

Case No. 2023-1011

In the Supreme Court of Ohio

On Appeal from
The Ohio Power Siting Board
Case No. 20-1605-EL-BGN

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

**BRIEF OF AMICUS CURIAE,
NATURAL RESOURCES DEFENSE COUNCIL
AND INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 32, IN
SUPPORT OF THE POSITION OF APPELLANT
BIRCH SOLAR 1, LLC**

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Amicus curiae the International Brotherhood of Electrical Workers Local Union 32 (IBEW Local 32) and the Natural Resources Defense Council (NRDC) support Appellant Birch Solar in seeking to reverse the Ohio Power Siting Board (“Board”)’s denial of certification. IBEW Local 32 and NRDC write separately to emphasize three ways that the Board erred when deciding that “given the universal opposition from local governments and residents,” the Birch Solar Project (“Project”) was not in the “public interest.” ICN 136, Order on Rehearing (June 15, 2023) ¶ 20.

One, opposition was not at all “universal.” Hundreds of signatories to public testimony, nearly one hundred public commenters, and many witnesses advocated for the Project, and for good reason—the Project will bring nearly a thousand jobs, tens of millions of dollars in payments to the local community, and more energy production to Ohio, and will reduce the need for polluting forms of energy. The only intervenors who submitted briefs to the Board after the hearing supported the Project. They were amicus IBEW Local 32 and Allen Auglaize Coalition for Reasonable Energy (the Coalition), a local citizen group, which is submitting another amicus brief. The only local group opposed to the project and all the residents who had intervened withdrew their opposition before the Board’s decision. The Board’s understanding that opposition was “universal” shows a clear misapprehension of the record.

Two, the Board never even assessed whether there would be any potential negative impacts to the public before deciding that the Project was not in the “public interest.” The Board must evaluate the “public interest” by “balancing the facility’s projected benefits with the potential negative impacts.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶ 55. But the Board did not conduct any balancing of positive and negative impacts before deciding this Project did not serve the public interest. Instead, the

Board counted statements of local opposition, and then concluded that given the (incorrect) number of statements, the Project would not serve the public interest. Not once in its summary of those statements did the Board evaluate any evidence of potential negative effects. This new method of evaluating the “public interest” is not a faithful construction of the statutory term, and for this error, the Board’s decision should be reversed.

Three, the Board unreasonably concluded that the project would not serve the public interest—while acknowledging that the Project would bring significant economic investment and job opportunities and would generate clean electricity to fuel further economic growth, and safeguard against unhealthy air pollution. Even considering the local opposition, whose concerns the Board failed to evaluate, there is little to no evidence of negative impacts to the local communities. Their concerns are either contradicted by undisputed evidence in the record or fully addressed by conditions on certification to which Birch Solar has already agreed. Denying certification would deprive the public of the valuable benefits of the Project, while failing to prevent significant negative impacts.

INTERESTS OF AMICI CURIAE IBEW LOCAL UNION 32 and NRDC

IBEW Local 32 represents electrical workers across industries, including utilities. IBEW Local 32 covers west central Ohio, where it has nearly 300 members. In Allen and Auglaize counties, where this project will be located, IBEW Local 32 has over 200 members. IBEW Local 32 supports the proposed Birch Solar Project, which will bring substantial new investment to the area. ICN 102, List of Issues and Concerns for Cross-Examination (November 19, 2021). Birch Solar will employ nearly 1,000 workers to construct the facility, including skilled electrical workers, supporting lifelong careers in Ohio’s skilled building and construction trades. ICN 94, Staff Report (October 20, 2021) at 17. After construction is complete, the Project will sustain

dozens of long-term jobs, including for electrical workers, for ongoing maintenance and operations throughout its 35-year lifetime. *Id.* These jobs will bring significant earnings to workers on the Project, which will further stimulate economic activity in the area. And with well-paying and stable local jobs, IBEW members enliven their communities, volunteering as coaches for youth sports teams, acting as volunteer firefighters, and being present at home and with their families. The Project will further benefit the entire state of Ohio by training a skilled workforce capable of constructing solar and energy storage facilities, which will in turn attract greater investment to the state. For all of these reasons, IBEW Local 32 intervened in support of Birch Solar during Board proceedings, filed briefs after the Board hearing, and submitted a petition for rehearing of the Board's initial denial.

NRDC is an international non-profit environmental and public health membership organization with hundreds of thousands of members. In the Midwest, NRDC's team advocates for clean energy, quality clean energy jobs and healthy communities, including in Ohio. For over a decade, NRDC has worked with partners to build the clean energy economy in Ohio. NRDC has 7,551 members in Ohio, of which 35 live in Allen and Auglaize counties. A major part of NRDC's work is advocating for affordable and equitable solutions to meeting U.S. climate goals and ensuring the rights of all people to clean air and healthy communities. The United States must quickly build more clean energy sources to meet its goals, to stay economically competitive and become more energy independent. NRDC supports smart renewable energy projects that benefit the climate, communities, and nature, and NRDC's affiliate E2 tracks the number of jobs, total investment, and capacity of clean energy projects in each state, including Ohio. The Birch Solar Project is a beneficial project that will provide clean energy sufficient to meet the demands of over 50,000 homes; will fund approximately \$2 to \$3 million per year of payments in lieu of

taxes to the local community; and will safeguard the land until decommissioning, when Birch Solar has agreed that it will be restored and returned to agricultural use. ICN Test., Chappell-Dick (May 11, 2022), Ex. A, Michaud, G. et al., *Measuring the Economic Impacts of Utility-Scale Solar in Ohio*, p. 22; ICN Test., Dohoney (May 4, 2022) 15:6-9; ICN 94, Staff Report (October 20, 2021) at 18. NRDC accordingly supports Birch Solar in seeking approval for this Project. NRDC is also concerned that allowing the Board’s unprecedented and unreasonable decision on Birch Solar to stand will prevent the development of other well-planned renewable energy projects in Ohio.

BACKGROUND

I. Fact Background

Amici incorporate Appellant Birch Solar’s statement of facts.

II. Legal Background

The Board must evaluate eight factors based on the record when considering whether to approve a utility project: “the need for the facility”; the “nature of the probable environmental impact”; whether the project would impose “the minimum adverse environmental impact”; whether the project would “serve the interests of electric system economy and reliability”; compliance with other state laws; “what its impact will be on the viability” of certain agricultural land; whether the project “incorporates maximum feasible water conservation practices”; and whether the project will serve “the public interest, convenience, and necessity.” R.C. 4906.10(A). The Board must “find[] and determine[]” that each of one these factors has been fulfilled before granting certification. *Id.* The Board may also condition certification upon modification. *Id.* § 4906.10(B).

STANDARD OF REVIEW

When reviewing Board orders, the Court reviews questions of law de novo, without according the Board any deference. *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶ 12 (citing *In TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, --- Ohio St.3d ----, 2022-Ohio-4677, --- N.E.3d ----, ¶ 3. Questions of law include “questions like what is the proper interpretation of a statutory term, or whether the board followed the procedures prescribed by statute.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶ 12 (citations omitted).

If the Board’s decision rests on an “open-textured” term like “public interest,” the Court considers whether the Board’s “exercise of its implementation authority” falls “within the zone of permissible statutory construction.” *Id.* ¶ 15 For example, the Court concluded that in evaluating the “public interest,” the Board did not exceed its statutory authority by considering a “facility’s impact on current and potential recreational areas.” *Ohio Edison Co. v. Power Siting Comm’n*, 56 Ohio St. 2d 212, 214, 383 N.E.2d 588 (1978)). More recently, the Court reviewed the Board’s “exercise of its implementation authority” in determining “whether a facility represents the ‘minimum adverse environmental impact,’” again by “looking to whether the agency’s decision falls within a zone of permissible statutory construction.” *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶ 16 (citation omitted).

For questions of fact, the Court considers whether “the record contains sufficient probative evidence to show that the board’s decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7. If the Board’s order is “internally inconsistent,” then the

Board’s decision was “unreasonable.” *In re Application of Firelands Wind, L.L.C.*, , --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶ 16.

ARGUMENT

- I. Proposition of Law No. 1: When the Board’s conclusion is “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty,” the Court will reverse the Board’s decision. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7.**

The Board clearly misapprehended the record to find that the Project was met with “universal opposition” by “local governments and residents,” ICN 136, Order on Rehearing (June 15, 2023) ¶ 20, when the Project was supported by IBEW Local 32, which has over 200 members in the local community; the Coalition; hundreds of signatories appended to the Coalition’s testimony in support of the project; and many witnesses who offered testimony to the Board. Because the Board’s conclusion that the Project did not serve the public interest was based solely on “universal opposition,” and because the record clearly establishes that the Project was not universally opposed, but widely supported, the Board’s decision should be reversed.

- A. IBEW Local 32 supported the Project because of its overwhelmingly positive economic impacts.**

IBEW Local 32 was one of only two intervenors to submit a brief following the Board’s hearing. The union intervened early in the proceedings, urging the Board to certify the Project. As the union noted, the Project would provide nearly a thousand construction jobs and dozens of operations jobs, jobs that could go to union members. ICN 120, IBEW Initial Post-Hearing Br. (July 15, 2022) at 8 (citing ICN 94, Staff Report (October 20, 2021) at 17). The undisputed evidence also established that the Project would generate for Ohio “\$57.4 - \$69.2 million in annual earnings during construction[.]. . . \$797,000-\$1.6 million in annual earnings during facility operations. . . \$68.4-\$84.6 million in local output during construction [and] . . . \$1.5 - \$3

million in local annual output during facility operation.” ICN 94, Staff Report (October 20, 2021) at 18. Additionally, Birch Solar would enter into an agreement projected to contribute between \$2.1-\$2.7 million annually in lieu of taxes to Allen and Auglaize counties. *Id.* All this investment in the local community compelled IBEW Local 32 to put the full weight of its substantial membership in support of the Project.

B. Hundreds of others supported the Project.

In addition to IBEW Local 32, the record includes a petition attached to the Coalition’s testimony, which is signed by over 250 local residents who support the Project. ICN Test., Wildermuth (May 11, 2022), Ex. A, Petition. These residents urged the Board to certify the Project, which would bring “more than \$80 million” of new revenue to Allen and Auglaize Counties, “reducing [their] tax burden, decreasing the need for levies, and creating local jobs while generating clean, pollution free electricity.” *Id.* They recognized that this revenue could “be used to provide maintenance for our roads, fire stations, community parks and other public services.” *Id.* This petition was subject to cross-examination, and there can be no dispute at this time that these 250 people supported the project. More than twenty people also submitted their own testimony in support of the project, recognizing similar benefits. And another approximately 90 public comments also supported the project. Though these public comments are not part of the record, they should have been considered by the Board as much as the negative comments were. It was “internally inconsistent” and “unreasonable” for the Board to consider only the negative comments without considering positive comments. *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶ 16 (citations omitted). The Coalition, the only other intervenor to submit a brief after the Board hearing, is submitting another amicus brief, which will further explain its support for the Project.

II. Proposition of Law No. 2: The Board’s implementation of a statutory term cannot fall outside “the zone of permissible statutory construction.” *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶ 15.

The Board must evaluate whether a proposed project serves “the public interest, convenience, and necessity.” R.C. 4906.10(A). This is an “evidentiary issue.” See *In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶ 70. In evaluating the “public interest,” the Board must consider evidence of impacts, not the quantity of opinions. Yet the Board here relied only on statements “opposition from local governments and residents,” without examining whether those opinions were based on any underlying evidence of negative impacts. ICN 136, Order on Rehearing (June 15, 2023) ¶ 6. Not once in its original order or in its order on rehearing did the Board cite any evidence of negative impacts. Because the Board did not consider whether the evidence shows that the project might negatively affect the people who articulated their opposition, the Board could not and did not weigh negative impacts against benefits. This unprecedented method of evaluating the “public interest” fell outside “the zone of permissible statutory construction,” and the Board’s decision must be reversed. *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----, ¶ 15.

A. To evaluate “public interest,” the Board must consider evidence of public impacts.

To fulfill its mandate to evaluate the public interest, the Board “balanc[es] the facility’s projected benefits with the potential negative impacts.” *Id.* ¶ 55. It is not uncommon for neighbors to dislike proposed projects. In prior cases challenging Board decisions on the public interest, neither the Board nor this Court considered how many people voiced their opinions against the project. Instead, the Board and this Court considered whether the challengers had

presented sufficient evidence of negative impacts to establish that the project was against the public interest.

For example, when two surrounding cities and a local opposition group appealed the Board's certification of a natural gas pipeline, the Court did not consider the breadth of the opposition. Instead, the Court took a close look at the evidence presented by the appellants on safety hazards and determined that the record did not support their conclusion that the project was against the public interest. *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶¶ 48-58. Evidence of negative impacts was essential to the Court's decision, so much so that the Court distinguished another case in which appellants never had an opportunity to present the facts to the Board. *Id.* ¶¶ 55-56 (citing *In re Application of Middletown Coke Co.*, 127 Ohio St.3d 348, 2010-Ohio-5725, 939 N.E.2d 1210). Because the Board allowed the challengers to "build [their] factual case" against the natural gas pipeline and considered the evidence on safety hazards, the Court accepted the Board's conclusion on public interest. *Id.* ¶ 56.

Just recently, the Court considered an appeal brought by a group of neighbors to the Board's certification of two solar projects. *In re Application of Alamo Solar I, In re Application of Alamo Solar I*, --- Ohio St.3d ----, 2023-Ohio-3778, --- N.E.3d ----, ¶ 12. The appellants raised many arguments, including that the setbacks between the solar projects and neighboring land and homes were insufficient and would negatively affect them. *Id.* ¶ 69. Because the appellants "failed to present any evidence" that the setbacks were insufficient, the Court rejected their arguments. *Id.* ¶ 70.

Similarly, when neighboring residents, the surrounding county and three cities challenged the Board's certification of a wind farm on the basis of public interest, the Board, and later the

Court, considered challengers' evidence of negative impacts. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶¶ 30-33. The expressed concern was potential blade throw from wind turbines, and again the Court concluded that the evidence was not sufficient to reverse the Board's conclusion that the project was in the public interest. *Id.* ¶¶ 30-31.

Earlier this year, the Court considered another appeal of the Board's certification of a wind farm by neighbors, this time nineteen local residents and an observatory. *In re Application of Firelands Wind, L.L.C.*, --- Ohio St.3d ----, 2023-Ohio-2555, --- N.E.3d ----. Again, challengers asserted the project was against the public interest, this time on the basis of economic impact. *Id.* ¶¶ 54-58. An economic analysis showed that positive economic impacts outweighed negative economic impacts, the neighbors submitted no contrary analysis, and the Board determined that the project was in the public interest. ¶¶ 55, 58. The Court agreed that the evidence supported the Board's conclusion. *Id.*

In all cases, this Court reviewed whether the Board considered specific evidence of negative impacts and did so appropriately. In no case did the Board suggest that negative statements alone were evidence of negative impacts. Even in the two prior determinations the Board cites to support its argument that the Board considers statements of opposition, the Board considered whether the commenters presented any evidence of negative impacts, not just how many statements there were. ICN 136, Order on Rehearing (June 15, 2023) ¶ 20 (citing *In the Matter of the Application of Republic Wind, L.L.C. for A Certificate to Site Wind-Powered Elec. Generation Facilities in Seneca & Sandusky Ctys., Ohio*, OPSB No. 17-2295-EL-BGN, ¶¶ 87, 95, 100 (June 24, 2021) (finding that "Local Residents have set forth credible evidence" of negative impacts to the public interest); *In re Am. Transm. Systems, Inc.*, OPSB No. 19-1871-EL-

BTX, ¶ 58 (May 19, 2022) (considering whether the “evidence in the record” supported a determination that the facility served the public interest)). In fact, one former Chairman of the Board recognized that “passionately held views of one or more opponents of a project do not necessarily mean that the positions held by the developer are not reasonable, are without merit or incapable of being sustained by the Board,” and advised that the Board make its determinations based on the evidence. *In re Application of the Ohio State Univ. for a Certificate of Environmental Compatibility and Public Need to Construct a Combined Heat and Power Facility in Franklin County, Ohio*, OPSB No. 19-1641-EL-BGN, (Sept. 17, 2020) (Randazzo, S., concurring).

B. The Board impermissibly considered opinions, not impacts.

Here, the Board took a tack the Court has never seen or allowed before. Instead of considering whether the negative impacts alleged by local residents were substantiated and whether those impacts outweighed the benefits of the Project, the Board stopped after counting negative statements. The Board then assumed that because there were negative statements, the public interest would not be served by the Project. This assumption is fatally flawed. Negative statements may be based on misapprehensions, impermissible discrimination, or outright falsehoods. Unless the Board investigates the reasoning behind public statements and allows other parties to probe the statements via cross-examination, the Board cannot determine whether there are any potential negative impacts, or whether the challengers simply did not understand the project or the mitigation measures; exaggerated the project’s consequences; or just found it unsuited to their tastes. In another administrative context, the reviewing court warned against relying on “public opinion” instead of “direct evidence” because of the impossibility of

comparing “subjective” opinions. *Adelman Real Estate Co. v. Gabanic*, 109 Ohio App.3d 689, 694-695, 672 N.E.2d 1087 (11th Dist.1996).

If the Board listens to opinions alone, without probing for evidence of the negative impacts underlying those opinions, the Board cannot assess whether any negative impacts have been mitigated, or weigh them against the benefits, as it needs to do to assess whether the project serves the overall public interest. A neighbor who opposes a project because it will exacerbate her asthma is concerned about very different impacts than a neighbor who opposes a project because it is not pretty.

The Board’s new method of evaluating the public interest by considering negative public statements instead of any underlying evidence of negative impacts is not permissible as a matter of law. If allowed to stand, it will incentivize project opponents to spread misinformation so that more people will speak out against a project, no matter how beneficial. The legislature wisely prevented such gamesmanship by entrusting the Board to review the facts and accurately determine public impacts. This Court should not allow the Board to abandon its role and assume that opinions are facts. To do so would reduce the Court’s own role in judicial review. The Court would no longer review the evidence to determine whether the Board’s conclusions on public impacts are adequately supported, but only verify that the Board correctly tallied negative opinions. This Court is not a poll counter, and neither is the Board. The law demands more.

III. Proposition of Law No. 3 If the record does not “contain[] sufficient probative evidence to show that the board’s decision was not manifestly against the weight of the evidence,” the Court will reverse. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7. The Board’s conclusion that the project is against the public interest is manifestly contrary to the record.

The Board agrees that it must evaluate the public interest through a “broad lens.” ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 68. Had it actually done so, the Board could not have

found that the Project is against the public interest. The Project will bring sweeping benefits to the people of the state of Ohio and to the local community. In comparison, had the Board investigated the negative comments, it would have seen very little to substantiate concerns about any negative impacts. The comments ranged from confused to directly contrary to the Board's conclusions on the seven other statutory factors for certification to simply unsupported. The record does not support the Board's determination.

A. The “uncontroverted” evidence shows immense benefits to Ohio and the local community.

There is no dispute that this Project would significantly benefit Ohio. The Board acknowledged five comprehensive categories of benefits: “(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 [payment in lieu of taxes], (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.” ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 68.

In other words, this Project would not only create nearly a thousand jobs, tens of millions of dollars in economic growth, and additional tens of millions of dollars to fund payments to the local community, but it would also ensure that the electrical supply continues to sustain further economic growth. *See supra*, pp. 6-7 (detailing the tens of millions of dollars in economic growth and direct payments to the local community). The Project would generate this energy much more cleanly than fossil fuel alternatives, so that it will not inundate local communities with toxic air pollution or further contribute to climate change. And because this Project would allow some agricultural use simultaneously with solar operations and also return the land to agriculture following operation, the Project would preserve agricultural use.

In addition to these recognized benefits, there are several benefits implicit in the Board’s conclusion, based on the “uncontroverted” evidence, that the other seven statutory factors for certification had been established. ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 45. For example, the Project undisputedly serves “interests of electric system economy and reliability,” “incorporates maximum feasible water conservation practices,” and imposes “minimum adverse environmental impact.” R.C. § 4906.10(A).

B. There is little to no evidence of negative impacts.

The Board placed inordinate and unprecedented weight on unsubstantiated public comments, which do not reveal any significant negative impacts, and the vague statements of some surrounding government entities, even as other governments joined a stipulation imposing additional conditions on the Project and withdrew their opposition.

Public comments were top of mind to the Board in assessing the public interest, ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 70, but the Board did not examine whether the commenters that opposed the project had any legitimate concerns, were distinct individuals, or maintained their opposition. The docket shows that some commenters submitted multiple comments, up to eleven times. *See, e.g.*, Jim Thompson, Comments (Nov. 9, 2020); (Nov. 12, 2020); (Nov. 20, 2020); (Nov. 23, 2020); (Nov. 24, 2020); (Jan. 25, 2021); (May 7, 2021); (May 10, 2021); (May 13, 2021); (Aug. 12, 2021); Allyshia Kuhbander, Comment (Nov. 12, 2020); (Nov. 13, 2020); (Feb. 19, 2021); (Mar. 22, 2021) & Kyle Kuhbander, Comment (Nov. 13, 2020); (Nov. 23, 2020 7:54am); (Nov. 23, 2020 11:04am); (Nov. 23, 2020 11:57am); (Dec. 11, 2020). The most prolific commenters withdrew their opposition. *See* ICN 82, Notice of Kyle & Allyshia Kuhbander’s Withdrawal (Sept. 8, 2021) (stating that they have resolved their disagreements with Birch Solar); Jack A. Van Kley, Comment (Sept. 6, 2022) (noting that members of Against Birch

Solar, including James (Jim) W. Thompson III, “request that the Board disregard the inclusion of their names” on a list of residents opposed to the Project, which was submitted after the Joint Stipulation and the organization’s withdrawal from the case).

Moreover, the remaining public comments do not indicate any significant negative consequences to the Project. To the contrary, a sampling of the public comments demonstrates they are filled with misinformation and unjustified fears. For example, two commenters asked the Board to “look at the carnage produced by these fields of Chinese panels and Towering Avian killers” and “realize that they are not synonymous with nature’s goal.” Leslie and Shannon Kubinski, Comment (July 8, 2022). Another commenter suggested wildly that the Project site might be hot enough to “burn birds upon entry.” Rachelle Harmon, Comment (Nov. 17, 2021). While public comments can sometimes be informative and should be considered, the Board wisely announced a policy to put more weight on sworn testimony submitted to the record and subject to cross-examination. Board, *Public participation at the OPSB*, <https://opsb.ohio.gov/processes/public-participation> (accessed Oct. 20, 2023). The Board failed to adhere to this policy and placed more weight on the public comments than they can bear.

The other source of information that the Board considered in its public interest determination were statements by local governments, also submitted as public comments, not subject to cross-examination. The Board cites concerns from four government entities: Auglaize County, Logan Township, Shawnee Township, and Allen County. ICN 129, Opinion & Order (Oct. 20, 2022) ¶¶ 63-66. Both Auglaize County and Logan Township agreed to a stipulation imposing additional conditions on the project and withdrew their opposition. ICN 115, Joint Stip. (May 16, 2022) at 19. The stipulation states that those government entities “take **no position** on whether a certificate should be issued for the facility.” *Id.* (emphasis added). Thus, whatever

reasons Auglaize County and Logan Township initially had for opposing the Project, by signing the stipulation, they signaled that they no longer stand by those objections. The Board notes that Auglaize County passed a second resolution restricting future solar projects on April 26, 2022, but the Joint Stipulation, filed on May 16, 2022, post-dates that resolution. *Id.* Although both Auglaize County and Logan Township intervened, they never filed any briefs before the Board. The final position of both government entities was neutral.

As for the two remaining government entities, neither articulated any unmitigated negative impacts that would justify concluding that the project was contrary to their interests, much less the interests of the people of Ohio. Shawnee Township expressed its concern that “[p]rojects of this size are not suitable for areas abutting residential properties in any jurisdiction.” ICN Test., O’Dell (May 11, 2022) at 5:6-7; *see also* ICN 133, Shawnee Township Reply to Appl. for Reh’g (November 30, 2022) at 2 (“The primary concern of the opponents” is location because the site “would be very near to their homes.”). The Township has never explained why the location was not “suitable.” If the Township meant that the Project would negatively affect the residential character of the surrounding community, this concern is not based in fact. The Project will be built on agricultural land. ICN 94, Staff Report (October 20, 2021) at 12. Further, in assessing the Project’s environmental impact, the Staff found that “[s]ignificant impacts to residential... land uses are not anticipated, and surrounding agricultural land use would continue with minimal disruption.” *Id.* at 13. The Township never alleged that the health of its residents would suffer if the Project were built, and did not provide any evidence of any negative impacts to neighboring residents. The Board went on to find that the “record is uncontroverted” that the Project meets the statutory requirements regarding environmental impact. ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 45.

Allen County, which is home to Shawnee Township, also raised concerns, some co-signed by Shawnee. The Allen County Commissioners and the Shawnee Township Trustees submitted a letter stating that had the Project not been grandfathered in under SB52, it could not have been developed in the area proposed. ICN Test., O’Dell (May 11, 2022) 5:1-3; Allen County & Shawnee Township, Comment (June 7, 2022). That the Project was grandfathered does not in itself indicate that there were any negative impacts on the residents of Allen County.

The Board also noted that the Allen County Commissioners relayed that “‘many’ of the residents” had concerns about various issues. ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 63. Notably, the Commissioners did not relay any of the *support* expressed by Allen County residents, including IBEW Local 32 members, which have been described above. But even considering only the negative concerns raised by the Allen County Commissioners, had the Board examined these concerns, it would have found that each was either inconsistent with the record or statutory requirements, or completely resolved by conditions recommended by the Staff and agreed to by Birch Solar.

To take the eight concerns passed on by the Allen County Commissioners one by one, residents first expressed concern that the power generated by the facility would not benefit “local economic growth” because electricity would be “sold to the grid” and passed to other electricity consumers. Allen County, Comment (June 30, 2021) [hereinafter, Allen County Letter]. This concern is nonsensical because all projects certified by the Board must “serve[] the interest of electric system economy and reliability,” which the Board judges in part by whether they “are consistent with regional plans for the expansion of the electric power grid.” ICN 94, Staff Report (October 20, 2021) at 39-40. Increasing power to the grid benefits everyone who relies on electricity from the grid, including local residents. That is why the Board found that the Project

would serve “the public’s interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio.” ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 68.

The second concern was “impact on land use,” Allen County Letter, but, as explained above, the evidence shows that the Project will not have any significant negative impacts on land use. The third concern was “impact on property values.” *Id.* The only property value study in the record shows that there are no negative impacts to nearby property values, and the Staff found no errors in this study. ICN 94, Staff Report (October 20, 2021) at 46. Even still, Birch Solar committed to paying neighboring homeowners \$10,000 to \$50,000, depending on proximity, to compensate for any potential negative impact to home values, though none were anticipated. ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 47.

The fourth, fifth, sixth, and seventh concerns raised by the Allen County Commissioners were completely resolved by requirements or conditions recommended by the Staff, agreed to by Birch Solar in testimony following the Staff Report, and further agreed in the Joint Stipulation. ICN Test., Montana (May 2, 2021) at 5:11-6:2; ICN 115, Joint Stip. (May 16, 2022). The fourth concern was that the decommissioning plan was not bonded. Allen County Letter. The Staff Report and Joint Stipulation included a specific condition requiring a performance bond, which fully addresses this concern. ICN 94, Staff Report (October 20, 2021) at 57 ¶ 41; ICN 115, Joint Stip. (May 16, 2022) at 11 ¶ 38. The fifth concern was about groundwater contamination to private wells. Allen County Letter. The Staff found that “solar facilities are an unlikely potential source of contamination,” but even so required Birch Solar to adhere to the state setback requirement of 50 feet from private water supply wells, which the Staff determined was sufficient to prevent any unreasonable risk to public or private drinking water supplies. ICN 94, Staff Report (October 20, 2021) at 29. The sixth concern was that Birch Solar had not obtained a

road use agreement. Allen County Letter. The Staff Report and Joint Stipulation included a condition requiring road use agreements, which fully addresses this concern. ICN 94, Staff Report (October 20, 2021) at 54 ¶ 26; ICN 115, Joint Stip. (May 16, 2022) at 8 ¶ 25. The seventh concern was that the Project would cause drainage problems. Allen County Letter. The Staff Report and Joint Stipulation included a condition requiring Birch Solar to “ensure that nearby parcels are protected from unwanted drainage problems.” ICN 94, Staff Report (October 20, 2021) at 55 ¶ 31; ICN 115, Joint Stip. (May 16, 2022) at 10 ¶ 30. These requirements and conditions fully resolve these concerns.

Finally, the eighth and last concern was related to confusion about whether Birch Solar had entered into a Payment In Lieu Of Taxes (“PILOT”) agreement. Allen County Letter. Birch Solar has committed to applying for a PILOT agreement provided the Project is certified, the benefits of which are sufficiently certain that the Board found that the expected PILOT revenue would benefit the public. ICN Test., Montana (May 4, 2022) at 11:1-8; ICN 129, Opinion & Order (Oct. 20, 2022) ¶ 68.

C. The Board should have preserved the project’s benefits and addressed any remaining negative impacts by imposing conditions on the project.

To the extent the Court finds that there are any significant negative impacts, the Court should instruct the Board to impose conditions to mitigate those impacts and grant the certification. The Board has the power to and regularly imposes conditions to mitigate negative impacts. *See* R.C. § 4906.10(A); *In re Application of Duke Energy Ohio*, 166 Ohio St.3d 438, 450, 187 N.E.3d 472 (2021) (noting that the Board is “plainly empowered” to impose certificate conditions). Because the benefits of this Project are vast, the only reasonable path forward requires preserving those benefits and mitigating negative impacts so that on balance, the Project serves the public interest.

CONCLUSION

For the foregoing reasons, this Court should reverse the Board's denial of certification for the Birch Solar Project.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was severed via email on this 23rd day of

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