, entered May 16, 2019, at ¶36; Staff Report, entered March 4, 2019, at 19; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶39; Staff Report, entered February 26, 2019, at 20; *Nestlewood Solar Facility*, 18-1546, Opinion, Order, and Certificate, entered April 16, 2020, at ¶49; Staff Report, entered May 15, 2019, at 24; *Alamo Solar Farm*, 18-1578, Opinion, Order, and Certificate, entered June 24, 2021, at ¶70; Staff Report, entered May 28, 2019, at 22; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶52; Staff Report, entered on December 22, 2020, at 23; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶60; Staff Report, entered October 7, 2020, at 26; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶55; Staff Report, entered November 18, 2020, at 25; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶56; Staff Report, entered March 15, 2021, at 23; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶43; Staff Report, entered November 30, 2020, at 24; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶52; Staff Report, entered January 11, 2021, at 23; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶53; Staff Report, entered March 16, 2021, at 24; *New Market Solar*, 20-1288, Opinion, Order, and Certificate, entered March 18, 2021, at ¶48; Staff Report, entered January 4, 2021, at 21; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶73; Staff Report, entered May 24, 2021, at 27; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶85; Staff Report,

Those same benefits are present here. The Project's Application and Socioeconomic Report (Ex. G to the Application) set forth the following economic benefits:

- Approximately 400 to 500 jobs will be created during construction both onsite and with related services and 5-10 jobs during the O&M stage. (Application at 27; Exhibit G at 4.)
- Construction of the Project will result in a payroll of $32 million to $39 million during the 12-18 month construction window. (Application at 27; Exhibit G at 4.)
- During the 35-year operational life of the Project, payroll related to operations is expected to total $350,000 to $700,000 annually. The present value of the total payroll from operations, assuming a 9% discount rate and 2% escalation rate is between approximately $4.6 to $9.2 million. (Application at 27.)
- An additional approximately 225 to 300 jobs could be created within the supply chain and induced job markets during construction, in addition to the 400 to 500 direct construction jobs. Further, during operations, approximately 18 to 25

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entered March 22, 2021, at 24; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶67; Staff Report, entered May 19, 2021, at 24; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶60; Staff Report, entered June 22, 2021, at 29; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶52; Staff Report, entered on May 10, 2021, at 23; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶82; Staff Report, entered June 14, 2021, at 26; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶60; Staff Report, entered June 28, 2021, at 27; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 30; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 29; *Union Ridge Solar*, 20-1757, Opinion, Order, and Certificate, entered January 20, 2022, at ¶73; Staff Report, entered August 16, 2021, at 29; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶53, Staff Report, entered August 24, 2021, at 28; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶68; Staff Report, entered July 7, 2021, at 25; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶72; Staff Report, entered October 8, 2021, at 31; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶66; Staff Report, entered September 13, 2021, at 29; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 31; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 30.

supply chain and induced jobs could be created from O&M activities, in addition to the direct on-site jobs. (Application at 28; Exhibit G at 4.)

- Based on direct, indirect, and induced jobs for the Project and associated multiplier effects during construction, the Project will have an economic output of between approximately $70 million and $90 million. (Application at 28; Exhibit G at 4.)
- During the O&M phase of the Project, the total annual economic benefit would be approximately $3.8 to $5.5 million. (Application at 28; Exhibit G at 4.)

Further, above and beyond these workforce and payroll benefits, Birch anticipates entering into a payment in lieu of taxes ("PILOT") in Allen and Auglaize Counties, with estimated payments of approximately $2.1 to $2.7 million annually and approximately $73.5 million to $94.5 million throughout the life of the Project. (Application Exhibit G at 5.) The PILOT will provide funding, which would be available to the Shawnee School District for school improvements, which as seen in the testimony from Frank Caprilla on behalf of Allen Auglaize Coalition for Renewable Energy, is greatly needed and could otherwise be paid for by residents through potential levies.[4] Likewise, at the local public hearing, the superintendent of the Shawnee School District explained the importance of the PILOT to the district, testifying that the "money would go directly to the school, we wouldn't lose any of our local state funding, and that money would be able to be allocated for gifted [students], for programs that meet student needs, for additional resources that our kids desperately need." (Local Public Hearing Tr. at 93, filed Nov. 10, 2021.)

[4] Testimony of Frank Caprilla on behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022. Mr. Caprilla is the Capital Campaign Manager of the Shawnee Football Parents Association, a member of the Community Advisory Team (CAT) for the Shawnee Local Schools Building Project, and a parent and volunteer at Shawnee Local Schools in Shawnee Township. *Id.* at 9-22.

The Project also has the opportunity to economically benefit neighboring residents of the Project through Birch Solar's Neighboring Landowner Financial Benefit, where any home within 500 feet of the Project will receive a payment ranging from $10,000 to $50,000 depending on proximity. (Application Exhibit G at 6.) Birch has also committed to a $500,000 community development fund to be used at the community's discretion. (*Id.*)

Therefore, the uncontested evidence in record is that the Project would greatly benefit the local economy. But, in an unexplained deviation from many prior cases, the Board did not meaningfully consider the local economy in analyzing public interest under R.C. 4906.10(A)(6). Surely, if the Board is going to consider the potential local negative impacts of a Project, the proven local positive economic impacts also must be part of that analysis.

2. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide

Looking outside of the immediate Project locality, the evidence was uncontested and unrefuted that Project would provide significant economic benefits to the region and the State of Ohio as a whole. (Application Exhibit G at 6.) These benefits should have been considered by the Board under R.C. 4906.10(A)(6) in a "broad lens" analysis but were not.

The Ohio Chamber of Commerce noted in this case[5] that "The Birch Solar Project is consistent with our mission to champion free enterprise, economic competitiveness, and growth for all Ohioans. Specifically, the Ohio Chamber notes the myriad of ways that Birch will serve the public interest and provide local, regional, and statewide economic benefits."[6] The Ohio Chamber

[5] Birch does not believe that nonevidentiary Public Comments, including those filed by the Ohio Chamber of Commerce and the Lima/Allen County Chamber of Commerce, should sway the Board. However, in light of the Board's reliance on negative Public Comments in its Order, positive Public Comments from respected economic organizations should at least be given similar consideration.

[6] Ohio Chamber of Commerce Public Comment, filed September 23, 2022.

also stressed that solar development generally, and the Project specifically, is critical for Ohio to compete: "Ohio is in a constant race against other states to attract business. Those businesses are increasingly demanding renewable energy—especially affordable solar energy—from the states in which they choose to locate." (*Id.*) Similarly, the Lima/Allen County Chamber of Commerce supports the Project, noting that "Birch Solar project will bring additional investment dollars into the community while helping to power area businesses and the local economy. . . . Projects like Birch Solar allow for energy investment and other economic benefits to remain local."[7]

Nonetheless, despite the economic importance of the Project to the State as a whole, the Board failed to consider these critical regional and statewide public benefits.

3. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture

The Board is not faced with a choice between Ohio's agricultural heritage and a new solar industry. The two go hand-in-hand. In prior cases, the Board has recognized that solar projects are a good fit for agricultural communities. For example, as indicated in numerous other projects, a solar project is "consistent with agricultural industry support, in that the facility would provide supplemental income to farmers and the land could be returned to agricultural production upon decommissioning."[8] In many cases, the Board and its Staff have indicated that a solar project's

[7] Public Comments concerning the Birch Solar Project filed by Jed E. Metzger, filed December 7, 2020.

[8] *Hardin Solar Energy Facility*, 17-0773, Staff Report, entered November 21, 2017, at 12; *Willowbrook Solar Farm*, 18-1024, Staff Report, entered February 4, 2019, at 12; *Highland Solar Farm*, 18-1334, Staff Report, entered March 4, 2019, at 10; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶24; Staff Report, entered February 26, 2019, at 11; *Nestlewood Solar Facility*, 18-1546, Opinion, Order, and Certificate, entered April 16, 2020, at ¶28; Staff Report, entered May 15, 2019, at 12; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶34; Staff Report, entered on December 22, 2020, at 10; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶43; Staff Report, entered October 7, 2020, at 12; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶38; Staff Report, entered November 18, 2020, at 12; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶29; Staff Report, entered March 15, 2021, at 9; *Yellowbud Solar*, 20-

creation of pollinator habitat would enhance the visual appeal of the project, enrich local wildlife habitat, benefit the local farming community, increase plant diversity, improve water quality, and discourage invasive species.[9]

0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶25; Staff Report, entered November 30, 2020, at 10; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶29; Staff Report, entered January 11, 2021, at 10; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶33; Staff Report, entered March 16, 2021, at 10; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶73; Staff Report, entered March 22, 2021, at 20; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶41; Staff Report, entered May 19, 2021, at 10; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶36; Staff Report, entered June 22, 2021, at 10; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶79; Staff Report, entered on May 10, 2021, at 10; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶42; Staff Report, entered June 14, 2021, at 10; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶41; Staff Report, entered June 28, 2021, at 10; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 10; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 12; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶33, Staff Report, entered August 24, 2021, at 10; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶38; Staff Report, entered July 7, 2021, at 9-10; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 10; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶30; Staff Report, entered September 13, 2021, at 9; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 28.

[9] *Hardin Solar Energy Facility*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at ¶36; Staff Report, entered November 21, 2017, at 18; *Hillcrest Solar Farm*, 17-1152, Opinion, Order, and Certificate, entered February 15, 2018, at ¶39; Staff Report, entered November 15, 2017, at 20; *Willowbrook Solar Farm*, 18-1024, Opinion, Order, and Certificate, entered April 4, 2019, at ¶34; Staff Report, entered February 4, 2019, at 20; *Highland Solar Farm*, 18-1334, Opinion, Order, and Certificate, entered May 16, 2019, at ¶31; Staff Report, entered March 4, 2019, at 17; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶34; Staff Report, entered February 26, 2019, at 17; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶47; Staff Report, entered on December 22, 2020, at 20; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶55; Staff Report, entered October 7, 2020, at 23; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶50; Staff Report, entered November 18, 2020, at 23; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶38; Staff Report, entered November 30, 2020, at 21; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶46; Staff Report, entered January 11, 2021, at 20; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶47; Staff Report, entered March 16, 2021, at 21; *New Market Solar*, 20-1288, Opinion, Order, and Certificate, entered March 18, 2021, at ¶41; Staff Report, entered January 4, 2021, at 18; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶60; Staff Report, entered May 19, 2021, at 21; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶54; Staff Report, entered June 22, 2021, at 26; *Mark Center Solar Project*, 20-

Here, the Project is likewise consistent with the local agricultural industry. The Project would preserve and enhance farmland over the long-term (something that Shawnee Township has identified as a top priority in their Comprehensive Plan),[10] provide critical income to farmers participating in or contracting with the Project, and diversify the local agricultural opportunities. (Application at 17-18.)

As in the prior solar projects approved by the Board, the Project would protect the local agricultural land and heritage by maintaining "the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties." (Staff Report, at 47.) Further, the land would be restored upon decommissioning in measurably *better* farming condition than it is in today. As the Board and Staff have indicated in other cases, by allowing the land to rest under restorative pollinator-friendly

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1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶46; Staff Report, entered on May 10, 2021, at 20; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶72; Staff Report, entered June 14, 2021, at 22; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 29; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 27; *Union Ridge Solar*, 20-1757, Opinion, Order, and Certificate, entered January 20, 2022, at ¶63; Staff Report, entered August 16, 2021, at 25; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶50, Staff Report, entered August 24, 2021, at 26; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶64; Staff Report, entered July 7, 2021, at 24; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶69; Staff Report, entered October 8, 2021, at 29; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶63; Staff Report, entered September 13, 2021, at 28; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 28; *Harvey Solar Project*, 21-0164, Staff Report, entered February 25, 2022, at 27; *Nottingham Solar*, 21-0270, Staff Report, entered May 2, 2022, at 27; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 30; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 29; *Wild Grains Solar*, 21-0823, Staff Report, entered April 18, 2022, at 26; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶48; Staff Report, entered March 15, 2021, at 20; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered June 28, 2021, at 26; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 27.

[10] Response to Fourth Data Request from Staff of the Ohio Power Siting Board, filed April 12, 2021.

groundcover, the soil would be healthier and more productive whenever farming operations resume.[11]

The Staff Report in this case made this point:

> Based upon the Applicant's collective data responses and Staff's examination of existing land uses, Staff opines that the proposed project would reinforce the continued low population density levels in the project area. Solar projects maintain the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties (with the notable exception of some continuing agricultural activities) and employing very few operations personnel to burden community services. This continuation of low population density also benefits the adjacent higher population density areas as increased high density land uses are not able to be physically adjacent and adverse aesthetic impacts are mitigated by landscape screening.

(Staff Report, at 47.)

Further, within Allen County, the Shawnee Township Comprehensive Plan designates the land within the Project Area as land to be used as agricultural in their Future Conceptual Land Use Map. (Application at 72.) Birch took the Comprehensive Plan into consideration in Project design, and maintained the agricultural aesthetic of the area by incorporating cedar farm fencing and is also working towards allowing sheep grazing within the Project. (*Id.*) The life of the Project corresponds with the long-term goals of the Comprehensive Plan, maintaining long-term agricultural use rather than industrial or residential zoning. (*Id.*)

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[11] *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶73; Staff Report, entered March 22, 2021, at 20; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶60; Staff Report, entered May 19, 2021, at 22; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶46; Staff Report, entered on May 10, 2021, at 20; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶72; Staff Report, entered June 14, 2021, at 23; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered June 28, 2021, at 26; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 27; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶50, Staff Report, entered August 24, 2021, at 26; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶64; Staff Report, entered July 7, 2021, at 24; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶63; Staff Report, entered September 13, 2021, at 28.

The Project is also partnering with Ohio State University, College of Food, Agricultural and Environmental Sciences on research relating to honey bee foraging in the Ohio agroecoystem. (Application at 63.) To facilitate this study, honey bee colonies (apiaries) will be established on the landscape through The Ohio State University and managed in collaboration with local beekeepers. (*Id.*) Studies have shown that co-locating solar with pollinator friendly groundcover can expand habitat for the dwindling bee population and can also benefit local agriculture. (*Id.*)

In short, the uncontested evidence establishes that the Project will enhance the local agricultural industry and heritage. The Board, despite the Staff Report setting forth the benefit of the Project and its own prior precedent recognizing this important benefit under R.C. 4906.10(A)(6), failed to consider evidence of this benefit here. This is unreasonable error that should be corrected on rehearing.

4. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply

Solar projects, including the Project here, benefit the public by providing increased, diversified, and affordable energy generation. In many past cases, the Board and its Staff have recognized this benefit: "the facility would serve the public interest, convenience, and necessity by proving additional electrical generation to the regional transmission grid, would be consistent with plans for expansion of the regional power system, and would serve the interests of electric system economy and reliability."[12] Similarly, the Board has recognized that an "electric generation

[12] See *Hardin Solar Energy Facility*, 17-0773, Staff Report, entered November 21, 2017, at 25; *Vinton Solar Energy Facility*, 17-0774, Staff Report, entered July 5, 2018, at 25; *Alamo Solar Farm*, 18-1578, Opinion, Order, and Certificate, entered June 24, 2021, at ¶79; Staff Report, entered May 28, 2019, at 25; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶57; Staff Report, entered on December 22, 2020, at 28; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶59; Staff Report, entered November 18, 2020, at 29; *Fox Squirrel Solar Farm,* 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶61; Staff Report, entered March 15, 2021, at 26; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶48;

facility will provide a clean, sustainable source of electricity that will improve the quality and reliability of electric service in the area."[13] This is particularly important because, as the unchallenged testimony on behalf of Allen Auglaize Coalition for Reasonable Energy ("AACRE") set forth, "Allen County has often been classified by the USEPA as one of the top emitters of toxic air pollution among all Ohio's counties, at times topping the list."[14]

But, again, the Board ignored its prior precedent under R.C. 4906.10(A)(6) and disregarded the evidence regarding this benefit in this case. This was unreasonable and should be corrected on rehearing.

Staff Report, entered November 30, 2020, at 29; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶57; Staff Report, entered January 11, 2021, at 25; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶58; Staff Report, entered March 16, 2021, at 28; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶78; Staff Report, entered May 24, 2021, at 32; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21,2021, at ¶97; Staff Report, entered March 22, 2021, at 28; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶72; Staff Report, entered May 19, 2021, at 28; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶64; Staff Report, entered June 22, 2021, at 35; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered on May 10, 2021, at 28; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶65; Staff Report, entered June 28, 2021, at 31; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 35; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 34; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶58, Staff Report, entered August 24, 2021, at 33; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶74; Staff Report, entered July 7, 2021, at 30; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 33; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶76; Staff Report, entered October 8, 2021, at 36; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 34; *Harvey Solar Project*, 21-0164, Staff Report, entered February 25, 2022, at 33; *Nottingham Solar*, 21-0270, Staff Report, entered May 2, 2022, at 31; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 36; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 35; *Wild Grains Solar*, 21-0823, Staff Report, entered April 18, 2022, at 32.

[13] *Hardin Solar Energy Facility*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at ¶31; *Vinton Solar Energy Facility*, 17-0774, Opinion, Order, and Certificate, entered September 20, 2018, at ¶94.

[14] Testimony of T. Rae Neal on Behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022, at ¶¶ 20-22.

5. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells

The Project is in proximity to a historic oil and gas field. As Staff explained:

> This project is partially located within the mapped boundary of the Lima Consolidated Oil Field, which is a portion of . . . Lima Findlay Trenton Field. The project's proximity to this field is of importance due to the many orphan wells associated with the 1800's oil and gas drilling and development which took place during a period of no regulatory oversight

(Staff Report, at 24.)

As a result, the Staff Report recommended that the Project Area could not be safely developed due to an unfortunately common problem in much of Ohio: the potential for unmapped abandoned oil and gas wells. (Staff Report, 23-27.) More specifically, a preliminary investigation of the Project Area suggested that sixty oil and gas wells were potentially within the Project Area. (*Id.* at 27.) In other words, Staff did not find a problem with the Project, but found that the property comprising the Project Area itself was potentially unsuitable for beneficial development.

In response, the Project conducted extensive investigation of the Project Area and, coordinating closely with the Ohio Department of Natural Resources ("ODNR"), created a comprehensive Engineering Constructability Report. (Response to Staff Data Request 10, filed December 30, 2021, at Att. 1.) This Report found that, not only was the Project able to be safely constructed but, "during the 35-year operational life of the Project, the oil and gas wells within the Project area pose less of a human health risk than other potential land uses because of the minimal excavation for construction, minimal need for onsite operations or disruptions and secure nature of the facility with the Project fencing." (*Id.* at 5.) "Solar facilities, in many ways are ideal for historic oil and gas locations which could be harmed if additional more extensive infrastructure was created or a higher population density was established." (*Id.*) "The Birch Solar Project development preserves the land and ensures limited additional development of the site for the next

35 years or more, which can reduce potential impacts that might be associated with other types of development that include more intense excavations, grading of the site and possible disruption of the historic oil and gas features." (*Id*. at 15.) This Report was supported by the testimony of Thomas Stewart at the adjudicatory hearing. (Direct Testimony of Thomas E. Stewart, filed May 4, 2022.)

Following the Project's efforts, Staff agreed that the Project had addressed its concerns regarding constructing the arrays in proximity to abandoned wells, as the Board acknowledged in its Order. (Order, at ¶ 49.) (*See also* Prefiled Testimony of James S. O'Dell, filed May 11, 2022, at, 4: 9-14) ("Applicant has . . . rectified these issues to Staff's satisfaction by filing sufficient information and analysis in the docket.")

Accordingly, the Project submitted evidence that it would provide a uniquely beneficial use for property burdened with abandoned oil and gas wells—property that the Staff originally deemed unsafe for development, and property that is all too common in Ohio. The Board, however, ignored this evidence. This was unreasonable and should be corrected on rehearing.

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT.

The Board acknowledged that "[t]he record is uncontroverted as to the determination that Birch Solar's application satisfies the statutory requirements in R.C. 4906.10(A) in every respect except as to whether the Project serves the public interest, convenience, and necessity." (Order, at ¶ 45.) The Board did not identify a single concern regarding the technical suitability, safety, or environmental impact of the Project. (*Id.*) In other words, no *evidence* in the record casts any doubt on the suitability on the Project.

Nonetheless, in its Order, the Board blindly accepted opposition from local governments raising nothing more than disproven allegations of potential harm. The Board compounded this error by failing to consider any conditions to mitigate potential impacts to the public interest, despite evidence in the record that such conditions would be appropriate and acceptable to the local governments. These errors were unreasonable and should be corrected on rehearing.

1. It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record

In the face of the many proven public benefits of the Project, the opposition offered little (if any) contrary evidence in the record. For example, the Board noted that "the Auglaize County Board of Commissioners raised *concerns* regarding 'numerous potential impacts on users and property owners in the vicinity of such developments' and 'considered the potential impacts of development as well as the interest of property owners in making their land available for development.'" (Order, ¶ 64.) The Board also pointed to Allen County officials' *concerns* regarding the "Project's (1) lack of dedicated local power, (2) impact on land use, (3) impact on property values, (4) decommissioning plan, (5) impact on drinking and groundwater, (6) road maintenance, (7) drainage, and (8) communication regarding negotiations as to distributing PILOT to local governments." (*Id.* at ¶ 63.)

What Auglaize and Allen County did not do, however, was submit any supporting *evidence* of the truth of these potential impacts or the validity of these concerns. The Auglaize County Commissioners did not submit any pre-filed testimony or enter an appearance at the adjudicatory hearing. In fact, as the Board acknowledged, Auglaize County took "no position on whether the project should be certified by the Board" by the time of the hearing. (Order, at ¶ 39.) The Allen County Commissioners did not intervene and, as such, is not even a party in this case.

This, in itself, should have been enough for the Board to disregard the Counties' allegations of potential harm. In prior cases, the Board has done just that— holding opponents to their burden of proof and disregarding allegations of harm that had no evidentiary support. In *Ice Breaker Windpower, Inc.*, for example, the Board noted that local opponents argued that the project would cause electricity costs to rise, but "provided no evidence demonstrating that . . . rates would increase as a result of the power purchase agreement, apart from the bare allegations proffered by Dr. Brown." (Order, *In the Matter of Icebreaker Windpower, Inc. for a Certificate of Environmental Compatibility and Public Need*, 16-1871-EL-BGN, ¶ 189, May 21, 2020.) The Board therefore concluded, "[a]s such, the arguments proffered by the [opponents] to establish that the proposed project will not promote the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6) are misplaced." (*Id.*)

Here, as the Board itself made clear, there are *no* valid technical concerns with the suitability of the Project. **"**The record is uncontroverted as to the determination that Birch Solar's application satisfies the statutory requirements in R.C. 4906.10(A) in every respect except as to whether the Project serves the public interest, convenience, and necessity." (Order, at ¶ 45.) More granularly, Birch's Reply Brief laid out examples of the uncontested evidence in the record that directly addressed and resolved each of the Counties' concerns,[15] now resurrected in the Order. Further, the Ohio Department of Health has analyzed a number of potential negative impacts of a solar facility to public health and convenience – noise, electromagnetic fields, heat, glare, toxicity of materials – and determined that each of these concerns is unsubstantiated.[16]

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[15] Reply Brief of Birch Solar 1, LLC, filed September 29, 2022, at 12-14.

[16] Health Assessment Section Bureau of Environmental Health and Radiation Protection Ohio Department of Health, Ohio Department of Health Solar and Photovoltaics Summary and Assessment, April 22, 2022. (Available at: https://odh.ohio.gov/wps/wcm/connect/gov/fc124a88-62b4-4e91-b30bbc1269d0dde5/ODH+Solar+Farm+and+PVs+Summary+Assessments_2022.04.pdf/)

While two Counties may have raised concerns regarding the Project to justify their opposition, the Board was well aware that these concerns were unfounded and disproven – by the Ohio Department of Health, by the uncontroverted evidence in the record, and by the findings in the Order itself. The Board's reliance on these proven-false concerns in its Order was thus unreasonable and should be corrected on rehearing.

2. It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments

In this case, the only party representing local residents that provided pre-filed testimony and participated in the hearing is Allen Auglaize Coalition of Reasonable Energy ("AACRE"), which is in *favor* of the Project.[17] The Auglaize County Commissioners and Logan Township Trustees did not submit any pre-filed testimony—and, as the Board acknowledged, they now "take no position on whether the project should be certified by the Board." (Order, at ¶ 39.) The Shawnee Township Trustees likewise did not submit any testimony. Against Birch Solar and its members voluntarily withdrew from the case.[18] The Allen County Commissioners did not intervene and, as such, were never even a party.

In its Order, however, the Board did not differentiate between sworn evidence from parties and unsworn Public Comments. In fact, the Board favored the latter. Rather than rely on testimony that was subject to cross-examination, the Board relied on the breakdown of the Public Comments, simply tallying the number of comments for and against the Project. "The Board takes notice of the large number of public comments filed in the case, which disfavor the Project at a ratio of approximately 80 percent to 20 percent." (Order, ¶ 70.) "While we recognize that public

[17] *See* Testimony of A. Chappell-Dick, Michael Wildermuth, Everett Lacy, T. Rae Nea, Frank Caprilla on behalf of Allen Auglaize Coalition of Reasonable Energy, filed May 12, 2022.

[18] Notice of Withdrawal from Intervention electronically filed by Mr. Jack A. Van Kley on behalf of Against Birch Solar, LLC and Members, filed May 16, 2022.

comments are not evidence that has been admitted to the case, and thus, are less reliable than the admitted evidence, we nevertheless uphold that they are relevant to our consideration of the matter." (*Id.*)

This is a departure from past Board precedent and improperly turns a merit-based siting process into a popularly contest divorced from the merits of the Application. Until recently, negative comments have not been reason enough to deny a Certificate. In past cases, the Board has received "thousands of comments from members of the general public, local organizations, and local officials" opposing a project, but nonetheless looked to the underlying merits of the project and relied on the record. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc*., 16-253-GA-BTX, at 82-83, November 21, 2019).

Further, in a decision issued the very same day as the Order here, the Board stressed the importance of *evidence*, and explained that unverifiable opposition should not be considered. (Order, Opinion, and Certificate, *In re the Application of Harvey Solar I, LLC*, 21-164-EL-BGN, at ¶ 158, October 20, 2022). In *Harvey Solar*, the Board ruled that certain petitions created by an opposition group were unreliable and, therefore, were not admissible evidence: "the Board finds that the reliance on petitions for which the identity of the denoted individuals cannot be confirmed is not appropriate for consideration relative to the ultimate determination in this case." (*Id.*)

In these other cases, regardless of the number or proportion of negative comments, the Board still undertook its duty to review the actual evidence in the case to and determine the merits of a project. Nonetheless, in this case, the Board simply chose to count hands raised for against and the Project in the Public Comments,[19] none of which were evidence in the record.

[19] Notably, in counting the Public Comments, the Board did not acknowledge that many Public Comments were submitted by the same few individuals. Further, the Board did not acknowledge that members of Against Birch Solar who voluntarily withdrew from the case were among the most frequent commenters and accounted for an outsized proportion of the negative Public Comments. While the Board should not

Here, the Board placed unwarranted weight on the sheer number of unsworn and untested negative Public Comments in reaching its decision that the Project does not serve the public interest. This was unreasonable error, sets dangerous precedent, and incentivize vexatious and false submissions. The Board should correct this error on rehearing.

3. It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions

The Ohio Supreme Court has held that the Board does not need to resolve each and every issue prior to issuing a certificate because R.C. 4906.10(A) "expressly allows the board to issue a certificate subject to such conditions as it considers appropriate." *In re the Application of Icebreaker Windpower, Inc*., Slip Opinion, 2022-Ohio-2742, ¶ 40. *See, e.g., In re Application of Buckeye Wind, L.L.C*., 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 16-18); *In re Application of Duke Energy Ohio, Inc*., 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 52.

Therefore, in prior cases, the Board has considered the ability of certificate conditions to mitigate potential negative impacts of a project. In the Icebreaker Windpower demonstration project, for example, the Board addressed potential wildlife harm through conditions rather than an outright denial. "Rather than requiring Icebreaker to resolve those matters before issuing the certificate, the board determined that the conditions on its grant of the certificate were sufficient to protect birds and bats and to ensure that the facility represented the minimum adverse environmental impact." *In re the Application of Icebreaker Windpower, Inc.*, Slip Opinion, 2022-Ohio-2742, ¶ 37. (*See also* Order, Opinion, and Certificate, *In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013, ruling that "[T]he Board finds that,

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have granted Public Comments such great weight, it should not have granted these Public Comments any weight at all.

with respect to health and safety concerns, such as setbacks (including blade shear, ice throw, shadow flicker, and noise), these concerns have been thoroughly considered and appropriately addressed in the conditions contained in the Conclusions and Conditions section of this Opinion, Order, and Certificate.")

More recently, the Board applied this approach to a solar project in order to address concerns related to public opposition – the same and *only* issue identified in the Order here. In *Dodson Creek*, the Board adopted a stipulation approving the project but, noting general opposition and "concerns raised by the public relative to the proposed Project," imposed conditions incorporating upgraded fencing and enlarged setbacks from non-participating parcels, residences, and paved roads. (Order, Opinion, and Certificate, *In the Matter of Dodson Creek Solar LLC for a Certificate of Environmental Compatibility and Public Need*, 20-1814-EL-BGN, ¶ 114, May 21, 2020.) These conditions, the Board determined, addressed the public's concerns. (*Id.*)

Here, contrary to this precedent, the Board did not consider any conditions to address its concerns related to public opposition. This failure is especially striking because Auglaize County and Logan Township, two of the four local jurisdictions identified in the Order as opposing the Project, have already agreed to 40 draft conditions. (Order, at ¶ 71.) In so doing, these jurisdictions have made it clear what conditions they want to see put into place if the Project goes forward — but the Board flatly refused to even consider these agreed-to conditions. (*Id.*) ("We reject the conclusion that Partial Stipulating Parties have waivered in their opposition to the Project.") The Board denies the Certificate based entirely on perceived public sentiment of local jurisdictions, but refuses to consider the express sentiment from these same jurisdictions when it comes to conditions.

Again, the Board departed from its prior precedent and ignored the evidence in the record regarding the availability of conditions to mitigate any potential harm in this case, all in order to reject the Certificate. This was unreasonable error.

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A)

1. The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions

The Board denied the Project's Certificate for a single reason: "Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project,[20] the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order, ¶ 72.)

As set forth below, this myopic approach is not only an unreasonable departure from past Board precedent, but it violates Ohio public policy, Ohio's Constitutional nondelegation doctrine, and multiple Ohio laws. These errors must be corrected on rehearing.

a. The Board's approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance

The Boards approach in this case runs contrary to the very purpose of the Ohio Power Siting Board. The Board was created so a consortium of Ohio agencies could consider large energy projects on their merits under the diverse criteria set forth in R.C. 4906.10. As the Board states:

> Our mission is to support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens,

[20] Birch notes that the Board elsewhere acknowledges that opposition is less than "unanimous and consistent," as Auglaize County and Logan Township "take no position on whether the project should be certified by the Board." (Order, at ¶ 39.) Allen County did not even intervene.

> promoting the state's economic interests, and protecting the environment and land use.

(Ohio Power Siting Board, OPSB Mission.[21])

This type of holistic state-level review is necessary because *the public as a whole* has a stake in these projects. It not merely the local jurisdictions that touch or neighbor projects that must be considered. If that were the case, any amount of localized NIMBYism could derail large-scale solar generation projects.

Here, for example, in polling conducted in the Lima area, 70% of local voters agreed it is important to bring new sources of clean energy to Ohio and nearly 75% of local voters saw solar farms as beneficial to the economy and environment. (Application Exhibit 30A, Att. SM-3.) The Board acknowledged these results, but disregarded them because these local voters, while strongly supporting solar development *somewhere* in Ohio, did not necessarily support development of the Project in their own backyard. (Order, ¶ 70.) Early local polling support for the Project, despite little information about the Project and its potential benefits being known, was "only 45 percent." (*Id.*) In short, polling indicated that locals had a kneejerk negative reaction to the Project despite having little information and before looking into the benefits.

That disconnect is precisely why the Board has ruled in other cases that a project's larger benefits to the state, the public, and the grid outweigh local disapproval. The Board, in *In re Duke Energy Ohio,* approved a project even though there were "thousands of comments from members of the general public, local organizations, and local officials" and opposing intervention from multiple local governments. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc*., 16-253-GA-BTX, at 82-83, November 21, 2019). Similarly, in *In re Champaign Wind*, the Board

[21] Available at: https://storymaps.arcgis.com/stories/9bf2d0fc20214ffdaa3ae83a1fc9faa5

ruled that a project benefited the public even though multiple opposing local governments intervened and presented nine witnesses at the adjudicatory hearing. (Order, Opinion, and *Certificate, In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013). In that case, the Board took a broad view and ruled "that, in considering whether the proposed project is in the public interest, convenience, and necessity, we have taken into account that the renewable energy generation by the proposed facility will benefit the environment and consumers." (*Id.* at 72.)

As in the *Duke Energy Ohio* and *Champaign Wind* cases, the Board in this case is tasked with considering whether the Project furthers the goals embodied in the Board's overall mission and the goals of its member state agencies. Therefore, the close alignment of the Project with Ohio's top statewide policy priorities (*i.e.*, water conservation, statewide economic development, pollinator habitat, generation capacity, beneficial use of historic oil and gas fields, etc.) should have been considered by the Board in evaluating the impact on the public interest.

But the Board did not consider any of those things.

Instead, the Board deferred its sole and plenary authority to make a statewide public interest decision to the whims of local jurisdictions. As the Ohio Chamber of Commerce noted in this case:

> While legitimate local concerns should be carefully evaluated, local opposition based on hyperbole and allegations without supporting evidence and testimony should not dictate the outcome of the OPSB permitting process. Allowing it to do so undermines the fundamental purpose of the OPSB to balance a variety of interests when siting important energy infrastructure.

(Ohio Chamber of Commerce Public Comment, filed September 23, 2022.)

The Board failed to look beyond baseless local opposition in determining that the Project failed to serve the public interest under R.C. 4906.10(A)(6). There is no reason for a statewide

permitting regime staffed with diverse subject matter experts, like the Ohio Power Siting Board, if untested local prejudices carry the day.

As a result of the Board's abrogation of its authority, the best interests of Ohio and Ohioans as a whole are not represented (or even considered) in the Board's Order. This is unreasonable and unlawful.

b. <u>The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine</u>

In denying the Certificate and preventing the beneficial use of privately-owned property, the Board improperly delegated its regulatory powers to private residents and local jurisdictions: "Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order, ¶ 72.)

Under the Constitutional nondelegation doctrine, it is a violation of due process for the state government to empower "a few citizens to deny an individual the use of his property" – precisely as the Board did here. *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 664 (4th Cir. 1989).

"At least since *Yick Wo v. Hopkins*, 118 U.S. 356 [6 S.Ct. 1064, 30 L.Ed. 220] (1886)," the Supreme Court teaching is that the due process clause "places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself." *McGautha v. California*, 402 U.S. 183, 272 n. 22, 91 S.Ct. 1454, 1473 n. 22, 28 L.Ed.2d 711 (1971) (Brennan, J., dissenting). This is particularly true where the power delegated relates to the ability to develop and use property. *See, e.g., Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) (setting of property line by adjacent owners); *Embree v. Kansas City & Liberty Blvd. Road Dist.*, 240 U.S. 242, 36 S.Ct. 317, 60 L.Ed. 624 (1916)

(determination of boundary for road district by petition of landowners); *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330 (1926) (same as *Embree*); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) (zoning variance only by consent of adjacent owners). "These opinions still stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion." *Gen. Elec. Co. v. New York State Dep't of Lab*., 936 F.2d 1448, 1455 (2d Cir. 1991).

In *Geo-Tech*, for example, the court struck down a West Virginia law that permitted a state agency to deny a permit if a project is "significantly adverse to public sentiment," even though the project in question had inspired hundreds of letters in opposition. *Id.* at 663 (holding that the law "violated due process by impermissibly delegating legislative authority to local citizens.") Such delegation to public sentiment, the Supreme Court has explained, is repugnant because it empowers neighbors "to withhold consent for selfish reasons or arbitrarily" to block otherwise lawful and beneficial development. *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122, 49 S. Ct. 50, 52, 73 L. Ed. 210 (1928). Further, even the if the State remains able to exercise its authority, it is nonetheless a violation of the nondelegation doctrine and unconstitutional if, in fact, the State does not actually exercise that discretion. *Gen. Elec. Co*., 936 F.2d at 1458.

The nondelegation doctrine is as applicable to the Board as it is to the legislature. *See Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 381 N.W.2d 842, 847 (Minn. 1986) ("The question is not whether the legislature unlawfully delegated its powers to the Commission, but whether the Commission unlawfully delegated its powers to a private entity.") Under both

situations, "the policy considerations that underlie the delegation doctrine are applicable . . . and the inquiry is the same: whether adequate legislative or administrative safeguards exist to protect against the injustice that results from uncontrolled discretionary power." *Id.*

Here, the Board has delegated its authority to the local residents and jurisdictions without placing any such safeguards in place. Whether or not the Board nominally retains the authority to exercise its siting power is not the question. The question is whether the Board chose to exercise that power in fact, or whether it has chosen instead to empower a few private citizens and local jurisdictions to make the decision on its behalf. Clearly, it is the latter. The Board, despite being bestowed with plenary authority over the certification process by the Ohio General Assembly, did not exercise *any* independent analysis or fact-finding to test the allegations and complaints made by the local residents and jurisdictions regarding the Project. As set forth above, the Board merely accepted the complaints of the opponents at face value, despite overwhelming contrary evidence in the record, and adopted their opposition wholesale to prevent the development of the Project on private property.

The Ohio General Assembly itself would be unable to establish such a siting standard and pass constitutional muster. Surely, the Board cannot establish such a standard for itself. Accordingly, the Order is unlawful, unreasonable, and unconstitutional. It must be reconsidered.

c. <u>The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B)</u>

In addition to being a violation of Ohio's public policy and Constitution, the Board's total reliance on the opinions of the local jurisdictions violates Ohio law. Ohio law is clear that the Board, and *only* the Board, is authorized to determine the permissibility of a large-scale solar project. Chapter 4906.10(A), for example, speaks only in terms of findings regarding the Certificate that *the Board* must make. No one else.

This exclusive and plenary authority is made explicit under R.C. 4906.13(B), which provides that "[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code." The Board, however, did just this. The Board, in denying the Project's Certificate, required the approval and consent of the local political subdivisions. In fact, the presence or absence of this local subdivision approval is the *only* factor the Board seems to have considered.

Accordingly, the Order is unlawful and must be reconsidered.

2. The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute

The Board, as a creature of statute, may exercise only those powers that the General Assembly confers on it. *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. The General Assembly, in R.C. 4906.10, provides the certification criteria the Board must consider in granting a certificate for the construction, operation, and maintenance of a solar-powered electric generation facility unless 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.[22]
>
> (2) The nature of the probable environmental impact.
>
> (3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.
>
> (4) That the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and

[22] As this Project is a proposed electric generating facility, this criterion is not applicable.

interconnected utility systems and that the facility will serve the interests of electric system economy and reliability.

(5) 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 sections 1501.33, 1501.34, and 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.

(6) That the facility will serve the public interest, convenience, and necessity.

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

However, instead of relying on these factors as required by the Ohio Revised Code, the Board invented its own single-factor standard. The Board relied on a single consideration in denying the Project a Certificate: public opposition from local jurisdictions. This single determinative factor appears nowhere in R.C. 4906.10(A). And it is not for good reason. As set forth above, simply because there is local opposition to a project does not mean that a project is not in the public interest.

The Board rewriting the statute to focus solely on local public opposition was unreasonable and unlawful.

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND

PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52")

The Board's Order is unreasonable and unlawful because it attempts to impermissibly legislate in the place of the Ohio General Assembly. In addition to impermissibly modifying R.C. 4906.10(A) as set forth above, the Board's Order violates and purports to *de facto* amend SB 52 as enacted by the General Assembly. Because this Board action conflicts with the directive of the General Assembly regarding the siting of utility-scale solar projects, it is in violation of the separation of powers in the Ohio Constitution.

"[I]f an administrative policy exceeds the statutory authority granted by the General Assembly, the agency has usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution." *McFee v. Nursing Care Mgt. of Am., Inc.*, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 24. Policies promulgated by administrative agencies are unenforceable if they are in conflict with statutory enactments covering the same subject matter. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 18. *See, e.g., State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis,* 2002-Ohio-7041, 781 N.E.2d 163, at ¶ 21 ("the General Assembly is the ultimate arbiter of public policy"); *Carroll v. Dept. of Adm. Servs.* (1983), 10 Ohio App.3d 108, 110, 460 N.E.2d 704 ("In the absence of clear legislative authorization, declarations of policy . . . are denied administrative agencies and are reserved to the General Assembly").

The General Assembly, in enacting SB 52, drastically changed the siting landscape and future of solar development in Ohio. Under this new law, utility-scale solar projects are subject to two levels of permitting approval: county and state. First, at the county level: At least 90 days prior to applying to the Board for a certificate, a project must hold a public meeting in each county where the facility is to be located. Following the public meeting, the county board of

commissioners has 90 days to adopt a resolution prohibiting or reducing the proposed project in size.

Second, at the State level: If the County Commissioners either approve, reduce, or take no action regarding the project, the project may file its application before the Board. S.B. 52 creates two new voting ad hoc members of the Board, the chairperson of the township board of trustees and the president of the county board of commissioners, or their designees.

By design, not every project is subject to SB 52. The General Assembly chose to include a robust two-tiered grandfathering scheme in the law in order to provide certainty to the many projects already pending approval by the Board that this new level of local control would not apply to their applications.[23] It is uncontested that Birch is a fully grandfathered project, meaning it is not subject to any component of SB 52. "The Board acknowledges that this case is not impacted by SB 52, which subjects solar projects that are filed after October 11, 2021 to increased county-level and township-level review and participation in the Board's certification process." (Order, ¶ 69, fn. 9.)

However, despite Birch's status as a fully grandfathered project and the Board's admission that SB 52 should not apply to this case, the Board in fact fashioned and applied its own version of SB 52 to the Project, relying entirely on the opinion of local political subdivisions in reaching its permitting decision. At multiple points in the Order, the Board made this application explicit. The Board often supported its reasoning that the Project did not serve the public interest by arguing that the Project *would* be barred by the local jurisdictions under SB 52 if not for grandfathering. (Order, ¶¶ 39, 61, 63, 65, 69.) In other words, although the Board acknowledged that SB 52 is not

[23] The grandfathering provisions for solar projects are set forth at sections 4 and 5 of S.B. 52.

supposed to apply to the Project, it nonetheless denied the Certificate based on how it believed SB 52 would have applied. That is just another way of applying the new law to the Project.

As a grandfathered project, Birch is entitled to participate in the prior statewide siting process that explicitly prohibits a local approval requirement. R.C. 4906.13(B). That is the compromise the General Assembly enacted. The Board's imposition of SB 52 on a grandfathered project like Birch is a violation of its mandate from the General Assembly and, as a result, a violation of the Ohio Constitution.

There is an even larger issue, however. The Board's approach in the Order (whether the Board acknowledges its approach as the application of SB 52 or not) is not a faithful application of SB 52. The Order is inconsistent with the spirit and text of the law passed by the General Assembly. The Board took the General Assembly's policy behind SB 52—enhanced local leverage over large-scale solar projects– and stretched it to the extreme. In so doing, the Board denied Birch any of the necessary procedural safeguards that the General Assembly built into SB 52:

- While SB 52 requires that projects receive an official decision from the county before undertaking the expense of filing their application and beginning the state-level siting process, the Board here deferred to unsworn public comments, correspondence, and emails from any political subdivision provided at any point in the proceeding – even after the Staff Report was issued and on the eve of hearing. (Order, ¶¶ 63-66.)
- While SB 52 empowers a single county and township designee to participate in an official capacity as de facto Board members, the Board here gave full deference to unsworn and disproven complaints and emails from any county or township official. (*Id.*)

- While SB 52 requires counties to make a final determination on suitability within 90 days of the county-level meeting, the Board here allowed endless leeway for local governments to change their positions as often as they wished and at any point, inserting uncertainty late into the permitting process. The Board's Staff itself changed its recommendation regarding the public interest criteria between the issuance of the Staff Report and the adjudicatory hearing due to last-minute local opposition, creating an impossible moving target for the Project and unworkable precedent for future developers. (*Id.* at ¶¶ 48, 49.)

Under the Board's approach in this case, it was enough that any official from any level of local government expressed dissatisfaction with the Project in any form. SB 52 itself does not go nearly so far. The General Assembly, in enacting SB 52 after much testimony, debate, amendments, and multiple hearings,[24] determined the appropriate level and means of control for local jurisdictions over utility-scale solar projects. The Board's Order here violated that legislative directive. The Board rewrote the General Assembly's enactment into an unworkable standard.

The Board's Order is unreasonable, unlawful, and unconstitutional. These errors must be corrected on rehearing.

IV. CONCLUSION

For the foregoing reasons, Birch requests that the Board grant this application for rehearing.

Respectfully submitted,

BRICKER & ECKLER LLP

[24]Over eight months, the Senate Energy and Public Utilities Committee held six hearings, the House Public Utilities Committee held five hearings, and hundreds of witnesses provided testimony either supporting or opposing the bill. The Ohio Legislature, 134th General Assembly, Senate Bill 52 (details available at: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-52)

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 21st of November, 2022.

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Case No(s). 20-1605-EL-BGN

Summary: Application for Rehearing of Birch Solar I, LLC electronically filed by Teresa Orahood on behalf of Herrnstein, Kara

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF BIRCH SOLAR, LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED.	**CASE NO. 20-1605-EL-BGN**

ORDER ON REHEARING

Entered in the Journal on June 15, 2023

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the applications for rehearing filed by Birch Solar, LLC and jointly filed by intervenors Allen Auglaize Coalition for Reasonable Energy and the International Brotherhood of Electrical Workers, Local Union 32.

II. PROCEDURAL HISTORY

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

{¶ 3} Birch Solar, LLC (Birch) is a person as defined in R.C. 4906.01(A).

{¶ 4} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Board.

{¶ 5} On February 12, 2021, Birch filed its application for a certificate to construct a solar-powered electric generation facility in Allen and Auglaize Counties, Ohio, which it described as an up to 300 megawatt (MW) solar-powered electric generation facility on approximately 1,410 acres in Shawnee Township. Thereafter, the application was supplemented on March 25, 2021, March 31, 2021, April 5, 2021, October 5, 2021, February 17, 2022, and May 4, 2022.

{¶ 6} On October 20, 2021, Staff filed its report of investigation (Staff Report).

{¶ 7} On November 2, 2021, the administrative law judge ordered that the Board of County Commissioners of Auglaize County (Auglaize County), the Board of Township Trustees of Logan Township (Logan Township), Ohio Farm Bureau Federation (OFBF), Allen Auglaize Coalition for Reasonable Energy (AACRE), the International Brotherhood of Electrical Workers, Local Union 32 (IBEW), and the Shawnee Township Trustees (Shawnee Township) be granted intervention.

{¶ 8} On May 16, 2022, Birch, Auglaize County, Logan Township, AACRE, OFBF, and IBEW filed a joint stipulation and recommendation (Stipulation). In the Stipulation, Birch, AACRE, and IBEW (Stipulating Parties) recommend that the Board issue a certificate approving the Project. Auglaize County, Logan Township, and OFBF (Partial Stipulating Parties) take no position on whether the Project should be certificated by the Board, though they request that conditions of the Stipulation be adopted if the Board issues a certificate. Further, Auglaize County and Logan Township indicated that the Project would be restricted from approval if Substitute Senate Bill 52 (SB 52), which gives local governments authority to restrict unincorporated areas from large wind and solar projects, was effective as of Birch's application. Shawnee Township did not join in the Stipulation.

{¶ 9} By Opinion and Order dated October 20, 2022 (Order), the Board denied Birch's application for a certificate.

{¶ 10} R.C. 4906.12 provides that R.C. 4903.02 to 4903.16 and R.C. 4903.20 to 4903.23 apply to any proceeding or order of the Board, as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 11} Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner, form, and circumstances set forth in R.C. 4903.10. R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission. R.C. 4903.10(B) also requires that applications for rehearing

be in writing and must set forth specifically the ground or grounds on which the party seeking rehearing considers an order to be unreasonable or unlawful.

{¶ 12} On November 21, 2022, Birch filed an application for rehearing of the October 20, 2022 Opinion and Order. Also on November 21, 2022, intervenors AACRE and IBEW (collectively, AACRE/IBEW) filed a joint application for rehearing. Birch's application assigns four points of error to the Board's Order; the alleged errors are focused on the Board's reliance on the evidence provided by the local legislative authorities to determine that the Project did not satisfy R.C. 4906.10(A)(6). The claims advanced by AACRE/IBEW, as discussed below, largely overlap with Birch's assignments of error where they focus on the Board's findings as concerned to R.C. 4906.10(A)(6).

{¶ 13} On November 30, 2022, Shawnee Township filed a reply to Birch's application for rehearing, stating that it believes the Board considered all record evidence before it and that, contrary to Birch's statements otherwise, the local populace of Shawnee Township, the Allen County Commissioners (Allen County), and many others were opposed to the project.

{¶ 14} By Entry issued December 13, 2022, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the administrative law judge granted rehearing for the limited purpose of affording the Board additional time to consider the issues and arguments raised in the applications for rehearing.

III. DISCUSSION

{¶ 15} In its Order, the Board denied Birch a certificate for the construction, operation, and maintenance of the proposed project. The Board determined that, considering the recommendation from Staff, and with opposition from Auglaize County, Shawnee Township, Allen County, and Logan Township, all of which filed resolutions or correspondence stating said opposition, the Project does not serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

{¶ 16} The applications for rehearing filed by Birch and AACRE/IBEW claim that the Board erred in denying the certificate primarily on grounds that the proposed project did not satisfy R.C. 4906.10(A)(6) and that, further, the Board erred in relying on non-evidentiary public comments made by the local legislative authorities in Shawnee Township, Logan Township, Allen County, and Auglaize County.

{¶ 17} The Board has reviewed and considered all of the claims and arguments contained in the applications for rehearing. Any claim or argument contained in the applications for rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and is, unless otherwise specifically stated, denied.

{¶ 18} Birch's first assignment of error contends that the Order is against the manifest weight of the evidence because the Board did not consider the public interest, convenience, and necessity of the project through a broad lens, which Birch contends is inconsistent with both Board precedent and Supreme Court of Ohio precedent. Birch argues that the Order is contradictory where it states that the determination under R.C. 4906.10(A)(6) must be viewed through a broad lens, but considers only one factor, which was the opposition of local government entities. Birch asserts that the Board did not consider the projected benefits of the proposed project, thus performing a one-sided analysis of R.C. 4906.10(A)(6). Specifically, Birch contends that the Board's Order disregarded the local economic development opportunities offered by the proposed project. Birch states that in over thirty prior cases, the Board and its Staff have acknowledged that a solar facility would have an overall positive impact on the local economy. Birch further argues that various economic factors, including Payment in Lieu of Taxes (PILOT) revenue, local temporary and permanent jobs and their associated wages, and its Neighboring Landowner Financial Benefit were all factors the Board did not consider in determining if the proposed project satisfied R.C. 4906.10(A)(6). Next, Birch avers that the regional economic benefits of the proposed project would have benefitted the State of Ohio as a whole, but that these benefits were not broadly considered by the Board in its Order. Particularly, Birch cites to public comments filed in the case docket by both the Lima/Allen County Chamber of Commerce

and the Ohio Chamber of Commerce about both the proposed project and renewable energy projects broadly as benefitting the State of Ohio economically. Next, Birch argues that the proposed project's positive impact to local agriculture was disregarded by the Board in its Order. Elaborating, Birch states that in other cases, the Board recognized that solar projects are "consistent with agricultural industry support, in that the facility would provide supplemental income to farmers and the land could be returned to agricultural production upon decommissioning." *See In re the Application of Hardin Solar Energy LLC, 17-773-EL-BGN,* Staff Report of Investigation, at 12 (November 21, 2017). Birch argues that the proposed project would variously have beneficial effects to land within the project area and would align with at least one local jurisdiction's land use plan. Birch puts forth that in the Order, the Board disregarded that the proposed project benefits Ohio through a diversified energy supply. Specifically, Birch calls to prior cases before the Board in which Staff recognized that solar projects can serve the public interest by providing additional electrical generation to the regional transmission grid, among other things. Birch concludes its first assignment of error by arguing that it was unreasonable for the Board to disregard that the proposed project provides a beneficial use for property containing abandoned oil and gas wells. Citing to the Staff Report, Birch avers that while Staff initially found issue with the proposed project area based on its preliminary investigation, Birch was able to work with the Ohio Department of Natural Resources to create a comprehensive Engineering Constructability Report, eventually resolving Staff's concerns.

{¶ 19} Similarly, AACRE/IBEW's first assignment of error contends that the Board unlawfully and unreasonably denied the proposed project a certificate against the manifest weight of the evidence presented in the case, violating R.C. 4903.09, through application of R.C. 4906.13(B). AACRE/IBEW contest the Board's reliance upon the local opposition to the project in its Order, citing to polling conducted by Birch concerning local support for solar farms and clean energy. Additionally, AACRE/IBEW, like Birch, find fault with the Board's Order giving weight to the public commentary filed in the case docket, the value of which AACRE/IBEW question.

{¶ 20} Concerning Birch and AACRE/IBEW's first assignments of error, the Board finds the arguments lack merit. Initially, contrasting with the claims made in Birch and AACRE/IBEW's first assignments of error, the Board did indeed consider in its Order the proponents of the proposed project. Our initial discussion of R.C. 4906.10(A)(6) specifically noted the benefits of the proposed project, including: the economic benefits of the project, such as PILOT revenues; air quality and climate impact improvements; protecting landowner rights; and preserving agricultural land use. Order at ¶68. However, as explained in the Order, the project was contemplated by the Board through a broad lens and those benefits were compared to the impact of the project on those individuals who would be most impacted. The Board also acknowledged that the project satisfied each requirement of R.C. 4906.10(A) but for (A)(6), and that, despite the noted benefits, given the universal opposition from local governments and residents, the Board could not determine that the proposed project was in the public interest, convenience, and necessity. Order at ¶¶ 67-73. Additionally, we observe that, despite Birch's contentions, such findings are not unprecedented. In previous cases the Board has found that a project was not in the public interest, convenience, and necessity where there was substantial local opposition. *See In the Matter of the Application of American Transmission Systems, Incorporated for a Certificate of Environmental Compatibility and Public Need to Construct the Lincoln Park-Riverbend Transmission Line in Mahoning County, Ohio,* Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022), and *In the Matter of the Application of Republic Wind, LLC for a Certificate to Site Wind-Powered Electric Generation Facilities in Seneca and Sandusky Counties, Ohio,* Case No. 17-2295-EL-BGN, Opinion, Order and Certificate (June 24, 2021). In this case, the Board determined that, despite the benefits of this project and solar energy projects in general, the substantial and persistent opposition by local government and the public, especially residents of the project area, outweigh those potential benefits. Order at ¶ 68. The Board disagrees with Birch and AACRE/IBEW concerning its consideration of the evidence presented with respect to both the benefits of the proposed project and the opposition through public hearing testimony, public comments, and the activity of the various local governments.

{¶ 21} For its second assignment of error, Birch submits that the Board's Order is against the manifest weight of the evidence because it relied on unsupported, unsworn, and disproven claims of adverse impact of the proposed project. Particularly, Birch cites the Order where it states that the Board did not address the suitability of the proposed project outside of R.C. 4906.10(A)(6) and the public interest, convenience, and necessity factor. Order at ¶ 45. Birch claims that the Board unreasonably relied upon allegations of harm that were unsupported or disproven in the record. Birch states that the Board identified concerns raised by Auglaize County regarding potential impacts on users and property owners. Order at ¶ 64. Further, Birch points to the Board having mentioned various concerns of Allen County concerning the project, including its lack of dedicated power, impacts to land use, property values, and drinking and ground water, among other things. Order at ¶ 63. Birch then states that neither Allen County nor Auglaize County provided supporting evidence of the truth of the impacts about which they were concerned. Birch cites to Auglaize County having signed the Stipulation and the Board's statement in its Order that Auglaize County took no position as to the certification of the proposed project in the Stipulation. Next, Birch asserts that the Board was unreasonable and unlawful where it weighed the quantum of the positive and negative public commentary filed in the case docket. Specifically, Birch avers that the only party representing local residents that provided pre-filed testimony and participated in the adjudicatory hearing was AACRE, which is in favor of the proposed project. Continuing, Birch states that where the Board's Order states that public comments are relevant to its consideration of the proposed project, despite not being admitted evidence, it has departed from its own precedent by "turning a merit-based siting process into a popularity contest divorced from the merits of the Application." Further, Birch states that, in other cases, regardless of the number or proportion of negative comments, the Board made its determination based on the merits of the Application, which Birch contends did not happen here. Adding to this alleged error, Birch argues that it was unreasonable and unlawful for the Board to refuse consideration of conditions on any certificate granted that would serve to mitigate negative impacts on local jurisdictions. Supporting its claim that the Board could and should have utilized conditions

on any certificate granting the proposed project, Birch cites the Ohio Supreme Court's holding that R.C. 4906.10(A) "expressly allows the Board to issue a certificate subject to such conditions as it considers appropriate." *In re the Application of Icebreaker Windpower, Inc.*, 2022-Ohio-2742, ¶ 40. Birch then argues that the Board has addressed a similar situation to the instant case, where the Board noted general opposition and "concerns raised by the public relative to the proposed project" and summarily imposed various conditions on the certificate that were calculated to mitigate the concerns related to the public opposition to the proposed project. *In re the Application of Dodson Creek Solar LLC,* 20-1814-EL-BGN, Opinion, Order, and Certificate, at ¶ 114 (September 15, 2022) (*Dodson Creek*). Contrasting the instant case with *Dodson Creek*, Birch argues that the Board simply rejected consideration of any mitigating conditions on a certificate granting the proposed project, despite two of the four local jurisdictions having agreed to 40 draft conditions by way of the partial stipulation. Birch opines that the Board's refusal to consider mitigating conditions represents an unreasonable departure from past precedent.

{¶ 22} Concerning Birch and AACRE/IBEW's second assignments of error, the Board finds the applications should be denied. The universal opposition to the project by local governing bodies is uncontroverted. As discussed in the Order, the constituents of these entities are the ones most impacted by the project and the ones best able to express whether a project will serve the public interest, convenience, and necessity. While Birch contends local issues can be addressed through conditions, the conditions in the Staff Report and in the Stipulation did not reverse the local governments' opposition to the project. As described in the Order, many of the resolutions and comments opposed to the project were submitted after the Staff Report was filed. The Board thus found that the proposed conditions did not resolve the issue of the uniform, manifest opposition to the proposed project. Order at ¶ 69, 70. Additionally, the Board gave the public commentary proper weight. We initially observe that testimony at the local public hearing is sworn testimony subject to cross examination. As to the filed comments submitted to the docket, we expressed in the Order that, while relevant in affirming the local governments' views, the

Board considered such statements less reliable than admitted evidence. In the Order, we found that the large number of one-sided comments validated that the government entities were representing the views of their constituents. Order at ¶ 70. Further, the Board did not depart from precedent by considering the public commentary in making its decision with respect to the public interest, convenience, and necessity. As stated above, the Board has previously acknowledged the significant negative sentiment in the public commentary and the volume of public comments filed in the docket.[1] The Board invites public commentary regarding proposed utility scale projects to assist it in determining if a project satisfies the requirement that it be in the public interest, convenience, and necessity, and that commentary is given the weight it is due when the Board renders its decision.

{¶ 23} Birch's third assignment of error alleges that the Board's Order is unreasonable because the Board improperly abrogated its sole and plenary authority to determine the environmental compatibility and public need of the project. Birch contends that the Board delegated its authority to the public sentiment in the local jurisdictions in which the proposed project would be sited, citing the Board's Order where it states "based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity," Order at ¶ 72. Birch avers that the Board's decision was an unreasonable departure from past precedent and in violation of Ohio public policy, among other things.

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1 In the time since its decision in this case, the Board has consistently applied this reasoning to two other projects, both of which had substantial public commentary that was largely opposed to the respective projects. *See In the Matter of the Application of Cepheus Energy Project, LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar Powered Electric Generation Facility in Defiance County, Ohio,* Case No. 21-293-EL-BGN, Opinion, Order, and Certificate (January 19, 2023), and *In the Matter of the Kingwood Solar for a Certificate of Environmental Compatibility and Public Need to Construct Solar Powered Electric Generation Facility in Greene County, Ohio,* Case No. 21-117-EL-BGN, Opinion, Order, and Certificate (December 15, 2022).

{¶ 24} Birch initially argues that the Board violated public policy with respect to large scale energy generation by denying the certificate. Birch argues that the Board's action runs counter to the purpose of the Board's existence, which is to provide a consortium of Ohio agencies to consider large energy projects on their merits. Birch cites several polling efforts seeking opinions of Ohioans concerning the importance of new sources of clean energy in Ohio. Birch claims that the Board simply rejected the positive sentiment toward renewable energy from these polls and instead deferred to the local voters, who were not in support of the project being located "in their own backyard" according to Birch. Further, Birch cites two other cases as examples of situations where the Board considered, and ultimately approved, projects where "a project's larger benefits to the state, the public, and the grid outweigh local disapproval." *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, Opinion, Order, and Certificate (November 21, 2019) (*Duke*) and *In the Matter of the Application of Champaign Wind, LLC,* 12-160-EL-BGN, Opinion, Order, and Certificate, at 3 (May 28, 2013) (*Champaign Wind)*. Birch avers that in *Duke*, the Board approved a project despite receiving "thousands of comments from members of the general public, local organizations, and local officials," along with intervention from multiple local governments who opposed the project. *Duke* at 82-83. In the same line of argument, Birch cites *Champaign Wind*, arguing that the Board found the project benefitted the public despite opposition from multiple local government intervenors, who collectively presented nine witnesses at the adjudicatory hearing. *Champaign Wind* at 3. Further, Birch states that in the same case, the Board took a broad view and ruled "that, in considering whether the proposed project is in the public interest, convenience, and necessity, we have taken into account that the renewable energy generation by the proposed facility will benefit the environment and consumers." *Id.* at 72. Finally, Birch concludes that the Board's denial of a certificate for the proposed project in this case is an abrogation of its authority where the best interests of Ohioans, as a whole, were not represented or considered, which is unreasonable and unlawful.

{¶ 25} Birch next submits that the Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine. Birch avers that under this doctrine,

it is a violation of due process for state government to empower a few citizens to deny an individual use of their property. Going further, Birch opines that the nondelegation doctrine is as applicable to the Board as it is to the state legislature. Specifically, Birch's argument is that the Board delegated its authority to local residents and jurisdictions without placing safeguards or doing any independent analysis or fact-finding tests to the allegations and complaints made by those groups. Similarly, AACRE/IBEW argue that the Board may not delegate certificate approval to local governments, but here relied on the opposition of the local governments involved in the case. Like Birch, AACRE/IBEW argue that the Board, in its Order, abrogates its authority given by the General Assembly for siting major power projects and instead delegates to local governments.

{¶ 26} Birch's final point under this assignment of error is that the Board's approach to this proposed project is a violation of Chapter 4906 of the Revised Code, including R.C. 4906.13(B), as well as Chapter 4906 of the Administrative Code. Specifically, Birch alleges that the Board's total reliance on opinions of the local jurisdictions is a violation of Ohio law where R.C. 4906 confers authority on only the Board to determine the permissibility of large-scale solar projects. Birch elaborates that R.C. 4906.13(B) makes explicit the Board's plenary and exclusive authority where it states that "[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code." Birch concludes that the Board violated these statutes by considering only the presence or absence of local subdivision approval.

{¶ 27} Birch's third assignment of error alleges that the Board abrogated its sole and plenary authority to determine the environmental compatibility and public need of a proposed project. Birch's argument is that the Board delegated this authority to the local governments by denying the proposed project a certificate while citing the heavy opposition of local government and public commenters. Birch argues that the Board violated Ohio public policy, the Constitutional nondelegation doctrine, and both R.C. 4906, and Ohio

Adm.Code Chapter 4906. All of these allegations find a common thread in that they claim the Board, as the sole entity with the ability to approve or deny authority to construct and maintain utility scale projects, handed off its authority to local governments in this case.

{¶ 28} Birch further asserts that the Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by this statute. Birch opines that, instead of considering all eight factors listed in R.C. 4906.10(A), the Board relied solely on (A)(6), effectively creating a "single-factor standard."

{¶ 29} The Board disagrees with Birch regarding this claim. The Board made its decision based upon the evidence presented and exercised its authority and obligations in accordance with R.C. 4906.10(A), which the Board reiterates, provides that it must find that all requirements are met or it cannot issue a certificate. Among those requirements is that the Board must find, consistent with R.C. 4906.10(A)(6), that the project would serve the public interest, convenience, and necessity. The Order described the various considerations the Board made in assessing this factor. The Board weighed the numerous benefits of the project to the public with the large public opposition to the project and determined that the project would not serve the public interest, convenience, and necessity. At no point did the Board pass off its authority to the local governments. Rather, the Board found the opposition of the local governments to be representative of the public's interest in the project, and thus a determining component as to whether the proposed project satisfied R.C. 4906.10(A)(6). While the Board acknowledged in its Order that the driving factor in its decision was the uniform and overwhelming opposition to the project by local governments and members of the public, including largely those residing in the footprint of the project, it considered all requirements of R.C. 4906.10(A), and stated that it shall not issue a certificate unless it finds all factors outlined in the statute. Order at ¶ 69, 73.

{¶ 30} In its fourth and final assignment of error, Birch claims that the Board violated and purported to administratively amend the text and public policy of SB 52. Birch argues

that the Order is unreasonable and unlawful where it attempts to impermissibly legislate in place of the General Assembly. Birch states that the Board attempted to amend SB 52 through its Order. Birch describes the various effects of SB 52 on power siting projects, concluding that, despite the proposed project pre-dating when SB 52 was signed into law, the Board effectively subjected the application to SB 52 in its Order. Elaborating, Birch avers that the Board's Order applies SB 52 to the proposed project by "stretching to the extreme" the powers conferred by the General Assembly on local governments with respect to utility scale renewable energy projects. Birch's argument is that by making its decision solely on the public interest factor, the Board applied SB 52 retroactively to the proposed project and in a manner that gives far more power than the General Assembly intended to give local governments in such cases.

{¶ 31} In a similar argument, AACRE/IBEW's third and final assignment of error alleges that the Board retroactively applied SB 52 to this project, in violation of Article II, Section 28 of the Ohio Constitution. AACRE/IBEW allege that by denying the certificate on grounds based in the local government opposition, the Board has effectively applied SB 52 retroactively where Allen County, for example, filed Allen County's Resolution No. 238-22 stating that if SB 52 had not "grandfathered" Birch's application for the proposed project, it would have been ineligible for consideration in Allen County. AACRE/IBEW construe this resolution as a plea by Allen County to the Board to apply SB 52 retroactively, and the Board, by denying the certificate on grounds of local government opposition, including that of Allen County, effectively acquiesced to that request.

{¶ 32} With respect to Birch's fourth and AACRE/IBEW's third and final assignments of error, the Board rejects the argument that it retroactively applied SB 52 to this project in its Order. This argument fails where the Board specifically noted that this project was not impacted by SB 52 and that the Board's decision was independent of any SB 52 parameters. Order at ¶ 69, footnote 9. Consistent with R.C. 4906.10(A)(10), the Board is required to make findings regarding each of the enumerated factors before the Board can issue a certificate. Among those factors, as discussed, is whether the project would serve

the public interest, convenience, and necessity. In our determination regarding the public interest, we must consider, separate from SB 52, the matter and degree of opposition of the local governments impacted by the project. Further, the Board did not deny a certificate to the proposed project solely on the basis that it was opposed by Allen County and Auglaize County. The Board reiterates that, as discussed above, both the local government opposition (that of Allen County, Auglaize County, Shawnee Township, and Logan Township) and the public opposition from public commenters and local residents who testified at the public hearing, factored into the Board's decision. Order ¶¶ 69-72. Our denial of the certificate was based on the required considerations of R.C. 4906.10(A) and the obligation to consider how the project would serve the public interest.

{¶ 33} In summary, the Board finds that Birch's and AACRE/IBEW's applications for rehearing should be denied, as discussed above. Having found all other arguments to be without merit, the Board finds that the applications for rehearing filed by Birch and AACRE/IBEW should be denied.

IV. ORDER

{¶ 34} It is, therefore,

{¶ 35} ORDERED, That the applications for rehearing filed by Birch and AACRE/IBEW be denied. It is, further,

{¶ 36} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:
Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Dan Bucci, Designee for Lydia Mihalik, Director
Ohio Department of Development

Damian Sikora, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

W. Gene Phillips, Designee for Bruce T. Vanderhoff, M.D., Director
Ohio Department of Health

Drew Bergman, Designee for Anne Vogel, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Brian Baldridge, Director
Ohio Department of Agriculture

Gregory Slone
Public Member

JMD/mef

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in

Case No(s). 20-1605-EL-BGN

Summary: Opinion & Order on Rehearing denying the applications for rehearing filed by Birch Solar, LLC and jointly filed by intervenors Allen Auglaize Coalition for Reasonable Energy and the International Brotherhood of Electrical Workers, Local Union 32 electronically filed by Debbie S. Ryan on behalf of Ohio Power Siting Board.

Staff Report of Investigation

Hardin Solar Center
Hardin Solar Energy LLC

Case No. 17-0773-EL-BGN

November 21, 2017

Ohio | Power Siting Board

John R. Kasich, Governor | Asim Z. Haque, Chairman

In the Matter of the Application of Hardin Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Hardin County, Ohio.	))))	**Case No. 17-0773-EL-BGN**

Staff Report of Investigation

Submitted to the
OHIO POWER SITING BOARD

BEFORE THE POWER SITING BOARD OF THE STATE OF OHIO

In the Matter of the Application of Hardin Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Hardin County, Ohio.	))))	**Case No. 17-0773-EL-BGN**

Chairman, Public Utilities Commission
Director, Department of Agriculture
Director, Development Services Agency
Director, Environmental Protection Agency
Director, Department of Health
Director, Department of Natural Resources
Public Member
Ohio House of Representatives
Ohio Senate

To the Honorable Power Siting Board:

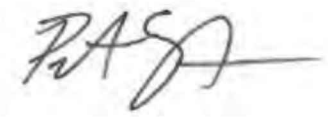
In accordance with the Ohio Revised Code (R.C.) 4906.07(C) and rules of the Ohio Power Siting Board (Board), the staff of the Public Utilities Commission of Ohio (Staff) has completed its investigation in the above matter and submits its findings and recommendations in this Staff Report for consideration by the Board.

The findings and recommendations contained in this report are the result of Staff coordination with the following agencies that are members of the Board: Ohio Environmental Protection Agency, the Ohio Department of Health, the Ohio Development Services Agency, the Ohio Department of Natural Resources, and the Ohio Department of Agriculture. In addition, Staff coordinated with the Ohio Department of Transportation, the Ohio Historic Preservation Office, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and the Federal Aviation Administration.

In accordance with R.C. 4906.07(C) and 4906.12, copies of this Staff Report have been filed with the Docketing Division of the Public Utilities Commission of Ohio and served upon the Applicant or its authorized representative, the parties of record, and pursuant to Ohio Administrative Code 4906-3-06, the main public libraries of the political subdivisions in the project area.

The Staff Report presents the results of Staff's investigation conducted in accordance with R.C. Chapter 4906 and the rules of the Board, and does not purport to reflect the views of the Board nor should any party to the instant proceeding consider the Board in any manner constrained by the findings and recommendations set forth herein.

Respectfully submitted,



Patrick Donlon
Director, Rates and Analysis
Public Utilities Commission of Ohio

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I. POWERS AND DUTIES

OHIO POWER SITING BOARD

The authority of the Ohio Power Siting Board (Board) is prescribed by Ohio Revised Code (R.C.) Chapter 4906. R.C. 4906.03 authorizes the Board to issue certificates of environmental compatibility and public need for the construction, operation, and maintenance of major utility facilities defined in R.C. 4906.01. Included within this definition of major utility facilities are: electric generating plants and associated facilities designed for, or capable of, operation at 50 megawatts (MW) or more; electric transmission lines and associated facilities of a design capacity of 100 kilovolts (kV) or more; and gas pipelines greater than 500 feet in length and more than nine inches in outside diameter, and associated facilities, designed for transporting gas at a maximum allowable operating pressure in excess of 125 pounds per square inch. In addition, pursuant to R.C. 4906.20, the Board authority applies to economically significant wind farms, defined in R.C. 4906.13(A) as wind turbines and associated facilities with a single interconnection to the electrical grid and designed for, or capable of, operation at an aggregate capacity of five MW or greater but less than 50 MW.

Membership of the Board is specified in R.C. 4906.02(A). The voting members include: the Chairman of the Public Utilities Commission of Ohio (PUCO) who serves as Chairman of the Board; the directors of the Ohio Environmental Protection Agency (Ohio EPA), the Ohio Department of Health, the Ohio Development Services Agency, the Ohio Department of Agriculture, and the Ohio Department of Natural Resources (ODNR); and a member of the public, specified as an engineer, appointed by the Governor from a list of three nominees provided by the Ohio Consumers' Counsel. Ex-officio Board members include two members (with alternates) from each house of the Ohio General Assembly.

NATURE OF INVESTIGATION

The Board has promulgated rules and regulations, found in Ohio Administrative Code (Ohio Adm.Code) 4906:1-01 et seq., which establish application procedures for major utility facilities and economically significant wind farms.

Application Procedures

Any person that wishes to construct a major utility facility or economically significant wind farm in this state must first submit to the Board an application for a certificate of environmental compatibility and public need.[1] The application must include a description of the facility and its location, a summary of environmental studies, a statement explaining the need for the facility and how it fits into the Applicant's energy forecasts (for transmission projects), and any other information the Applicant or Board may consider relevant.[2]

Within 60 days of receiving an application, the Chairman must determine whether the application is sufficiently complete to begin an investigation.[3] If an application is considered complete, the Board or an administrative law judge will cause a public hearing to be held 60 to 90 days after the

1. R.C. 4906.04 and 4906.20.
2. R.C. 4906.06(A) and 4906.20(B)(1).
3. Ohio Adm.Code 4906-3-06(A).

official filing date of the completed application.[4] At the public hearing, any person may provide written or oral testimony and may be examined by the parties.[5]

Staff Investigation and Report

The Chairman will also cause each application to be investigated and a report published by the Board's Staff not less than 15 days prior to the public hearing.[6] The report sets forth the nature of the investigation and contains the findings and conditions recommended by Staff.[7] The Board's Staff, which consists of career professionals drawn from the staff of the PUCO and other member agencies of the Board, coordinates its investigation among the agencies represented on the Board and with other interested agencies such as the Ohio Department of Transportation (ODOT), the Ohio Historic Preservation Office (OHPO), and the U.S. Fish and Wildlife Service (USFWS).

The technical investigations and evaluations are conducted pursuant to Ohio Adm.Code 4906-1-01 et seq. The recommended findings resulting from Staff's investigation are described in the Staff Report pursuant to R.C. 4906.07(C). The report does not represent the views or opinions of the Board and is only one piece of evidence that the Board may consider when making its decision. Once published, the report becomes a part of the record, is served upon all parties to the proceeding and is made available to any person upon request.[8] A record of the public hearings and all evidence, including the Staff Report, may be examined by the public at anytime.[9]

Board Decision

The Board may approve, modify and approve, or deny an application for a certificate of environmental compatibility and public need.[10] If the Board approves, or modifies and approves an application, it will issue a certificate subject to conditions. The certificate is also conditioned upon the facility being in compliance with applicable standards and rules adopted under the Ohio Revised Code.[11]

Upon rendering its decision, the Board must issue an opinion stating its reasons for approving, modifying and approving, or denying an application for a certificate of environmental compatibility and public need.[12] A copy of the Board's decision and its opinion is memorialized upon the record and must be served upon all parties to the proceeding.[13] Any party to the proceeding that believes its issues were not adequately addressed by the Board may submit within 30 days an application for rehearing.[14] An entry on rehearing will be issued by the Board within 30 days and may be appealed within 60 days to the Supreme Court of Ohio.[15]

4. R.C. 4906.07(A) and Ohio Adm.Code 4906-3-08.
5. R.C. 4906.08(C).
6. R.C. 4906.07.
7. Ohio Adm.Code 4906-3-06(C).
8. R.C. 4906.07(C) and 4906.10.
9. R.C. 4906.09 and 4906.12.
10. R.C. 4906.10(A)
11. R.C. 4906.10.
12. R.C. 4906.11.
13. R.C. 4906.10(C).
14. R.C. 4903.10 and 4906.12.
15. R.C. 4903.11, 4903.12, and 4906.12.

CRITERIA

Staff developed the recommendations and conditions in this *Staff Report of Investigation* pursuant to the criteria set forth in R.C. 4906.10(A), which reads, in part:

> The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless 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, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;
>
> (4) In the case of an electric transmission line or generating facility, that 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;
>
> (5) 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 sections 1501.33, 1501.34, and 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;
>
> (6) That the facility will serve the public interest, convenience, and necessity;
>
> (7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site; and
>
> (8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

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II. APPLICATION

APPLICANT

On July 5, 2017, Hardin Solar Energy LLC (the Applicant), a wholly-owned subsidiary of Invenergy Solar Development North America LLC, filed an application with the Board to construct a solar-powered electric generation facility of up to 150 MW, located in Hardin County, Ohio. Invenergy Solar Development North America LLC is owned by Invenergy Renewables LLC, which in turn is an affiliate of Invenergy LLC (Invenergy).

Invenergy develops, builds, owns, and operates power generation and energy storage projects in North America and Europe. Its portfolio includes wind, solar, and natural gas-fueled power generation and energy storage facilities. It is one of the six largest owners of wind generation in the United States and is North America's largest independent wind power generation company.[16]

According to Invenergy, the company has developed 10,071 MW of wind farms; 5,519 MW of natural gas-fueled facilities; 231 MW of solar projects; and, 94 MW of energy storage facilities. The company also has nearly 4,000 MW of renewable and clean energy projects under contract or in construction.

HISTORY OF THE APPLICATION

The following is a summary list of the major filings:

On April 6, 2017, the Applicant held a public informational meeting regarding the proposed solar electric generating project in Ada, Ohio.

On July 5, 2017, the Applicant filed the Hardin Solar Center project application.

On August 16, 2017, the Applicant filed a supplement to the Hardin Solar Center project application providing additional information. Specifically, the Applicant provided information on a decommissioning report, construction and operational sound levels, location of noise-sensitive areas within one mile of the facility, and the mitigation of sound emissions during construction and operation.

On September 1, 2017, the Applicant filed a second supplement to the Hardin Solar Center project application providing further information. Specifically, the Applicant provided information on the public information meeting, a habitat study, a wetland study within the potential right-of-way that may be used for the project's underground collection line, and a cultural resources study.

On September 5, 2017, the Director of the Rates and Analysis Department of the PUCO issued a letter of compliance regarding the application to the Applicant.

On October 17, 2017, the Ohio Farm Bureau Federation filed a Motion to Intervene.

A local public hearing has been scheduled for December 6, 2017 at 6:00 p.m. at the Kenton High School, 200 Harding Ave., Kenton, Ohio 43326. The adjudicatory hearing will commence on

16. "Company Overview of Invenergy LLC," *Bloomberg*, accessed November 7, 2017, https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4850990&goback=.cps_12367151001 55_1.

December 15, 2017, at 11:00 a.m., on the 11th floor in Hearing Room 11-D, at the offices of the PUCO, 180 East Broad Street, Columbus, Ohio, 43215.

A complete list of all filings can be found on the Board's website http://dis.puc.state.oh.us under Case No. 17-0773-EL-BGN.

PROJECT DESCRIPTION

The Applicant intends to construct the Hardin Solar Center project as a 150 MW solar-powered generating and battery storage facility in Marion, Roundhead, and McDonald townships, Hardin County, Ohio. The project would consist of numerous large arrays of ground-mounted photovoltaic (PV) modules, commonly referred to as solar panels, installed on approximately 1,115 acres of leased land. In addition to the PV modules, the project would include associated support facilities, such as access roads, pyranometers, inverter pads, a battery storage area, a substation, and buried electrical collection lines to connect the solar farm to a planned future utility substation.

The proposed project area layout is shown on the map in this report.

Solar Panels and Racking

The project involves plans to generate electricity by means of arrays of solar panels mounted on metal racking. The racking would be supported by piles that would be driven or screw rotated into the ground. The solar panel arrays would be fenced, with locked gates, for equipment security and public safety.

The project's arrays would use a tracking array of racking. The Applicant's preferred model is the NEXTracker SPT system. Tracking arrays would run in a north-south direction and be equipped with electric motors that very slowly rotate the panels throughout the day to keep them perpendicular to the direction of sunlight. Tracking arrays would face east at sunrise, rotate to the west during the day, face west at sunset, and then reset to the east.

The Applicant has not selected the specific PV module vendor. The Applicant currently prefers the JINKO solar panel brand, but indicated that it intends to use a manufacturer that has the capability and experience to provide the large quantity of modules necessary for this project.

Electric Collection System

The solar modules would be connected in direct current (DC) series to form strings of PV modules. Electricity from these strings of PV modules would be aggregated into combiner boxes where it would exit through a single DC cable. The DC cable would then connect to a pad mount inverter/transformer combination. The inverter would convert the DC power to alternating current (AC) power, and the transformer would step up the AC voltage from 480 volts to 34.5 kV. Underground electric collection cables, buried to a minimum depth of three feet, would connect the transformers to the project substation and then to the Hardin Wind substation.

Substation

The project substation would increase the electric collection system voltage from 34.5 kV to 345 kV, for interconnection with the Hardin Wind substation and hence the electric grid. The project substation would include several circuit breakers, open-air isolation switches, a 34.5 to 345 kV step-up transformer, a 345 kV circuit breaker, control house, protective relays, and metering. The

Hardin Solar Center project would have a dedicated transformer(s) that would be co-located within the Hardin Wind substation.

Battery Storage

The project would include a large-scale battery storage system with a capacity of up to 50 MW. The battery storage system would complement the solar farm by regulating frequency, balancing variations in solar production, energy shifting, and digital peaking, and deferral of transmission or distribution system upgrades. The battery system would consist of lithium-ion battery racks housed in a custom building or prefabricated shipping containers and would interconnect to the Hardin Wind substation.

Roads

The Applicant indicates that it would use existing township and farm access roads for construction, operation and maintenance of the solar farm. The access roads would consist of aggregate cover material, and would be approximately 16 feet wide with two feet shoulders.

Meteorological Towers

The project would include up to ten solar meteorological towers, with a vertical height of 10 feet tall secured with a concrete foundation. The meteorological towers would include a pyranometer, which measures the solar resource, and an anemometer, a wind vane, a barometer, and a temperature probe.

Construction Laydown Areas

The Applicant intends to utilize approximately seven to ten acres as the project laydown area. The potential sites for the laydown area would be located within the project area. The laydown area would contain contractor trailers, parking, and a graveled staging area for construction equipment and material. Once the project is completed, the laydown area would be removed and the land reclaimed.

Project Schedule

The Applicant expects to finalize minor design modifications in the fourth quarter of 2017. The Applicant also intends to start construction in first quarter 2018 and become operational during the second quarter of 2019. The Applicant estimates that the cost of delays could range over one million dollars per month in lost revenue and federal tax credits.

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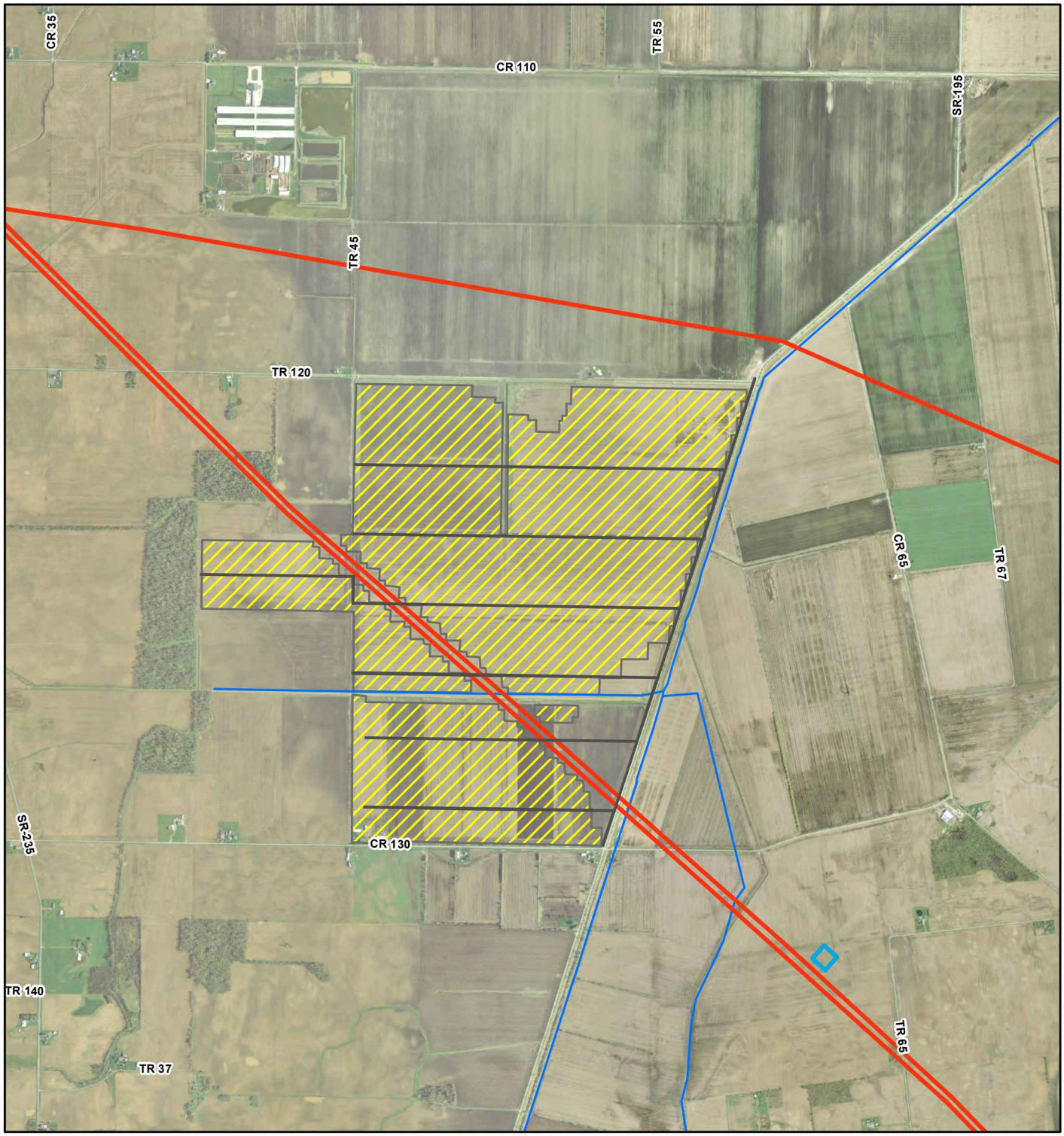

Hardin County

NORTH

0 1,500 3,000

Feet

1:30,000

NAD 83 SP Ohio North (Feet)

- Existing Transmission Lines
- Access Roads
- Rivers
- Project Substation
- Proposed Solar Array

Overview Map

17-0773-EL-BGN

Hardin Solar Farm

Maps are presented solely for the purpose of providing a visual representation of the project in the staff report, and are not intended to modify the project as presented by the Applicant in its certified application and supplemental materials.

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III. CONSIDERATIONS AND RECOMMENDED FINDINGS

In the Matter of the Application of Hardin Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Hardin County, Ohio, Staff submits the following considerations and recommended findings pursuant to R.C. 4906.07(C) and 4906.10(A).

Considerations for R.C. 4906.10(A)(1)

BASIS OF NEED

Pursuant to R.C. 4906.10(A)(1), the Board must determine the basis of the need for the facility only if the facility is an electric transmission line or gas pipeline. Staff has found this requirement inapplicable to this application.

Recommended Findings

Staff recommends that the Board find that the basis of need as specified under R.C. 4906.10(A)(1) is not applicable to this proposed electric generating facility, because the facility is neither an electric transmission line nor a gas pipeline.

Considerations for R.C. 4906.10(A)(2)

NATURE OF PROBABLE ENVIRONMENTAL IMPACT

Pursuant to R.C. 4906.10(A)(2), the Board must determine the nature of the probable environmental impact of the proposed facility. Staff has found the following with regard to the nature of the probable environmental impact:

Socioeconomic Impacts

Regional Planning

The Applicant has reviewed the most recent Hardin County Comprehensive Land Use and Housing Plan, 1979-1999. Based on that review, the Applicant concluded that the proposed solar facility would be expected to aid long-term regional development by increasing tax revenues, enhancing employment opportunities and increasing economic contributions to the local economy. The project is also consistent with agricultural industry support, in that the facility would provide supplemental income to farmers and the land could be returned to agricultural production upon decommissioning. The project is not expected to significantly affect housing, transportation system development, or other public services and facilities.

Land Use

The dominant land uses in proximity to the project area are agricultural and rural residential uses. The Applicant has verified that Agricultural District land is not present within the project's boundaries. No residences are located within the confines of the fenced project boundaries. The nearest non-participating residence is located approximately 130 feet from the proposed facility boundary. Seven non-participating houses are within 1,000 feet of the proposed facility boundary. The Applicant does not plan to remove any residential structures. Additionally, there are no parks, commercial structures, places of worship, medical facilities or any other institutional land uses located in proximity to the project area.

Cultural Resources

The Applicant has enlisted a consultant to gather background information and complete a cultural resources records review for a five-mile radius defined as the Area of Potential Effect for the project. This review was based on data provided by the OHPO online geographic information system mapping, Ohio Historic Inventory (OHI), the Ohio Archaeological Inventory, and National Register of Historic Places files. The Applicant obtained information on historic cemeteries from the Ohio Genealogical Society. The consultant confirmed that there are no known recorded archaeological resources within the project boundaries. Twenty known archaeological resources are located within a one-mile radius of the project, with the closest site being 1,700 feet away.

To ensure minimal impacts from the construction and operation of this project on cultural resources, a limited archaeological and architectural Phase I survey is being conducted for those portions of the project where previous surveys were not performed, and where architectural resources may be visible from the project area. The Phase I study would examine the extent of known resources and establish criteria for further study of cultural resources in the project area should any unexpected discovery during construction be found. As of the writing of this report, the Applicant was in the process of designing a systematic Phase I survey program for the project in conjunction with input from the OHPO. Staff concurs that a Phase I study should be performed for both archaeological sites and adjacent architectural resources.

Aesthetics

The project area is predominantly agricultural land, with few nearby residences. The overall expected aesthetic impact would be minimal. The Applicant intends to install an anti-glare coating on the solar panels to maximize the amount of solar energy captured by the panels, which also has the aesthetic benefit of glare reduction.

The solar panels would be no higher than 15 feet above ground level. Based on the results of the Applicant's Viewshed Analysis and Aesthetic Resources Inventory Report, the solar panels would not likely be visible at locations beyond two miles of the perimeter of the project.

Whether viewing the solar panels would have a positive or negative impact on the receptor is subjective, and likely to vary by receptor. Steps taken to minimize the visibility of the project would include vegetative screening and using the minimal lighting necessary to satisfy safety requirements.

Staff recommends the Applicant incorporate a landscape and aesthetics plan to reduce impacts in areas where an adjacent non-participating parcel contains a residence with a direct line of sight to the project area. Staff recommends that aesthetic impact mitigation could include native vegetative plantings, alternate fencing, good neighbor agreements, or other methods subject to Staff review.

Glare

Glare is the phenomenon where sunlight reflects from a surface to create a duration of bright light. Glare also encompasses glint, which is a momentary flash of bright light. Potential impacts of this reflection from solar panel could be a brief reduction in visibility, afterimage, a safety risk to pilots, or a perceived nuisance to neighbors.

The Applicant contracted with Forge Solar to conduct a glare analysis. Four observation points were selected to examine the potential for glare relative to the nearby roadways and the Hardin County Airport. The study found that there were no glare impacts from the proposed solar farm in air flight paths. The study also found that there were no impacts from glare at three of the observations points, and a low potential for afterimage at the northeastern observation point. The Applicant intends to use an anti-glare coating and a tracking array system, both of which would reduce the potential for glare. Staff notes that aesthetic impact mitigation measures that include native vegetative plantings would also further reduce potential impacts as part of a landscape and lighting plan.

In accordance with R.C. 4906.10(A)(5), Staff contacted the ODOT Office of Aviation during the review of this application in order to coordinate review of potential impacts of the facility on local airports. The ODOT Office of Aviation staff has stated that it is likely this proposed solar farm development will not be an Airspace Permit issue, and that the glare analysis conducted by the Applicant was satisfactory.

Economics

The Hardin Solar Center project represents a potential investment in excess of $200 million.[17]

Invenergy enlisted the expertise of an independent economic consulting firm to analyze both the direct and indirect economic impact of building and operating the planned facility. The economic

17. Application at Exhibit K: Economic Impact Report.

analysis identified the following direct, indirect, and induced economic impacts that that would be associated with the construction and operational phases of the planned facility.

Jobs

- 336 new construction related job impacts for Hardin County
- 10 long-term operational jobs for Hardin County
- 768 new construction related jobs for the State of Ohio
- 13 long-term operational jobs for the State of Ohio[18]

Earnings

- $9.15 million in local earnings during construction for Hardin County
- $45.6 million in new local earnings during construction for the State of Ohio
- $354,000 in earnings resulting from annual operations for Hardin County
- $758,000 in earnings resulting from annual operations for the State of Ohio[19]

Output[20]

- $27 million in local output during construction for Hardin County
- $80.8 million in local output during construction for the State of Ohio
- $866,000 in local annual output derived from operations for Hardin County
- $1.673 million in local annual output derived from operations for the State of Ohio.[21]

Taxes

The Hardin County taxing district and Upper Scioto Valley School District would receive up to $975,000 annually. The amounts stated in Exhibit K assume a Payment in Lieu of Taxes (PILOT) plan in which Invenergy would pay $6,500 per MW, or up to $975,000, on an annual basis.[22]

All Staff recommendations for the requirements discussed in this section of the *Staff Report of Investigation* are included under the **Socioeconomic Conditions** heading of the Recommended Conditions of Certificate section.

Ecological Impacts

Geology and Seismology

The geology of Hardin County at the land surface consists of glacial till that can be variable in composition. The bedrock that underlies Hardin County is typically Silurian age dolomite and limestone, as well as gypsum, anhydrite and shale. Dolomite and limestone are the principle rock types that contain Karst-like characteristics. Karst features can be characterized as dissolution cavities, caves, and sinkholes that can cause subsidence of the ground surface. The glacial till on the surface enhances the possibility of these features occurring in Hardin County. However, the

18. Ibid.
19. Ibid.
20. Ibid. Output represents the value of production in the local or state economy.
21. Ibid.
22. Ibid.

ODNR Division of Geological Survey has not mapped any Karst features presently in Hardin County.

According to the Department of Natural Resources, Division of Geological Survey interactive map of Ohio Earthquake Epicenters, Hardin County has no history of seismic activity. There is a seismic zone located near Anna, Ohio approximately 30 miles southwest of the project area. There have been approximately 40 earthquakes recorded in this seismic zone since 1875. Most of these events in this seismic zone are 3.2 or less in magnitude on the Richter Scale and occur every two or three decades, with much smaller earthquakes in magnitude occurring two to three times each decade. There have been 15 of these recorded earthquakes resulting in property damage and some minor injuries.

The Applicant has reviewed the state of Ohio database of oil and gas drilling and exploration. Although there are a few abandoned and plugged wells near the project area, there are no current oil and gas drilling operations occurring near the project. According to state of Ohio records, there are no known underground or surface mining sites near the project.

The Applicant intends to conduct further drilling and subsurface work in the fall of 2017 and stated that it would provide Staff with a report of the findings. Karst features, oil and gas operations, industrial mineral mining operations, and seismic activity are not present or have a history of occurring at the project area. Staff finds that the geology of Hardin County does not present conditions that would limit or negatively impact the construction and future operation of this solar energy facility.

Soil Suitability and Test Borings

The soils in the project area, as characterized in the Soil Survey of Hardin County, Ohio generally consist of muck, variant muck, and to a much lesser amount silty clay loam. McGuffey muck is the largest mapped unit in the project area and consists of a deep, level, very poorly drained soil generally found on broad flats, on lake plains, and in marches. In some areas, it is found in depressions on till plains and outwash plains. Runoff descends from higher elevation soils causing ponding with this soil unit. The slope is less than one percent. Most areas range in size from 10 to more than 500 acres and are irregularly shaped. In the project area, the McGuffey muck takes up 52 percent of the project area.

Roundhead muck occupies 33 percent of the project area. Roundhead muck consists of deep, level, very poorly drained soil on broad flats and in marshes. Slope is less than one percent. As with the McGuffey muck, most areas range from 75 to more than 500 acres and are irregularly shaped.

The last soil unit mapped of significant extent in the project area is the Pewamo Variant muck. This soil unit is a deep, level, very poorly drained soil on broad flats along the margin of large plains. Slope ranges from level to one percent. Most areas range in size from 25 acres to 250 acres and are long and irregularly shaped. The Pewamo Variant muck is present in 14 percent of the project area.

These soil units are commonly identified in similar landscape positions. There are limitations to the use of these soils. Ponding, seasonal high water table, soil blowing, very slow permeability, frost action, and high shrink-swell potential are conditions the Applicant would need to consider and address in the design and construction of this solar energy facility.

The Applicant intends to perform test borings around the project area and project substation to determine site-specific criteria related to subsurface soil properties, including static water level, rock quality description, percent recovery of rock, and depth and description of bedrock contact. Based on the acquired data, the Applicant would implement best management practices (BMP) as necessary to address these identified soil limitations and design the solar facility in such a manner that soil related limitations would not adversely effect the construction and future operation of this solar facility.

Surface Waters

The Applicant delineated three streams within the project area, including two perennial streams and one intermittent stream. The application indicates that no direct stream impacts would be anticipated as a result of construction or operation of the project. However, the Applicant has clarified to Staff that an access road along the eastern edge of the project area would require in-water work associated with culverts. This impact work would require permitting through the U.S. Army Corps of Engineers (USACE) Nationwide Permit 14.

The Applicant delineated one category one wetland in the project area. No infrastructure is proposed within the wetland area and no direct wetland impacts are anticipated as a result of construction or operation of the project.

Additional measures to reduce indirect water quality impacts would be taken through the development of a Storm Water Pollution Prevention Plan (SWPPP), as part of the Ohio EPA issued National Pollutant Discharge Elimination System (NPDES) permit for storm water discharge associated with construction activities, to help control potential sedimentation, siltation, and runoff. No ponds or lakes would be impacted by the facility during construction or operation. No proposed facility components are within a 100-year floodplain.

Threatened and Endangered Species

The Applicant requested information from the ODNR and the USFWS regarding state and federal listed threatened and endangered plant and animal species. Staff gathered additional information through field assessments and review of published ecological information. The following table provides the results of the information requests, field assessments, and document review.

MAMMALS				
Common Name	**Scientific Name**	**Federal Status**	**State Status**	**Presence in Project Area**
Indiana bat	*Myotis sodalis*	Endangered	Endangered	Historical range includes the project area.
northern long-eared bat	*Myotis septentrionalis*	Threatened	N/A	Historical range includes the project area.
BIRDS				
Common Name	**Scientific Name**	**Federal Status**	**State Status**	**Presence in Project Area**
upland sandpiper	*Bartramia longicauda*	N/A	Endangered	Nesting upland sandpipers utilize dry grasslands including native grasslands, seeded grasslands, grazed and ungrazed pasture, hayfields, and grasslands established through the Conservation Reserve Program. Low potential for suitable nesting habitat.
Northern Harrier	*Circus cyaneus*	N/A	Endangered	Nesting habitat includes large marshes and grasslands. Observed flying through the Study Area during a site reconnaissance on April 12, 2017. Low potential for suitable nesting habitat.
MUSSELS				
Common Name	**Scientific Name**	**Federal Status**	**State Status**	**Presence in Project Area**
rayed bean	*Villosa fabalis*	Endangered	Endangered	Historical range includes the project area. Streams in project area do not provide suitable habitat.
clubshell	*Pleurobema clava*	Endangered	Endangered	Historical range includes the project area. Streams in project area do not provide suitable habitat.
purple lilliput	*Toxolasma lividus*	N/A	Endangered	Historical range includes the project area. Streams in project area do not provide suitable habitat.
pondhorn	*Uniomerus tetralasmus*	N/A	Threatened	Historical range includes the project area. Streams in project area do not provide suitable habitat.
REPTILES				
Common Name	**Scientific Name**	**Federal Status**	**State Status**	**Presence in Project Area**
eastern massasauga	*Sistrurus catenatus*	Threatened	Endangered	Due to the location, the type of habitat present at the project site and within the vicinity of the project area, this project is not likely to impact this species.

The Applicant did not identify any listed plant or animal species during field surveys. Further, the ODNR and the USFWS did not identify any concerns regarding impacts to listed plant species. In the unexpected event that the Applicant encounters listed plant or animal species during construction, Staff recommends that the Applicant contact Staff, the ODNR, and the USFWS, as applicable. Staff also recommends that if the Applicant encounters any listed plant or animal species prior to construction, the Applicant include the location and how impacts would be avoided in the final access plan to be provided to Staff.

The project area is within the range of state and federal endangered Indiana bat (*Myotis sodalis*) and the federal threatened northern long-eared bat (*Myotis septentrionalis*). A small amount of tree clearing would be required as a result of the project. As tree roosting species in the summer months, the habitat of these species may be impacted by the project. In order to avoid impacts to the Indiana bat and northern long-eared bat, Staff recommends the Applicant adhere to seasonal tree cutting dates of October 1 through March 31 for all trees three inches or greater in diameter, unless coordination efforts with the ODNR and the USFWS reflects a different course of action. Further, the USFWS stated that if any caves or abandoned mines may be disturbed, further coordination with its office is requested to determine if fall or spring portal surveys are warranted.

The project is within the range of the state endangered upland sandpiper. Nesting upland sandpipers utilize dry grasslands including native grasslands, seeded grasslands, grazed and ungrazed pasture, hayfields, and grasslands established through the U.S. Department of Agriculture's Conservation Reserve Program. In order to avoid impacts to this species the Staff recommends that construction in areas of potential habitat be avoided during the species' nesting period of April 15 through July 31, unless coordination with the ODNR allows a different course of action.

The project is within the range of the state endangered northern harrier. Nesting northern harriers utilize large marshes and grasslands. In order to avoid impacts to this species, the Staff recommends that construction in areas of potential habitat be avoided during the species' nesting period of May 15 through August 1, unless coordination with the ODNR allows a different course of action.

Vegetation

The overall project study area included 1,153 acres, of which 96 percent is cultivated crops. The entire construction impact area is actively farmed. During field investigations, the Applicant identified several mature trees within the project area that may require removal. The Applicant does not anticipate the use of herbicides.

Staff recommends that the final design of the project include the planting and maintenance of pollinator-friendly, native plantings in selected locations within the project area. These features not only would enhance the visual appeal of the project, but also would enrich local wildlife habitat and benefit the local farming community.

Staff further recommends that the Applicant be required to provide a vegetation management plan for review prior to the preconstruction conference. The plan would identify all areas of proposed vegetation clearing for the project, specifying the extent of the any clearing, and describing how such clearing work would be done as to minimize removal of woody vegetation. The plan would describe how trees and shrubs along access routes, at construction staging areas, during

maintenance operations, and in proximity to any other project facilities would be protected from damage. The plan would also describe the implementation of pollinator-friendly plantings.

All Staff recommendations for the requirements discussed in this section of the *Staff Report of Investigation* are included under the **Ecological Conditions** heading of the Recommended Conditions of Certificate section.

Public Services, Facilities, and Safety

High Winds

The Applicant found that there is a low probability of extreme high wind speeds in the project area. This low probability does not warrant that the Applicant mitigate for any adverse impact from extreme high wind velocities.

Flood Plains

The Applicant hired a consultant Aon Risk Services Central, Inc. to determine the prospects of floods in the area. The Applicant, through Aon, determined that the site has low flood risk rating with no 500-year flood zones in the project area.

Public Services and Traffic

The principal impact on public services would include temporary increases in traffic during construction on routes leading to the project area. Some traffic management during the construction phase may be necessary in the immediate vicinity of the project area to ensure safe and efficient maintenance of existing traffic patterns and usages. The Applicant has committed to coordinating with local officials to ensure that the impacts to traffic will be minimal.

Once the proposed facility becomes operational, facility related traffic would be minimal and would not be expected to impact local roadways significantly. Potential emergency service requirements would be coordinated with local officials.

Roads and Bridges

There is one delivery route proposed for the transportation of equipment to the project site. The delivery route progresses from the north using Interstate 75, east on State Route 309 to State Route 235/Hardin County Road 35 south, and then east on Township Road 120 to the northwest corner of the project area. At this location on the northwest section of the project area, access roads to be used for the northern part of the project area are Township 120 and Township Road 130. Access to the western and southern sections of the project area would be from State Route 235.

According to the Hardin County Engineer, approximately half of the project area or more lies within the Scioto Marsh, a former wetland area that was drained in the 1800s to allow for farming. The engineer noted that it is difficult to keep a stabilized pavement due to poor subgrade support from the high levels of organic muck soil in the area. State Route 195, which runs along the eastern perimeter of the project area, currently is closed to traffic for this reason. The Applicant has conducted a road survey, which included two sample cores every one-half mile. The road survey report describes all access roads as being in good condition except for sections of Township Road 120. The Applicant should avoid transporting heavy loads onto this roadway to minimize damage to the Township Road 120.

Staff recommends a requirement for the Applicant to develop a final transportation management plan that would include a road use agreement. Any damaged public roads and bridges would be repaired promptly to their previous condition by the Applicant under the guidance of the appropriate regulatory agency. Any temporary improvements would be removed unless the appropriate regulatory agency requests that they remain in place.

Noise

Noise impacts from construction activities would include site clearing, installation of mechanical and electrical equipment, and commissioning and testing of equipment. Many of the construction activities would generate significant noise levels during the 12-18 months of construction. However, the adverse impact of construction noise would be temporary and intermittent, would occur away from most residential structures, and would be limited to daytime working hours. The Applicant would use equipment mitigation practices such as maintaining engines and mufflers in good operating order, limiting construction activities to daylight hours, and establishing a complaint resolution process.

Operational noise impacts for a solar generation facility would be minor and occur most often during the daylight hours. A possible battery storage facility located at the substation may operate at night, but the impact to residences would be negligible. Operational noise sources include solar panel tracking motors, which allow the solar panels to track the sun to maximize generation, inverters located within a group of solar panels, and the step up transformers at the new substation. The sound from the tracking motors and inverters is not expected to be heard outside a distance of 50 to 150 feet.

The Applicant used the background ambient noise level study that was done for the Hardin Wind Energy project in Board Case No. 09-0479-EL-BGN, which is located to the east of the project area, in order to understand the existing noise levels near the proposed facility. The closest Hardin Wind Energy measurement point is approximately one mile from the project area. A solar generation facility only operates in the daytime. The daytime ambient noise level at the Hardin Wind Energy measurement point closest to the project area is 41.5 A-weighted decibels (dBA). The most significant operational noise impact to a noise sensitive receptor is predicted to be 43 dBA and is from an inverter approximately 1,000 feet from the receptor. Therefore, the project would be expected to have minimal adverse noise impacts on the adjacent community.

All Staff recommendations for the requirements discussed in this section of the *Staff Report of Investigation* are included under the **Public Services, Facilities, and Safety Conditions** heading of the **Recommended Conditions of Certificate** section.

Recommended Findings

Staff recommends that the Board find that the Applicant has determined the nature of the probable environmental impact for the proposed facility, and therefore complies with the requirements specified in R.C. 4906.10(A)(2), provided that any certificate issued by the Board for the proposed facility include the conditions specified in the section of this *Staff Report of Investigation* entitled Recommended Conditions of Certificate.

Considerations for R.C. 4906.10(A)(3)

MINIMUM ADVERSE ENVIRONMENTAL IMPACT

Pursuant to R.C. 4906.10(A)(3), the proposed facility must represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, along with other pertinent considerations.

Site Selection

The Applicant became familiar with the Hardin County vicinity through previous development of a nearby wind facility. The Applicant evaluated key factors such as statewide transmission line locations and availability, landowner interest, community interest, competitive analysis, and evaluation of site suitability. The proposed site received a positive reception from area landowners and community leaders, as evidenced at the public information meeting, where 30 attendees posed questions of general interest about the project and no negative comments were voiced.

Minimizing Impacts

The Applicant has sited and designed the Hardin Solar Center project to minimize potential impacts. Leased agricultural land accounts for all of the land that would be directly impacted by construction of the proposed facility.

No known archaeological sites are within the project's boundaries and relatively few recorded cultural resources are nearby. The Applicant is currently in the process of designing a systematic Phase I survey program for the project in conjunction with input from the OHPO to assure that potential impacts to cultural resources are minimized.

The proposed facility would have an overall positive impact on the local state economy due to the increase in construction spending, wages, purchasing of goods and services, annual lease payments to the local landowners, increased tax revenues and estimated PILOT revenue. Estimated PILOT revenue is expected to be approximately $975,000 annually.

The project area has a low risk of flooding. The Applicant's consultant has determined that there are no 500-year floodplains within the facility footprint. The geology of this area of Hardin County is suitable for the proposed facility.

No direct wetland impacts are anticipated and no significant in-water work is proposed. Impacts to any state or federal listed species can be avoided by following seasonal restrictions for construction in certain habitat types as detailed by the USFWS and the ODNR.

Noise impacts are expected to be limited to construction activities. The adverse impact of construction noise would be temporary and intermittent, would occur away from most residential structures, and would be limited to daytime hours.

During the construction period, local, state, and county roads would experience a temporary increase in truck traffic due to deliveries of equipment and materials. Due to the location of the project, the Applicant anticipates that components for the entire project would be delivered by truck. The transportation management plan would be finalized once the engineering layout is determined. A final delivery route plan would be developed through discussions with local officials. The Applicant intends to enter into a road use agreement with the county engineer.

Due to the low profile of the project combined with existing vegetation in the area, the visual impacts would be most prominent to landowners in the immediate vicinity of the infrastructure itself. In order to reduce impacts in areas where an adjacent non-participating parcel contains a residence with a direct line of sight to the project area, Staff further recommends that the Applicant develop an aesthetic and lighting plan that addresses the potential impacts of the facility.

Staff recommends that the Applicant limit the hours of construction and have a complaint resolution plan in place to address potential construction and operational related concerns from any nearby residents.

Conclusion

Staff concludes that the proposed project would result in both temporary and permanent impacts to the project area and surrounding areas. Due to the low potential to impact land use, cultural resources, surface water resources, wildlife, and Staff's recommended conditions to further mitigate these impacts, Staff concludes that the project represents the minimum adverse environmental impact.

Recommended Findings

Staff recommends that the Board find that the proposed facility represents the minimum adverse environmental impact, and therefore complies with the requirements specified in R.C. 4906.10(A)(3), provided that any certificate issued by the Board for the proposed facility include the conditions specified in the section of this *Staff Report of Investigation* entitled Recommended Conditions of Certificate.

CONSIDERATIONS FOR R.C. 4906.10(A)(4)

ELECTRIC GRID

Pursuant to R.C. 4906.10(A)(4), the Board must determine that the proposed electric facilities are 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 facilities will serve the interests of electric system economy and reliability.

The purpose of this section is to evaluate the impact of integrating the proposed facility into the existing regional transmission grid. The Applicant proposes to construct a solar photovoltaic generating facility located in Hardin County, capable of producing 150 MW. The proposed facility would interconnect to the American Electric Power (AEP) proposed Hardin Switch 345 kV switching station which would connect to the AEP East Lima-Marysville 345 kV transmission line.

NERC Planning Criteria

The North American Electric Reliability Corporation (NERC) is responsible for the development and enforcement of the federal government's approved reliability standards, which are applicable to all owners, operators, and users of the bulk power system (BPS). As an owner, operator, and/or user of the BPS, the Applicant is subject to compliance with various NERC reliability standards. NERC reliability standards are included as part of the system evaluations conducted by PJM Interconnection, LLC (PJM).[23]

PJM Interconnection

On June 31, 2009, the Applicant submitted its initial generation interconnection request for the proposed facility to PJM. PJM gave the application a queue position of V3-028. The executed Interconnection Service Agreement and Construction Service Agreement were filed at the Federal Energy Regulatory Commission on August 12, 2013.[24]

The Applicant subsequently submitted an additional generation interconnection request to PJM on April 29, 2016. This request would increase the energy output of interconnection queue V3-028 by 130 MW. PJM gave the application a queue position of AB2-170. The System Impact Study (SIS) was released by PJM in November 2017. The total energy output of the combined interconnection queues V3-028 and AB2-170 would be 150 MW.[25, 26]

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23. PJM Interconnection, LLC is the regional transmission organization charged with planning for upgrades and administrating the generation queue for the regional transmission system in Ohio. Generators wanting to interconnect to the bulk electric transmission system located in the PJM control area are required to submit an interconnection application for review of system impacts. The interconnection process provides for the construction of expansions and upgrades of the PJM transmission system, as needed to maintain compliance with reliability criteria with the addition of generation in its footprint.

24. Federal Energy Regulatory Commission, Docket Number ER13-1981, accessed November 11, 2017, https://www.ferc.gov/docs-filing/elibrary.asp.

25. PJM Interconnection, LLC, "System Impact Study, Queue Number V3-028," accessed November 11, 2017, http://pjm.com/planning/generation-interconnection/generation-queue-active.aspx.

26. PJM Interconnection, LLC, "System Impact Study, Queue Number AB2-170," accessed November 11, 2017, http://pjm.com/planning/generation-interconnection/generation-queue-active.aspx.

PJM GENERATION INTERCONNECTION QUEUE - HARDIN SOLAR ENERGY			
Queue	**Energy (MW)**	**Capacity (MW)**	**Status**
V3-028	20	7.6	Executed Interconnection Service Agreement
AB2-170	130	49.4	System Impact Study Released

PJM studied the interconnection as an injection through the proposed AEP Hardin Switch 345 kV switching station into the AEP East Lima-Marysville 345 kV transmission line. The proposed Hardin Switch 345 kV switching station is an associated facility to the Hardin Wind Farm, which was approved by the Board in Case No. 09-0479-EL-BGN.[27] Construction of the Hardin Wind Farm began in October 2016.[28]

The Applicant requested an injection of 150 MW, of which 57 MW could be available in the PJM capacity market. The capacity market ensures the adequate availability of necessary generation resources can be called upon to meet current and future demand.

PJM Network Impacts

PJM analyzed the bulk electric system with the proposed facility interconnected to the BPS. A 2020 summer peak power flow model was used to evaluate the regional reliability impacts. The studies revealed no reliability problem. The below chart displays the results of the PJM SIS for the PJM regional footprint.[29]

PJM REGIONAL SYSTEM IMPACTS	
Generator Deliverability - System Normal and Single Contingency Outage	
Plant Output - Capacity Level: 57 MW	No problems identified

Category C and D - Multiple Contingency Outages	
Plant Output - Full Energy Level: 150 MW	No problems identified

Contribution to Previously Identified Overloads - Network Impacts

PJM studied overloading where the proposed facility may affect earlier projects in the PJM Queue. The below chart displays the results of PJM's study.

CONTRIBUTION TO PREVIOUSLY IDENTIFIED OVERLOADS	
Plant Output - Full Energy Level: 150 MW	No problems identified

27. *In the matter of the Application by Hardin Wind Energy, LLC for a Certificate of Environmental Compatibility and Public Need for the Hardin Wind Farm*, Case No. 09-0479-EL-BGN, (Opinion, Order, and Certificate)(March 22, 2010)

28. *In the matter of the Application by Hardin Wind Energy, LLC for a Certificate of Environmental Compatibility and Public Need for the Hardin Wind Farm*, Case No. 09-0479-EL-BGN, (Correspondence)(October 20, 2016)

29. PJM Interconnection, LLC, "System Impact Study, Queue Number AB2-170," accessed November 11, 2017, http://pjm.com/planning/generation-interconnection/generation-queue-active.aspx.

Potential Congestion due to Local Energy Deliverability- Energy Delivery Impacts

PJM studied the delivery of the energy portion. Network upgrades under this section would allow for the delivery of energy with operational restrictions. The upgrades are at the discretion of the Applicant.

POTENTIAL CONGESTION DUE TO LOCAL ENERGY DELIVERABILITY	
Plant Output: Capacity Level – 57 MW *Full Energy Level – 93 MW*	No problems identified

Short Circuit Analysis

The short circuit analysis study, which is part of the SIS, evaluates the interrupting capabilities of circuit breakers that would be impacted by the proposed generation addition. The results identified no circuit breaker problems.

Conclusion

PJM analyzed the bulk electric system, with the facility interconnected to the transmission grid, for compliance with NERC reliability standards and PJM reliability criteria. The PJM system studies indicated that no reliability violations would occur during single and multiple contingencies. In addition, no potential violations were found during the short circuit analysis. The facility would interconnect to AEP's proposed Hardin Switch 345 kV switching station that connects to the AEP East Lima-Marysville 345 kV transmission line.

The facility would provide additional electrical generation to the regional transmission grid, would be consistent with plans for expansion of the regional power system, and would serve the interests of electric system economy and reliability.

Recommended Findings

Staff recommends that the Board find that the proposed 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 would serve the interests of electric system economy and reliability. Therefore, Staff recommends that the Board find that the facility complies with the requirements specified in R.C. 4906.10(A)(4), provided that any certificate issued by the Board for the proposed facilities include the conditions specified in the section of this *Staff Report of Investigation* entitled Recommended Conditions of Certificate.

Considerations for R.C. 4906.10(A)(5)

AIR, WATER, SOLID WASTE, AND AVIATION

Pursuant to R.C. 4906.10(A)(5), the facility must comply with Ohio law regarding air and water pollution control, withdrawal of waters of the state, solid and hazardous wastes, and air navigation.

Air

Air quality permits are not required for construction of the proposed facility. However, fugitive dust rules adopted under R.C. Chapter 3704 may be applicable to the construction of the proposed facility. The Applicant would control fugitive dust through dust suppression techniques such as irrigation, application of dust suppressant, or temporary paving. These methods of dust control are typically used to comply with fugitive dust rules.

This project would not include any stationary sources of air emissions and, therefore, would not require air pollution control equipment.

Water

Neither construction nor operation of the proposed facility would require the use of significant amounts of water. Therefore, the requirements under R.C. 1501.33 and 1501.34 are not applicable to this project.

Although the project area is large, storm water pollution from the project's construction activities would be limited in scope and regulated as described below. The Applicant would obtain coverage under the Ohio EPA General NPDES permit. Sedimentation in the local watercourse may occur because of construction activities, but would be minimized through BMP such as silt fences or diversion berms. BMP would be outlined in the Applicant's SWPPP, which is required as part of the NPDES permit.

If the following permits or authorizations would be needed after the finalization of project engineering design, then the Applicant anticipates obtaining the following environmental permits. The Applicant would mitigate potential water quality impacts associated with aquatic discharges by:

- Obtaining NPDES Construction Storm Water General Permits from the Ohio EPA;
- Pursuing the USACE Section 404 individual permit or nationwide permit for limited stream crossings;
- Obtaining an Ohio EPA Section 401 water quality certification of those same USACE permits;
- Obtaining an Ohio EPA Isolated Wetland Permit;
- Preparing a SWPPP that identifies potential sources of pollution and describes and ensures the implementation of BMP; and
- Preparing and implementing a Spill Prevention, Control, and Countermeasure Plan to prevent the release of hazardous substances.

During operation of the facility, the project would not need a NPDES permit, because solar panels generate electricity without water discharge.

With these measures, construction and operation of this facility would comply with requirements of R.C. Chapter 6111, and the rules and laws adopted under that chapter.

Solid Waste

Debris generated from construction activities would include items such as plastic, wood, cardboard and metal packaging materials, construction scrap, and general refuse. Materials with reuse or salvage value will be removed for such use. The Applicant intends that all construction-related debris would be disposed of at a licensed solid waste disposal facility.

Operation of the project would generate small amounts of non-hazardous, solid waste, which would be disposed of in accordance with federal, state, and local requirements.

The Applicant's solid waste disposal plans would comply with solid waste disposal requirements set forth in R.C. Chapter 3734.

Aviation

According to the Applicant, and confirmed by Staff, there are no public use airports, helicopter pads, or landing strips within five miles of the project. There are also no private use airports, helicopter pads, or landing strips within or adjacent to the project. Neither construction nor operation of the proposed facility is expected to have any significant impact on aviation facilities.

In accordance with R.C. 4906.10(A)(5), Staff contacted the ODOT Office of Aviation during the review of this application in order to coordinate review of potential impacts of the facility on local airports. The ODOT Office of Aviation stated that it is likely this proposed solar farm development would not be an Airspace Permit issue.

Recommended Findings

Staff recommends that the Board find that the proposed facility complies with the requirements specified in R.C. 4906.10(A)(5), provided that any certificate issued by the Board for the proposed facility include the conditions specified in the section of this *Staff Report of Investigation* entitled Recommended Conditions of Certificate.

Considerations for R.C. 4906.10(A)(6)

PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

Pursuant to R.C. 4906.10(A)(6), the Board must determine that the facility will serve the public interest, convenience, and necessity.

Public and Private Water Supplies

The Applicant has indicated that no public or private water supplies would be impacted by the construction and operation of this solar energy facility. Staff review confirms this analysis.

Safety

The Applicant stated that it would comply with safety standards set by the Occupational Safety and Health Administration and National Fire Protection Association. In addition, the Applicant has indicated that it would use equipment compliant with applicable Underwriters Laboratories, Institute of Electrical and Electronics Engineers, National Electrical Code, National Electrical Safety Code, and American National Standards Institute standards.

Construction activities would occur on private land far from roads and residences. The Applicant would work with local fire departments and other emergency responders to provide training for response to emergencies related to a solar farm.

Additionally, the Applicant stated that it intends to restrict public access to the facility during construction by enclosing the project area with a seven feet tall chain-link fence.

The Applicant also intends to develop and implement an emergency action plan and consult with all necessary local emergency responders.

Public Interaction

The Applicant hosted a public informational open house for this project on April 6, 2017. Attendees were provided the opportunity to speak with the Applicant about the proposed project and to provide feedback.

The Applicant served copies of the complete application on officials representing Hardin County; Marion, McDonald, and Roundhead townships; the villages of Alger and McGuffey; and the City of Kenton. The Applicant also sent a copy of the complete application to the Ada Public School District Library, the Alger Public Library, and the Mary Lou Johnson Hardin County District Library. Additionally, copies of the complete application are available for public inspection at the offices of the PUCO and on the PUCO online Docketing Information System website.[30] The Applicant maintains a project website where visitors can obtain information about the project and access the application.[31]

During the construction and operation of the project, the Applicant has committed to make representatives available to respond to questions and concerns regarding the project. The Applicant would also implement the complaint resolution plan described in Exhibit L of the application. In

30. "Case record for: 17-0773-EL-BGN," *Public Utilities Commission of Ohio*, accessed November 7, 2017, http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=17-0773.

31. Invenergy, "Hardin Solar Energy Center," accessed November 7, 2017, https://invenergyllc.com/public-filings/hardin-energy-center.

the complaint resolution plan, the Applicant commits to file the nature and resolution of all complaints received with the Board on a quarterly basis. Staff recommends the Applicant file these quarterly reports in the case record.

The Applicant has also committed to provide notice to adjacent landowners immediately surrounding the proposed site regarding construction information and its complaint resolution process at least seven days prior to the start of any construction activities.[32] Staff recommends that this notice also be provided to tenants of any property immediately surrounding the proposed site.

The Administrative Law Judge issued an entry on October 6, 2017 scheduling a local public hearing and an adjudicatory hearing for this proceeding. The local public hearing, at which the Board will accept written or oral testimony from any person, is scheduled for December 6, 2017, at 6:00 p.m., at Kenton High School, 200 Harding Ave., Kenton, Ohio 43326. The adjudicatory hearing is scheduled for December 15, 2017 at 11:00 a.m., at the offices of the PUCO, 11th floor, Hearing Room 11-D, 180 E. Broad St., Columbus, Ohio 43215.

As of the filing of this Staff Report, the Board has not received any public comments regarding this project. On October 17, 2017, the Ohio Farm Bureau Federation filed a motion to intervene in this case.

Land Leases

All solar panels would be installed on property under lease or easement to the Applicant.

Liability Compensation Plans

The Applicant represents that the terms of the property leases require the Applicant to provide insurance for all solar facility components and to indemnify the landowner and other third parties from liability claims resulting from the solar facility's construction and operation.[33] The Applicant has stated that the facility would carry insurance during development, construction, operation, and decommissioning that will ensure proper indemnification for third parties and for the interests of the Applicant. A program would be specifically tailored to meet the risk management and indemnification needs of all of the solar facility stakeholders.[34] A Certificate of Liability Insurance is provided as Exhibit M, which has been filed under seal.[35]

All Staff recommendations for the requirements discussed in this section of the *Staff Report of Investigation* are included under the **Public Interest, Convenience and Necessity Conditions** heading of the **Recommended Conditions of Certificate** section.

Recommended Findings

Staff recommends that the Board find that the proposed facility would serve the public interest, convenience, and necessity, and therefore complies with the requirements specified in R.C. 4906.10(A)(6), provided that any certificate issued by the Board for the proposed facility include the conditions specified in the section of this *Staff Report of Investigation* entitled Recommended Conditions of Certificate.

32. Application at p. 34.
33. Ibid.
34. Ibid., p. 35.
35. Ibid.

Considerations for R.C. 4906.10(A)(7)

AGRICULTURAL DISTRICTS

Pursuant to R.C. 4906.10(A)(7), the Board must determine the facility's impact on the agricultural viability of any land in an existing agricultural district within the project area of the proposed facility. The agricultural district program was established under R.C. Chapter 929. Agricultural district land is exempt from sewer, water, or electrical service tax assessments.

Agricultural land can be classified as an agricultural district through an application and approval process that is administered through local county auditors' offices. Eligible land must be devoted exclusively to agricultural production or be qualified for compensation under a land conservation program for the preceding three calendar years. Furthermore, eligible land must be at least 10 acres or produce a minimum average gross annual income of $2,500.

No agricultural district parcels would be impacted by the construction of the proposed facility. No agriculture related structures would be affected by the project. The construction and operation of the proposed facility would disturb approximately 1,115 acres of agricultural land, 995 acres of which would be occupied by solar modules, none of which has been classified as agricultural district land.

Agricultural land that has not been classified as an agricultural district in the project area may experience some construction-related activities, such as vehicle traffic and materials storage. These activities could lead to temporary reductions in farm productivity caused by direct crop damage, soil compaction, broken drainage tiles, and reduction of space available for planting. The Applicant has discussed and approved the siting of facility components with the landowner in order to minimize impacts, and also intends to take steps in order to address such potential impacts to farmland, including: repairing all drainage tiles damaged during construction, removing construction debris, compensating the farmer for lost crops, and restoring temporarily impacted land to its original use. After construction, only the agricultural land associated with solar production and access roads would be removed from farm production.

Recommended Findings

Staff recommends that the Board find that the impact of the proposed facility on the viability of existing agricultural land in an agricultural district has been determined, and therefore complies with the requirements specified in R.C. 4906.10(A)(7), provided that any certificate issued by the Board for the proposed facility include the conditions specified in the section of this report entitled Recommended Conditions of Certificate.

Considerations for R.C. 4906.10(A)(8)

WATER CONSERVATION PRACTICE

Pursuant to R.C. 4906.10(A)(8), the proposed facility must incorporate maximum feasible water conservation practices, considering available technology and the nature and economics of the various alternatives.

Construction of the proposed facility would not require the use of significant amounts of water. Water would be brought from off site by 3,500-gallon water trucks, and would be used during earthwork activities, foundation construction, and dust control as needed. Potable water would be brought for human consumption in five-gallon containers from off site as well.

Operation of the proposed facility would not require the use of significant amounts of water. No water is needed for any function, and no water or wastewater discharge is expected. Therefore, the requirements under R.C. 1501.33 and 1501.34 are not applicable to this project.

Recommended Findings

The Staff recommends that the Board find that the proposed facility would incorporate maximum feasible water conservation practices, and therefore complies with the requirements specified in R.C. 4906.10(A)(8). Further, the Staff recommends that any certificate issued by the Board for the certification of the proposed facility include the conditions specified in the section of this report entitled Recommended Conditions of Certificate.

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IV. RECOMMENDED CONDITIONS OF CERTIFICATE

Following a review of the application filed by Hardin Solar Energy LLC, and the record compiled to date in this proceeding, Staff recommends that a number of conditions become part of any certificate issued for the proposed facility. These recommended conditions may be modified as a result of public or other input received subsequent to the issuance of this report. At this time, Staff recommends the following conditions:

GENERAL CONDITIONS

Staff recommends the following conditions to ensure conformance with the proposed plans and procedures as outlined in the case record to date, and to ensure compliance with all conditions listed in this Staff Report:

(1) The facility shall be installed at the Applicant's proposed site as presented in the application and as modified and/or clarified by supplemental filing, replies to data requests and the recommendations in this *Staff Report of Investigation*.

(2) The Applicant shall conduct a preconstruction conference prior to the start of any construction activities. Staff, the Applicant, and representatives of the prime contractor and all subcontractors for the project shall attend the preconstruction conference. The conference shall include a presentation of the measures to be taken by the Applicant and contractors to ensure compliance with all conditions of the certificate, and discussion of the procedures for on-site investigations by Staff during construction. Prior to the conference, the Applicant shall provide a proposed conference agenda for Staff review. The Applicant may conduct separate preconstruction meetings for each stage of construction.

(3) At least 30 days before the preconstruction conference, the Applicant shall submit to Staff, for review to ensure compliance with this condition, one set of detailed engineering drawings of the final project design, including the facility, temporary and permanent access roads, any crane routes, construction staging areas, and any other associated facilities and access points, so that Staff can determine that the final project design is in compliance with the terms of the certificate. The final project layout shall be provided in hard copy and as geographically-referenced electronic data. The final design shall include all conditions of the certificate and references at the locations where the Applicant and/or its contractors must adhere to a specific condition in order to comply with the certificate.

(4) If the Applicant makes any changes to the project layout after the submission of final engineering drawings, the Applicant shall provide all such changes to Staff in hard copy and as geographically-referenced electronic data. All changes will be subject to Staff review to ensure compliance with all conditions of the certificate, prior to construction in those areas.

(5) Within 60 days after the commencement of commercial operation, the Applicant shall submit to Staff a copy of the as-built specifications for the entire facility. If the Applicant demonstrates that good cause prevents it from submitting a copy of the as-built specifications for the entire facility within 60 days after commencement of commercial operation, it may request an extension of time for the filing of such as-built specifications. The Applicant shall

use reasonable efforts to provide as-built drawings in both hard copy and as geographically-referenced electronic data.

(6) Prior to the commencement of construction activities in areas that require permits or authorizations by federal or state laws and regulations, the Applicant shall obtain and comply with such permits or authorizations. The Applicant shall provide copies of permits and authorizations, including all supporting documentation, to Staff within seven days of issuance or receipt by the Applicant. The Applicant shall provide a schedule of construction activities and acquisition of corresponding permits for each activity at the preconstruction conference.

(7) The certificate shall become invalid if the Applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.

(8) As the information becomes known, the Applicant shall docket in the case record the date on which construction will begin, the date on which construction was completed, and the date on which the facility begins commercial operation.

(9) The Applicant shall not commence any construction of the facility until it has a signed Interconnection Service Agreement with PJM Interconnection, LLC, which includes construction, operation, and maintenance of system upgrades necessary to reliably and safely integrate the proposed generating facility into the regional transmission system. The Applicant shall docket in the case record a letter stating that the Agreement has been signed or a copy of the signed Interconnection Service Agreement.

(10) At least 30 days prior to the preconstruction conference, the Applicant shall provide to Staff a copy of its public information program that informs affected property owners and tenants of the nature of the project, specific contact information of Applicant personnel who are familiar with the project, the complaint resolution process, the proposed timeframe for project construction, and a schedule for restoration activities. The Applicant shall give notification of planned construction to affected property owners and tenants at least seven days prior to commencement of construction.

(11) During the construction and operation of the project, the Applicant shall file a complaint summary report in the case record by the fifteenth day of January, April, July and October of each year. The report should include a list of all complaints received through its complaint resolution process, a description of the actions taken to resolve each complaint, and a status update if the complaint has yet to be resolved.

(12) General construction activities shall be limited to the hours of 7:00 a.m. to 7:00 p.m., or until dusk when sunset occurs after 7:00 p.m. Impact pile driving, hoe ram, and blasting operations, if required, shall be limited to the hours between 10:00 a.m. to 5:00 p.m., Monday through Friday. Construction activities that do not involve noise increases above ambient levels at sensitive receptors are permitted outside of daylight hours when necessary. The Applicant shall notify property owners or affected tenants within the meaning of Ohio Adm.Code 4906-3-03(3)(B)(2) of upcoming construction activities including potential for nighttime construction activities.

SOCIOECONOMIC CONDITIONS

Staff recommends the following condition to address the impacts discussed in the **Socioeconomic Impacts** section of the Nature of Probable Environmental Impact:

(13) Prior to the commencement of construction, the Applicant shall finalize coordination of the assessment of potential effects of the proposed facility on cultural resources, if any, with Staff and the Ohio Historic Preservation Office (OHPO). If the resulting coordination discloses a find of cultural or archaeological significance, or a site that could be eligible for inclusion in the National Register of Historic Places, then the Applicant shall submit a modification or mitigation plan to Staff. Any such mitigation effort, if needed, shall be developed in coordination with the OHPO and submitted to Staff for review that it complies with this condition.

(14) Prior to commencement of any construction, the Applicant shall prepare a landscape and lighting plan that addresses the aesthetic and lighting impacts of the facility on neighboring residences. The Applicant shall provide the plan to Staff for review and confirmation that it complies with this condition.

(15) The Applicant shall avoid, where possible, or minimize to the extent practicable, any damage to field tile drainage systems and soils resulting from construction, operation, and/or maintenance of the facility in agricultural areas. Damaged field tile systems shall be promptly repaired to at least original requirements at the Applicant's expense. If applicable, excavated topsoil shall be segregated and restored in accordance with the Applicant's lease agreement with the landowner. Severely compacted soils shall be plowed or otherwise de-compacted, if necessary, to restore them to original condition unless otherwise agreed to by the landowner.

(16) The Applicant shall provide to Staff a copy of any arrangement or resulting resolution adopted by any county relating to the a Payment in Lieu of Taxes (PILOT) program within a reasonable time after issuance or receipt.

ECOLOGICAL CONDITIONS

Staff recommends the following condition to address the impacts discussed in the **Ecological Impacts** section of the Nature of Probable Environmental Impact:

(17) The Applicant shall contact Staff, the ODNR, and the USFWS within 24 hours if state or federal threatened or endangered species are encountered during construction activities. Construction activities that could adversely impact the identified plants or animals shall be halted until an appropriate course of action has been agreed upon by the Applicant, Staff, and the ODNR in coordination with the USFWS. Nothing in this condition shall preclude agencies having jurisdiction over the facility with respect to threatened or endangered species from exercising their legal authority over the facility consistent with law.

(18) The Applicant shall adhere to seasonal cutting dates of October 1 through March 31 for removal of any trees greater than or equal to three inches in diameter, unless coordination efforts with the Ohio Department of Natural Resources (ODNR) and the U.S. Fish and Wildlife Service (USFWS) allow a different course of action.

(19) If any caves or abandoned mines may be disturbed, the Applicant shall coordinate with the USFWS to determine if fall or spring portal surveys are warranted.

(20) Construction in upland sandpiper preferred nesting habitat types shall be avoided during the species' nesting period of April 15 through July 31, unless coordination with the ODNR allows a different course of action.

(21) Construction in northern harrier preferred nesting habitat types shall be avoided during the species' nesting period of May 15 through August 1, unless coordination with the ODNR allows a different course of action.

(22) The Applicant shall have a vegetation management plan that addresses the concerns outlined in the *Vegetation* section of this Staff Report. Prior to the preconstruction conference, the Applicant shall submit this plan to Staff, for review and confirmation that it complies with this condition.

PUBLIC SERVICES, FACILITIES, AND SAFETY CONDITIONS

Staff recommends the following conditions to address the requirements discussed in the **Public Services, Facilities, and Safety** section of the Nature of Probable Environmental Impact:

(23) Prior to commencement of construction activities that require transportation permits, the Applicant shall obtain all such permits. The Applicant shall coordinate with the appropriate authority regarding any temporary or permanent road closures, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed facility. Coordination shall include, but not be limited to, the county engineer, the Ohio Department of Transportation, local law enforcement, and health and safety officials. The Applicant shall detail this coordination as part of a final traffic plan submitted to Staff prior to the preconstruction conference for review and confirmation by Staff that it complies with this condition.

Summary: Staff Report of Investigation electronically filed by Mr. Matt Butler on behalf of Staff of OPSB

August 4, 2022

Chairwoman Jennifer French
Ohio Power Siting Board
180 E. Broad Street
Columbus, Ohio 43215
RE: Case Number: 21-902-GE-BRO

Dear Honorable Chairwoman French,

The Data Center Coalition (DCC) is the national trade association that empowers and champions the data center industry through public policy advocacy, education, thought leadership, and community engagement.[1] DCC represents and advances the interests of the data center industry, aggregates industry expertise, and offers thought leadership and collaboration with utilities, policymakers, regulatory bodies, and other stakeholders. Its advocacy efforts focus on promoting a strong business climate and public policies for the data center industry including policies that drive sustainability, provide access to clean and renewable energy, and decarbonize the grid.

On June 16, 2022, the Ohio Power Siting Board (Board) issued an Entry inviting all interested persons to file initial and reply comments regarding the proposed revisions to O.A.C. Chapter 4906 by July 22, 2022, and August 12, 2022, respectively. On July 14, 2022, the Board granted a request to extend deadlines for filing initial and reply comments to August 5, 2022, and September 2, 2022, respectively.

DCC member companies are focused on building and operating sustainable and efficient data centers and strive to utilize carbon-free sources of energy to power their operations. Over 300 companies worldwide have 100% renewable energy goals, including a number of DCC members that operate in Ohio. Access to renewable energy is a key part of the decision-making process for when and where a

[1] 1 For a list of DCC members, see https://www.datacentercoalition.org/.

company would site a new development or expand an existing facility. If a company cannot access the renewable energy they desire, or if it is too complicated or expensive, they may not site a large new development in a particular state. Ensuring timely access to renewable energy in Ohio will continue to attract large businesses to the state, furthering the state's economic development goals, increasing local tax revenue, and bringing construction and operational jobs to Ohio.

DCC members have a substantial economic presence in Ohio. To further their clean and renewable energy goals, which are core business priorities for DCC members, these companies have also entered into multiple power purchase agreements representing gigawatts of utility-scale renewable energy projects located in Ohio, and such investment continues to grow. As such, DCC members have a substantial interest in this rulemaking, as the changes proposed by the Board could have a meaningful impact on their ability to access new renewable energy resources in Ohio.

Businesses desire regulatory certainty and the Board has an opportunity in this proceeding to strike a balance between sound renewable energy and related infrastructure development and fostering continued economic development in Ohio. DCC submits the following comments for the Board's consideration.

Public Interest

DCC believes that the Board should carefully weigh local community considerations with other matters of public interest, including furtherance of Ohio's economic development goals, continued job growth, lowering energy prices for consumers, and improving energy resiliency. New renewable energy generation in Ohio accrues public benefits to customers across Ohio, such as low-cost energy, reduced emissions, new tax revenue for local governments and schools, and additional economic development activity. Additionally, renewable energy benefits consumers by providing long term, fixed price energy contracts (often through power purchase agreements) that require zero fuel costs. These contracts are an important tool to reduce costs in the current high commodity cost and inflationary environment all businesses and consumers currently face. Furthermore, these projects create significant new and stable revenue streams for local governments and schools, which directly benefit communities and Ohioans alike. We urge the Board not to proceed with rules that could delay project approvals and unduly drive-up costs.

The Board should take all relevant pubic benefit factors, including, but not limited to, statewide economic development, job creation, reduced energy costs and emissions for Ohio ratepayers, and new local revenues, into consideration when making a public interest determination for new projects. The

Ohio Administrative Code already requires applicants to submit information regarding the economic impact of the project.[2] The Board should require in this rule review that such information, along with input of a broad array of stakeholders, is appropriately weighed with other concerns when reviewing certificate applications.

Similar consideration balancing local community needs with renewable energy growth and economic development is appropriate for transmission line and substation development. This infrastructure supports new renewable energy projects, reduces congestion on Ohio's grid, increases grid resiliency, and enables continued investment in new businesses. DCC believes that the application process for transmission and substation infrastructure should be efficient, timely, and predictable to provide companies with the certainty needed to locate projects in Ohio.

Prospective Application of Rules

Central to a sound statewide business environment is a consistent and predictable application of new regulations.[3] As renewable energy projects across Ohio are in various stages of development, DCC maintains that any new rule should apply prospectively to new certificate applications only, and only after promulgation of the proposed rules. Certificate applications submitted prior to the promulgation of the rules proposed in this proceeding should avail themselves of the law and regulation in existence at the time of application. Such application of the Board's rules would serve to protect Ohio's business climate and the ability of corporate purchasers of clean energy to make sound business decisions within a stable regulatory framework.

Distribution Substation Infrastructure

As major electricity consumers, DCC members are keenly aware of the opportunities and challenges in siting transmission infrastructure to support our operations. As such, DCC is opposed to the Board's proposal to broaden the category of substations subject to OPSB jurisdiction by including distribution substations in the definition of "associated facilities."

The Board proposes to include substations that transform voltage from transmission voltage to distribution voltage in the category of infrastructure subject to Board certification as an "associated

[2] Ohio Administrative Code 4906-4-06 (E).

[3] JobsOhio, the state's economic and business development organization, notes that "Ohio offers a welcoming business climate that attracts global investment and fosters growth in businesses large and small. Ohio's simplified tax structure, central location, and affordable cost of doing business are catalysts for economic diversification and prosperity." See "A Business Friendly Approach" at https://www.jobsohio.com/doing-business-here/business-climate/.

facility" to transmission lines.[4] Under current Board rules, only substations that transform line voltage from one transmission voltage to another transmission voltage are considered an "associated facility".[5]

DCC believes this proposal adds regulatory uncertainty and costs, delays project timelines for no articulated benefit, and does not serve the public interest. Distribution substations that serve only one customer (data centers specifically in the case of DCC members) should not be subject to certification, public comment, administrative expense, and potential procedural delay. While it is true that these types of substations ensure reliable service and are an important component of the local grid when operational, distribution substations such as those contemplated by the proposed rule are typically located behind the fence-line of an individual customer and are constructed in close coordination with the local utility provider. As such, it is inappropriate to include this infrastructure in the scope of Board review. For the foregoing reasons, DCC believes the current rule is logical and should not be amended as proposed by the Board. At the very least, if the Board proceeds with this definitional change, it should only be applicable to affected substations that will commence construction activities after promulgation of the proposed rules.

Conclusion

DCC and its members appreciate the opportunity to offer comments in this proceeding. Smart regulation, sound development practices, and appropriate opportunities for public engagement will foster a pro-business climate in Ohio and ensure DCC members can continue to accelerate renewable energy deployment to meet business needs.

Respectfully,

Josh Levi
President
Data Center Coalition

[4] Ohio Power Siting Board's Review of Ohio Adm. Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7, Attachment A, p.6.
[5] O.A.C. 4906-1-01(F)(2)(b).

Summary: Comments Submitted by Data Center Coalition (DCC) electronically filed by Mr. Josh Levi on behalf of Data Center Coalition

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting Board's Review of Ohio Adm.Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7.	)))))	Case No. 21-902-GE-BRO

APPLICATION FOR REHEARING

OF

DUKE ENERGY OHIO, INC.

Pursuant to Ohio Revised Code (R.C.) 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35, Duke Energy Ohio, Inc. (Duke Energy Ohio), respectfully submits this Application for Rehearing of the Finding and Order (Order) issued by the Ohio Power Siting Board (Board) on July 20, 2023, in the above-captioned proceeding. Duke Energy Ohio submits that the Order is unreasonable and unlawful in the following respects:

1. The order unreasonably fails to define "public interest."
2. The Order fails to reasonably define the "replacement of an existing facility with a like facility."
3. The Order fails to reasonably define "resident."
4. The Order fails to reasonably define "route."
5. The Order fails to reasonably limit the time during which the Board may bill applicants for expenses incurred.
6. The Order fails to reasonably provide for the protection of critical energy infrastructure information.

As explained in more detail in the accompanying memorandum in support, the Board should grant rehearing.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Jeanne W. Kingery
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This proceeding commenced on September 3, 2021, with an entry establishing a schedule for the collection of public input on possible changes to O.A.C. Chapters 4906-1, 4901-2, 2901-3, 4901-4, 4901-5, 4901-6, and 4901-7. On June 16, 2022, the Board issued an entry, setting forth modified rules proposed by Board Staff (Staff) (Staff Proposal). The Board allowed for interested parties to file comments and reply comments and, on July 20, 2023, the Board issued its Finding and Order.

II. DISCUSSION

Pursuant to R.C. 4903.10 and O.A.C. 4906-2-32, Duke Energy Ohio seeks rehearing regarding the below rule changes, as approved by the Commission in its Finding and Order. The rule changes set forth below by the Company as appropriate for rehearing represent those that are either unreasonable, subject an applicant to an impossible compliance mandate, or should have been adopted to improve the power siting process and streamline efficiencies. For the reasons set forth below, further review is warranted.

A. Rule 4906-1-01 – Lack of Definition for "Public Interest"

Despite recommendations from multiple commenters, including Duke Energy Ohio, the Board failed to adopt a definition of "public interest."

Ohio law requires the Board to determine "[t]hat the facility will serve the public interest, convenience, and necessity."[1] The law does not set forth any definition of any of those terms, leaving them instead to the wisdom and expertise of the Board. However, as explained by

[1] R.C. 4906.10(A)(6).

numerous commenters, the Board has made its determination of "public interest" in a variety of seemingly conflicting bases, including the mere counting of the number of comments filed in a docket, regardless of the merits of any of the comments, their possible duplicative content, their possible duplicative senders, or their possible overlap with community groups that may be actual intervenors in the proceeding.

In response to the comments, the Board noted their existence and simply concluded, with no discussion, that "[t]he statute speaks for itself and the Board's orders have explained how each application's unique facts apply to our consideration of R.C. 4906.10(A)(6)."[2] In light of the comments received on this point, certainly the statute is not speaking clearly enough for itself for applicants to have any expectation as to how the Board is likely to rule in any given case.

The Board should adopt a definition of "public interest." It is unreasonable not to do so.

B. Rule 4906-1-01(KK)[3] – Definition of the "Replacement of an Existing Facility with a Like Facility"

The provision in the current rules that allows a utility to replace a facility of a type that it no longer uses with the nearest similar product is important and should not be deleted.

In addressing when a certificate from the Board is required prior to the construction of major facilities, Ohio law provides the Board with considerable latitude, stating that "[t]he replacement of an existing facility with a like facility, as determined by the power siting board, shall not constitute construction of a major utility facility."[4] Thus, although the law requires that a like-for-like replacement be deemed non-jurisdictional, it leaves the definition of such a replacement to the Board's expertise. Carrying out the intent of the law, the Board's current rule

[2] Finding and Order, ¶ 19.
[3] In the Order, this is O.A.C. 4906-1-01(LL).
[4] O.A.C. 4906.04.

on the topic defines a like-for-like replacement as being one of equal size, rating, and operating characteristics, in the same right-of-way. The current rules also recognize that the exact same size and specification might no longer be manufactured or in use. They therefore allow replacement with the nearest equivalent size and material on a non-jurisdictional basis.

The Staff Proposal would make just one change to that definition: It would delete the allowance for material that is no longer used by the applicant from being replaced with the nearest equivalent size and material.[5] In its initial comments, Duke Energy Ohio pointed out that the provision that Staff proposed to delete is an important one. Regarding the electric business, wooden poles are certainly still manufactured and available, but Duke Energy Ohio considers steel poles to be more advantageous. Steel poles are more resistant to rot and insect damage and are more tolerant of strong winds.[6] On the gas side, although still available, older sizes of pipes may be difficult to find, even though they may still be manufactured.[7] As the Board is aware, filing applications for certification is costly and time consuming, and requires pre-planning in order to avoid project delays. For these reasons, having the ability to make such replacements without Board jurisdiction is important.

Similarly, American Transmission System, Inc., (ATSI) noted that the "definition should allow for replacement of an existing major utility facility consistent with the applicant's current engineering or other operational standards."[8] ATSI offered an alternate definition to address the problem.

[5] Staff Proposal, Att. A, p. 5 of 9.
[6] Duke Energy Ohio Initial Comments, p. 4.
[7] *Id.*
[8] ATSI Initial Comments, p. 3.

The Board's Order refused to modify the Staff Proposal in this regard, only explaining its decision on this definitional change and numerous others by saying that "[f]or most of these proposals, the Board finds such changes would be unnecessary or inappropriate at this time."[9] With that explanation, Duke Energy Ohio cannot determine why the change both the Company and ATSI suggested is unnecessary or, at this time, inappropriate. The Board offers no explanation for its failure to adopt these changes, nor does it justify its acceptance of the Staff Proposal. The Board's failure to make this change was unreasonable.

C. Rule 4906-1-01(LL)[10] – New Definition of "Resident"

Staff has proposed a new definition of the term "resident," which would include tenants.[11] As Duke Energy Ohio indicated in its comments, it is impossible to determine who the tenants are in a building.[12] It is sometimes not even possible to know that there are tenants occupying a given space. The occupancy of a space by a tenant is not a matter of public record. Therefore, there is no way for an applicant to comply with a notification rule based on this definition, with any level of certainty or accuracy.

The Board's Order leaves this definition unchanged from the Staff Proposal, stating only that any change to it, along with numerous other definitional issues, is either "unnecessary or inappropriate at this time."[13]

Although Duke Energy Ohio agrees that people who may be impacted by a project should be notified, to the extent possible, the rules should explicitly recognize that perfect compliance with such a requirement is impossible when it comes to tenants.

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[9] Finding and Order, ¶ 12.
[10] In the Order, this is O.A.C. 4906-1-01(MM).
[11] Staff Proposal, Att. A, p. 5 of 9.
[12] Duke Energy Ohio Initial Comments, p. 5.
[13] Finding and Order, ¶ 12.

The term "resident" is used in relation to:[14] notices concerning informational meetings;[15] notices of complete, accepted applications;[16] notices of modification of a certificated facility;[17] notices of the proposed schedule of construction and restoration;[18] notices of the public information and complaint resolution programs;[19] coordination with local residents regarding the selection of vantage points for considering scenic impacts;[20] and notices of the filing of an accelerated letter of notification.[21] A few of the noted uses specifically allow for some level of failure to comply due to inability or inadvertent omission;[22] the rest do not.

In order to ensure that all uses of the term "resident" recognize the impossibility of perfect compliance, in light of the lack of available public information on which the applicant can rely, the definition itself should be modified. Alternatively, each use of "resident" must include a workable approach to public involvement that does not subject the applicant to an impossible compliance mandate.

D. Rule 4906-1-01(MM)[23] – New Definition of "Route"

The Staff Proposal contains a new definition addressing the term "route."[24] Although Duke Energy Ohio applauds the direction in which Staff has moved, additional details need to be addressed, as explained in Duke Energy Ohio's Initial Comments.

[14] This list does not include uses related solely to renewable generation facilities.
[15] O.A.C. 4906-3-03.
[16] O.A.C. 4906-3-09.
[17] O.A.C. 4906-3-13.
[18] O.A.C. 4906-3-14, O.A.C. 4906-4-06, O.A.C. 4906-6-05, O.A.C. 4906-6-11.
[19] O.A.C. 4906-4-06, O.A.C. 4906-6-11.
[20] O.A.C. 4906-4-08.
[21] O.A.C. 4906-6-08.
[22] O.A.C. 4906-3-03, 4906-3-09.
[23] In the Order, this is O.A.C. 4906-1-01(NN).
[24] Staff Proposal, Att. A, p. 5 of 9.

On the positive side, Staff's definition would provide that, in essence, the "route" is a corridor rather than a centerline. It goes on to say that the edges of the corridor are set at a distance from centerline, where that distance is as specified in the application, up to the width of the proposed right of way. There is allowance for variation along the length of a transmission line or pipeline.[25]

This change, however, is insufficient and will create difficulties and uncertainty in the future, from a definitional standpoint, as was described in Duke Energy Ohio's Initial Comments. First, in the construction of new pipelines, there are many times when the pipe is not located in the center of the right of way, either because of above- or below-ground obstructions or because of a need for future access. The definition should account for this fact. Second, the term "right of way," which is used in the proposed definition, does not account for easements and ignores the need for temporary construction workspace. Third, the definition should allow for the possible alteration of the application's specification by way of supplements or amendments.[26]

The Order merely lumped this definition into the group about which the Board felt that changes were "unnecessary or inappropriate at this time."[27] Duke Energy Ohio's concerns are important ones and should be at least considered by the Board.

E. Rule 4906-3-12 – Application Fees and Board Expenses

Duke Energy Ohio suggested that the Board include in its rules a requirement that fees be charged to applicants within a reasonable period after the applicant has filed its notice of completion. This suggestion was left unaddressed in the Order.

[25] *Id.*
[26] Duke Energy Ohio Initial Comments, pp. 6-7.
[27] Finding and Order, ¶ 12.

The payment of project-related bills months or years after the project has been completed and its accounting codes have been terminated causes a great deal of difficulty for at least some applicants to the Board. Although it is reasonable for Staff to have a period of time to collect and bill its charges, billing months or years after completion is not workable.

The Board should structure its rules to require those bills to be issued within a reasonable, stated period of time.

F. Rules 4906-4-03 and 4906-4-05 – Project Description in Detail and Project Schedule in Detail and Electric Grid Interconnection

Board Staff proposed to add a requirement, in paragraph (D)(1) of Rule 4906-4-03, that applications for electric transmission lines include one-line diagrams depicting system performance with and without the proposed facility.[28] Similarly, the Staff Proposal would add, in paragraph (A)(2) of Rule 4906-4-05, a requirement that applicants include in applications a single-line diagram of substations, together with a description of proposed major equipment.[29] As Duke Energy Ohio pointed out in its Initial Comments, single-line diagrams are critical energy infrastructure information and, as such, should not be required for inclusion in publicly filed applications.[30] Nor should they be required to be filed under seal, as such a filing would require biennial motions to extend the protective treatment, in perpetuity. Duke Energy Ohio is happy to provide this information confidentially to Board Staff, but it cannot be part of a publicly accessible document.

[28] Staff Proposal, Att. G, p. 9 of 56.
[29] Staff Proposal, Att. G, p. 12 of 56.
[30] Duke Energy Ohio Initial Comments, p. 13.

Neither of these rules was addressed or modified by the Board. These are critically important concerns, and the Board should provide a reasonable mechanism to allow for both a fully informed review of applications and adequate protection of sensitive information.

III. CONCLUSION

Duke Energy Ohio respectfully requests that the Board grant its Application for Rehearing and modify its proposed rules accordingly.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 21st day of August, 2023, upon the persons listed below.

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Jeanne W. Kingery

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This foregoing document was electronically filed with the Public Utilities

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Case No(s). 21-0902-GE-BRO

Summary: Application Application for Rehearing of Duke Energy Ohio, Inc. electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Kingery, Jeanne and Akhbari, Elyse Hanson and Vaysman, Larisa.

FILE

Committees:

Civil Justice
Criminal Justice
Government Oversight
Public Utilities
Rules and Reference

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Majority Floor Leader Bill Seitz
The Ohio House of Representatives

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April 5th, 2023

Ohio Power Siting Board
Attn: Jennifer French, Chair
180 East Broad St.
Columbus, Ohio 43215

cc: Mike Williams, Executive Director
Scott Elisar, Legislative and Policy Director

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician EC Date Processed 4/6/2023

RE: Circleville Solar Generation Facility, OPSB Case No. 21-1090-EL-BGN

Dear Chair French and Executive Director Williams,

I write today in support of the renewable energy development project in Pickaway County known as the Circleville Solar Project.

As a co-sponsor of Senate Bill 52, I understand the desire of local governments to govern the scope of projects that occur in their jurisdictions. However, when the General Assembly passed SB 52, there was also a desire to grandfather in late-stage projects that have followed the proper channels in their development. The Circleville Solar facility fits the bill to be grandfathered. Thus, while localized opposition to a grandfathered project may be of some relevance, it is by no means determinative as it would otherwise be if the project had not been protected by the grandfathering clauses of SB 52.

For some time now, NextEra, the company responsible for the development of the Circleville Solar facility, has been working with the community and local business leaders to ensure that the project will benefit the surrounding area and State of Ohio. NextEra has worked to site the Circleville Solar project responsibly. The project is relatively small (70 MW) and has extensive setbacks. In fact, nearly 99% of the project has setbacks of 1,000 ft. or more from public roads. The company has already invested nearly $7.5 million into the project as well. What's more, this project will not only provide jobs and tax benefits to the local residents, but will result in the green energy remaining in Ohio. And, a STEM educational center will be located on-site, which offers great opportunities for students locally in Pickaway County and in the region.

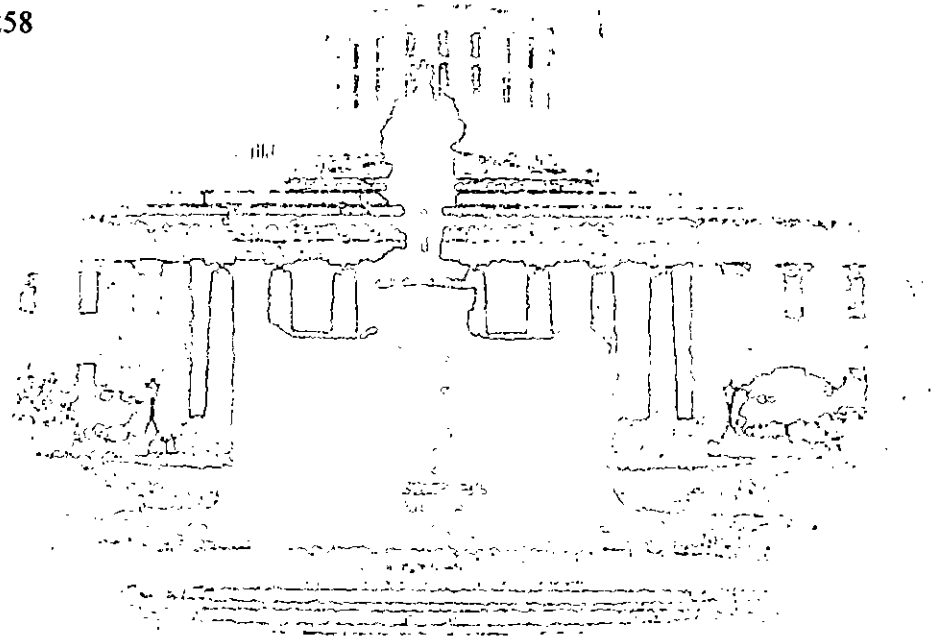
I believe that the Circleville Solar project fits the Ohio Power Siting Board criteria for approval and qualifies under law to be grandfathered. Therefore, I would urge your approval of the project's certificate application.

Sincerely,

Bill Seitz

William J. Seitz

Majority Floor Leader
Ohio House of Representatives
Columbus, Ohio 43215
(614) 466-8258



FILE

State Senator Kent Smith
Democratic Whip
21st District

Ohio Senate
Senate Building
Columbus, OH 43215
614-466-4857

April 12, 2023

Ohio Power Siting Board
Attn: Jennifer French, Chairwoman
180 East Broad St.
Columbus, Ohio 43215

RE: Circleville Solar Generation Facility, OPSB Case No. 21-1090-EL-BGN

Dear Chairwoman French:

I write today to support the renewable energy development project in Pickaway County, the Circleville Solar Project.

NextEra, the development company, has worked with the community and its leaders to ensure the project benefits and enhances the community. With that being said, the Circleville Solar Project has unprecedented setbacks due to these discussions. 98% of the project fence line is at least 1,000 feet from any public roads. The project facility's acreage was reduced from 756 acres to 619 acres. As the Ranking Member of the House Energy & Public Utilities Committee, I watched Senate Bill 52 go through the committee process. As I understand it, this legislation provided a grandfather clause for projects who were far into the development process. I believe that the Circleville Solar Project fits the criteria for this grandfather clause in Senate Bill 52.

The Circleville Solar Project has many benefits for the surrounding community. The project provides jobs and tax benefits to residents. On-site, there will be a STEM educational center that will benefit students in and around Pickaway County. Furthermore, the Circleville Solar Project provides Ohio with much-needed green energy. Finally, the power generated from this project will be purchased by Northeast Ohio Public Energy Council, NOPEC. Within Senate District 21, NOPEC fulfills the energy needs of many communities.

I believe that the Circleville Solar project fits the Ohio Power Siting Board criteria for approval and qualifies under the law to be grandfathered. Therefore, I would urge your approval of the project's certificate application.

Sincerely,

Senator Kent Smith
Ohio Senate District 21

81st House District
Henry County

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FILE

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Government Oversight
Public Utilities
Rules and Reference

James Hoops
State Representative

April 11, 2023

Ohio Power Siting Board
Attn: Jennifer French, Chair
180 East Broad St.
Columbus, Ohio 43215

cc: Mike Williams, Executive Director
Scott Elisar, Legislative and Policy Director

RE: Circleville Solar Generation Facility, OPSB Case No. 21-1090-EL-BGN

Dear Chair French,

I want to voice my support for the language we agreed to in the 134 GA while working on Senate Bill 52 in grandfathering projects that were at a certain point in the process.

I served as the Chair of the House Public Utilities Committee during the Senate Bill 52 debate. The goal of this legislation was to allow more local input into the Ohio Power Siting Board ("OPSB") process while ensuring that late-stage projects are grandfathered and protected. The Circleville Solar project fits the bill to be grandfathered, other than the addition of two ad-hoc members to the OPSB.

Thus, while reasonable local input into a project is important and warranted, it is by no means determinative. Circleville Solar has already invested nearly $7.5 million in the development of the project. Moreover, it is my understanding that the project team has been working with the local community to ensure that it will benefit the surrounding area and consumers in the State of Ohio. The project will provide tax revenue for the county and region, and Circleville Solar is planning on working with farmers in the area to allow solar and farming to co-exist.

Perhaps most unique to this project is the fact that the Northeast Ohio Public Energy Council ("NOPEC") will be the ultimate, long-term purchaser of the renewable attributes from the project to use. It will be supplying its electric aggregation, which consists of approximately 240 Ohio counties, municipalities and townships located in 19 Ohio counties, including the City of Lancaster in nearby Fairfield County.

In addition, it is my understanding a STEM educational center will be located on-site at the solar facility, which will provide amazing learning opportunities for students locally in Pickaway County and across the State of Ohio.

If developed, this project will be a positive addition to Ohio's energy economy, and will allow green power to be used within the State of Ohio. Further, as PJM testified recently we might face an energy shortfall by the end of the decade. This project, like others, will allow Ohio to attract investment from Fortune 500 companies, and meet that demand.

Sincerely,

Jim Hoops

Rep. Jim Hoops
Ohio House of Representatives
81st House District

Ohio Revised Code

Section 303.61 Public meeting before power siting board application for certificate or amendment.

Effective: October 11, 2021
Legislation: Senate Bill 52 - 134th General Assembly

(A) At least ninety days, but not more than three hundred days, prior to applying for a certificate from the power siting board, or a material amendment to an existing certificate, for a utility facility, to be located in whole or in part in the unincorporated area of a county, the person intending to apply shall hold a public meeting in each county where the utility facility is to be located.

(B) The applicant shall provide written notice of the public meeting to the board of county commissioners of the county, as well as the boards of trustees of every township in which the utility facility is to be located within that county. Notice shall be provided at least fourteen days prior to the meeting.

(C) At the public meeting, the applicant shall provide the following information:

(1) The person intending to apply for a certificate shall provide the following information to the board of county commissioners:

(a) Whether the utility facility will be:

(i) A large wind farm;

(ii) An economically significant wind farm; or

(iii) A large solar facility.

(b) The maximum nameplate capacity of the utility facility;

(c) A map of the proposed geographic boundaries of the project within that county.

(2) The person intending to apply for a material amendment that makes any change or modification to an existing certificate shall comply with the requirements of this section when providing information regarding that change or modification to the board of county commissioners.

(3) All of the information described in divisions (C)(1) and (2) of this section shall be submitted to the board of county commissioners in written form.

Ohio Revised Code

Section 4903.13 Reversal of final order - notice of appeal.

Effective: October 1, 1953
Legislation: House Bill 1 - 100th General Assembly

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Ohio Revised Code

Section 4906.01 Power siting definitions.

Effective: October 11, 2021
Legislation: Senate Bill 52

As used in Chapter 4906. of the Revised Code:

(A) "Person" means an individual, corporation, business trust, association, estate, trust, or partnership or any officer, board, commission, department, division, or bureau of the state or a political subdivision of the state, or any other entity.

(B)(1) "Major utility facility" means:

(a) Electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more;

(b) An electric transmission line and associated facilities of a design capacity of one hundred kilovolts or more;

(c) A gas pipeline that is greater than five hundred feet in length, and its associated facilities, is more than nine inches in outside diameter and is designed for transporting gas at a maximum allowable operating pressure in excess of one hundred twenty-five pounds per square inch.

(2) "Major utility facility" does not include any of the following:

(a) Gas transmission lines over which an agency of the United States has exclusive jurisdiction;

(b) Any solid waste facilities as defined in section 6123.01 of the Revised Code;

(c) Electric distributing lines and associated facilities as defined by the power siting board;

(d) Any manufacturing facility that creates byproducts that may be used in the generation of electricity as defined by the power siting board;

(e) Gathering lines, gas gathering pipelines, and processing plant gas stub pipelines as those terms are defined in section 4905.90 of the Revised Code and associated facilities;

(f) Any gas processing plant as defined in section 4905.90 of the Revised Code;

(g) Natural gas liquids finished product pipelines;

(h) Pipelines from a gas processing plant as defined in section 4905.90 of the Revised Code to a natural gas liquids fractionation plant, including a raw natural gas liquids pipeline, or to an interstate or intrastate gas pipeline;

(i) Any natural gas liquids fractionation plant;

(j) A production operation as defined in section 1509.01 of the Revised Code, including all pipelines upstream of any gathering lines;

(k) Any compressor stations used by the following:

(i) A gathering line, a gas gathering pipeline, a processing plant gas stub pipeline, or a gas processing plant as those terms are defined in section 4905.90 of the Revised Code;

(ii) A natural gas liquids finished product pipeline, a natural gas liquids fractionation plant, or any pipeline upstream of a natural gas liquids fractionation plant; or

(iii) A production operation as defined in section 1509.01 of the Revised Code.

(C) "Commence to construct" means any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route of a major utility facility, but does not include surveying changes needed for temporary use of sites or routes for nonutility purposes, or uses in securing geological data, including necessary borings to ascertain foundation conditions.

(D) "Certificate" means a certificate of environmental compatibility and public need issued by the

power siting board under section 4906.10 of the Revised Code or a construction certificate issued by the board under rules adopted under division (E) or (F) of section 4906.03 of the Revised Code.

(E) "Gas" means natural gas, flammable gas, or gas that is toxic or corrosive.

(F) "Natural gas liquids finished product pipeline" means a pipeline that carries finished product natural gas liquids to the inlet of an interstate or intrastate finished product natural gas liquid transmission pipeline, rail loading facility, or other petrochemical or refinery facility.

(G) "Large solar facility" means an electric generating plant that consists of solar panels and associated facilities with a single interconnection to the electrical grid that is a major utility facility.

(H) "Large wind farm" means an electric generating plant that consists of wind turbines and associated facilities with a single interconnection to the electrical grid that is a major utility facility.

(I) "Natural gas liquids fractionation plant" means a facility that takes a feed of raw natural gas liquids and produces finished product natural gas liquids.

(J) "Raw natural gas" means hydrocarbons that are produced in a gaseous state from gas wells and that generally include methane, ethane, propane, butanes, pentanes, hexanes, heptanes, octanes, nonanes, and decanes, plus other naturally occurring impurities like water, carbon dioxide, hydrogen sulfide, nitrogen, oxygen, and helium.

(K) "Raw natural gas liquids" means naturally occurring hydrocarbons contained in raw natural gas that are extracted in a gas processing plant and liquefied and generally include mixtures of ethane, propane, butanes, and natural gasoline.

(L) "Finished product natural gas liquids" means an individual finished product produced by a natural gas liquids fractionation plant as a liquid that meets the specifications for commercial products as defined by the gas processors association. Those products include ethane, propane, iso-butane, normal butane, and natural gasoline.

Ohio Revised Code

Section 4906.02 Power siting board organization.

Effective: October 11, 2021
Legislation: House Bill 110, Senate Bill 52

(A)(1) There is hereby created within the public utilities commission the power siting board, composed of the chairperson of the public utilities commission, the director of environmental protection, the director of health, the director of development, the director of natural resources, the director of agriculture, and a representative of the public who shall be an engineer and shall be appointed by the governor, from a list of three nominees submitted to the governor by the office of the consumers' counsel, with the advice and consent of the senate and shall serve for a term of four years. The chairperson of the public utilities commission shall be chairperson of the board and its chief executive officer. The chairperson shall designate one of the voting members of the board to act as vice-chairperson who shall possess during the absence or disability of the chairperson all of the powers of the chairperson. All hearings, studies, and consideration of applications for certificates shall be conducted by the board or representatives of its members.

In addition, the board shall include four legislative members who may participate fully in all the board's deliberations and activities except that they shall serve as nonvoting members. The speaker of the house of representatives shall appoint one legislative member, and the president of the senate and minority leader of each house shall each appoint one legislative member. Each such legislative leader shall designate an alternate to attend meetings of the board when the regular legislative member appointed by the legislative leader is unable to attend. Each legislative member and alternate shall serve for the duration of the elected term that the legislative member is serving at the time of appointment. A quorum of the board is a majority of its voting members.

The representative of the public and, notwithstanding section 101.26 of the Revised Code, legislative members of the board or their designated alternates, when engaged in their duties as members of the board, shall be paid at the per diem rate of step 1, pay range 32, under schedule B of section 124.15 of the Revised Code and shall be reimbursed for the actual and necessary expenses they incur in the discharge of their official duties.

(2) In all cases involving an application for a certificate or a material amendment to an existing

certificate for a utility facility, as defined in section 303.57 of the Revised Code, the board shall include two voting ad hoc members, as described in section 4906.021 of the Revised Code.

(B) The chairperson shall keep a complete record of all proceedings of the board, issue all necessary process, writs, warrants, and notices, keep all books, maps, documents, and papers ordered filed by the board, conduct investigations pursuant to section 4906.07 of the Revised Code, and perform such other duties as the board may prescribe.

(C) The chairperson of the public utilities commission may assign or transfer duties among the commission's staff. However, the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.

(D)(1) The chairperson may call to the chairperson's assistance, temporarily, any employee of the environmental protection agency, the department of natural resources, the department of agriculture, the department of health, or the department of development, for the purpose of making studies, conducting hearings, investigating applications, or preparing any report required or authorized under this chapter. Such employees shall not receive any additional compensation over that which they receive from the agency by which they are employed, but they shall be reimbursed for their actual and necessary expenses incurred while working under the direction of the chairperson. All contracts for special services are subject to the approval of the chairperson.

(2) Subject to controlling board approval, the board may contract for the services of any expert or analyst, other than an employee described in division (D)(1) of this section, for the purposes of carrying out the board's powers and duties as described in Chapter 4906. of the Revised Code. Any such expert or analyst shall be compensated from the application fee, or if necessary, supplemental application fees assessed in accordance with division (F) of section 4906.06 of the Revised Code.

(E) The board's offices shall be located in those of the public utilities commission.

The Legislative Service Commission presents the text of this section as a composite of the section as amended by multiple acts of the General Assembly. This presentation recognizes the principle stated in R.C. 1.52(B) that amendments are to be harmonized if reasonably capable of simultaneous operation.

Ohio Revised Code

Section 4906.07 Public hearing on application.

Effective: September 10, 2012
Legislation: Senate Bill 315 - 129th General Assembly

(A) Upon the receipt of an application complying with section 4906.06 of the Revised Code, the power siting board shall promptly fix a date for a public hearing thereon, not less than sixty nor more than ninety days after such receipt, and shall conclude the proceeding as expeditiously as practicable.

(B) On an application for an amendment of a certificate, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

(C) The chairperson of the power siting board shall cause each application filed with the board to be investigated and shall, not less than fifteen days prior to the date any application is set for hearing submit a written report to the board and to the applicant. A copy of such report shall be made available to any person upon request. Such report shall set forth the nature of the investigation, and shall contain recommended findings with regard to division (A) of section 4906.10 of the Revised Code and shall become part of the record and served upon all parties to the proceeding.

Ohio Revised Code

Section 4906.08 Parties - testimony.

Effective: April 7, 2004
Legislation: House Bill 133 - 125th General Assembly

(A) The parties to a certification proceeding shall include:

(1) The applicant;

(2) Each person entitled to receive service of a copy of the application under division (B) of section 4906.06 of the Revised Code, if the person has filed with the power siting board a notice of intervention as a party, within thirty days after the date the person was served with a copy of the application;

(3) Any person residing in a municipal corporation or county entitled to receive service of a copy of the application under division (B) of section 4906.06 of the Revised Code and any other person, if the person has petitioned the board for leave to intervene as a party within thirty days after the date of publication of the notice required by division (C) of section 4906.06 of the Revised Code, and if that petition has been granted by the board for good cause shown.

(B) The board, in extraordinary circumstances for good cause shown, may grant a petition, for leave to intervene as a party to participate in subsequent phases of the proceeding, that is filed by a person identified in division (A)(2) or (3) of this section that failed to file a timely notice of intervention or petition for leave to intervene, as the case may be.

(C) The board shall accept written or oral testimony from any person at the public hearing, but the right to call and examine witnesses shall be reserved for parties. However, the board may adopt rules to exclude repetitive, immaterial, or irrelevant testimony.

Ohio Revised Code

Section 4906.10 Basis for decision granting or denying certificate.

Effective: October 11, 2021
Legislation: Senate Bill 52

(A) The power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be subject to sections 4906.101, 4906.102, and 4906.103 of the Revised Code and conditioned upon the facility being in compliance with standards and rules adopted under section 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code. An applicant may withdraw an application if the board grants a certificate on terms, conditions, or modifications other than those proposed by the applicant in the application.

The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless 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, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that 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;

(5) 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.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

(B) If the board determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon that modification, provided that the municipal corporations and counties, and persons residing therein, affected by the modification shall have been given reasonable notice thereof.

(C) A copy of the decision and any opinion issued therewith shall be served upon each party.

Ohio Revised Code

Section 4906.12 Procedures of public utilities commission to be followed.

Effective: November 15, 1981

Legislation: House Bill 694 - 114th General Assembly

Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.

Ohio Revised Code

Section 4906.13 No local jurisdiction.

Effective: October 22, 2019
Legislation: House Bill 6 - 133rd General Assembly

(A) As used in this section and sections 4906.20 and 4906.98 of the Revised Code, "economically significant wind farm" means wind turbines and associated facilities with a single interconnection to the electrical grid and designed for, or capable of, operation at an aggregate capacity of five or more megawatts but less than fifty megawatts. The term excludes any such wind farm in operation on June 24, 2008. The term also excludes one or more wind turbines and associated facilities that are primarily dedicated to providing electricity to a single customer at a single location and that are designed for, or capable of, operation at an aggregate capacity of less than twenty megawatts, as measured at the customer's point of interconnection to the electrical grid.

(B) No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906. of the Revised Code. Nothing herein shall prevent the application of state laws for the protection of employees engaged in the construction of such facility or wind farm nor of municipal regulations that do not pertain to the location or design of, or pollution control and abatement standards for, a major utility facility or economically significant wind farm for which a certificate has been granted under this chapter.

Ohio Administrative Code

Rule 4906-2-09 Hearings.

Effective: December 11, 2015

(A) Unless otherwise ordered, all hearings shall be held at the principal office of the board. However, where practicable, the board shall schedule a session of the hearing for the purpose of taking public testimony in the vicinity of the project. Reasonable notice of each hearing shall be provided to all parties.

(B) The administrative law judge shall regulate the course of the hearing and conduct of the participants. Unless otherwise provided by law, the administrative law judge may without limitation:

(1) Administer oaths and affirmations.

(2) Determine the order in which the parties shall present testimony and the order in which witnesses shall be examined.

(3) Issue subpoenas.

(4) Rule on objections, procedural motions, and other procedural matters.

(5) Examine witnesses.

(6) Grant continuances.

(7) Require expert or factual testimony to be offered in board proceedings to be reduced to writing, filed with the board, and served upon all parties and the staff prior to the time such testimony is to be offered and according to a schedule to be set by the administrative law judge.

(8) Take such actions as are necessary to:

(a) Avoid unnecessary delay.

(b) Prevent the presentation of irrelevant or cumulative evidence.

(c) Prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The administrative law judge may, upon motion of any party, direct that a portion of the hearing be conducted in camera and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information or confidential research, development, or commercial materials and information. The party requesting such protection shall have the burden of establishing that such protection is required.

(d) Assure the hearing proceeds in an orderly and expeditious manner.

(C) Members of the public to offer testimony may be sworn in or affirmed at the portion or session of the hearing designated for the taking of public testimony.

(D) Formal exceptions to rulings or orders of the administrative law judge are unnecessary if, at the time any ruling or order is made, the party makes known the action which he or she desires the presiding hearing officer to take, or his or her objection to action which has been taken and the basis for that objection.

Ohio Administrative Code

Rule 4906-3-09 Public notice of accepted, complete applications.

Effective: December 11, 2015

(A) After filing an accepted, complete application with the board, the applicant shall give two notices of the proposed utility facility.

(1) The initial notice shall be a written notice to those persons that received service of a copy of the application pursuant to rule 4906-3-07 of the Administrative Code and each owner of a property crossed and/or adjacent to the preferred and alternative routes for transmission lines and/or a new generation site within fifteen days of the filing of the accepted, complete application and shall contain the following information:

(a) The name and a brief description of the proposed facility, including type and capacity.

(b) A map showing the location and general layout of the proposed facility.

(c) A list of officials served with copies of the accepted, complete application pursuant to rule 4906-3-07 of the Administrative Code.

(d) A list of public libraries that were sent paper copies or notices of availability of the accepted, complete application, and other readily accessible locations (including the applicant's website and the website, mailing address, and telephone number of the board) where copies of the accepted, complete application are available for public inspection.

(e) A statement, including the assigned docket number, that an application for a certificate to construct, operate, and maintain said facility is now pending before the board.

(f) A statement setting forth the eight criteria listed in division (A) of section 4906.10 of the Revised Code used by the board to review an application.

(g) Section 4906.07 of the Revised Code, including the time and place of the public and adjudicatory

hearings.

(h) Division (C) of section 4906.08 of the Revised Code, including the deadline for filing a notice of intervention or petition for leave to intervene as established by the board or administrative law judge.

(2) The second public notice shall be a written notice to those persons that received the initial notice pursuant to paragraph (A)(1) of this rule and shall be published in newspapers of general circulation in those municipal corporations and counties in which the chief executive received service of a copy of the application pursuant to rule 4906-3-07 of the Administrative Code at least seven days but no more than twenty-one days before the public hearing. The notice shall be published with letters not less than ten-point type, shall bear the heading "Notice of Proposed Major Utility Facility" in bold type not less than one-fourth inch high or thirty-point type and shall contain the following information:

(a) The name and a brief description of the project.

(b) A map showing the location and general layout of the proposed facility.

(c) A statement, including the assigned docket number that an application for a certificate to construct, operate, and maintain said facility is now pending before the board.

(d) The date, time, and location of the public and adjudicatory hearings.

(e) A statement that the public will be given an opportunity to comment on the proposed facility.

(f) A reference to the date of the first public notice.

(B) Inability or inadvertent failure to notify the persons or publish the notice described in this rule shall not constitute a failure to give public notice, provided substantial compliance with these requirements is met.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Merit Brief was served upon the parties of record this 20th day of October 2023 via electronic transmission.

/s/ Kara Hernstein
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