

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
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: On Appeal from The Ohio Power Siting Board Case No. 20-1605-EL-BGN
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BRIEF OF THE OHIO INDEPENDENT POWER PRODUCERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT BIRCH SOLAR 1, LLC

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I. STATEMENT OF INTEREST

Pursuant to S. Ct. Prac. R. 16.06, the Ohio Independent Power Producers (“OIPP”) submits this brief as *amicus curiae* in support of Appellant Birch Solar 1, LLC (“Birch”). The Ohio Power Siting Board (“OPSB”) denied Birch’s application to construct and operate a 300 MW solar facility in Allen and Auglaize counties (“Project”) solely on the basis of its determination that the Project did not satisfy the “public interest” under R.C. 4906.10(A)(6) because local governments opposed the land use.

Members of OIPP develop, construct, and operate new natural-gas-fired power plants, representing billions of dollars of new private investment in Ohio and thousands of megawatts (MW) of new, efficient, and reliable energy, powered by Ohio natural gas. The OIPP members include Oregon Clean Energy Center (900MW), Middletown Energy Center (475 MW), South Field Energy (1,100MW), Carroll County Energy (742 MW), Guernsey Power Station (1650 MW), and the Trumbull Energy Center 950 MW). These projects represent over \$10 billion in private capital investment in new generating facilities in Ohio. OIPP members provide critical baseload generation to Ohio consumers.

The OPSB’s decision in *Birch* erodes a fair and predictable permitting process upon which new investment in power generating facilities in Ohio relies. The OPSB’s refusal to certificate Birch Solar’s Project was premised on a single reason: opposition by local governments. Those local governments, however, did not offer any evidence in the record or present any witnesses in support for their arguments *contra* the Project’s being in the public interest. Other than local government opposition, the OPSB did not find any deficiencies with the Project for purposes of R.C. 4906.10(A). And even though the operative statutory scheme for the OPSB’s review of this Project does not give local governments the authority to restrict major utility facility development,

the OPSB did just that. In other words, simply the *existence* of local government opposition became outcome-determinative.

In delegating this kind of veto power to local governments, the OPSB disregarded the statutory purpose and framework of the state permitting framework. The OPSB also failed to “render a decision upon the record” as required by R.C. 4906.10(A). This precedent diminishes OIPP members’ confidence in Ohio’s energy regulatory environment and should be reversed by this Court.

II. STATEMENT OF FACTS

OIPP defers to and incorporates the statement of facts included in the merit brief of Appellant Birch Solar 1, LLC.

III. ARGUMENT

Proposition of Law: The OPSB acted unlawfully and unreasonably by deferring to local governments’ view for its determination that the Project will not serve the public interest, convenience, and necessity.

a. The OPSB’s arbitrary decision undermines critical energy infrastructure development that is required to ensure the security of the electric grid for all Ohioans.

In 1999, the Ohio General Assembly passed the Ohio Electric Restructuring Act, authorizing the restructuring of the electric industry in Ohio. Am. Sub. S.B. 3, 123rd General Assembly (Ohio 1999). This legislation, in part, unbundled the generation (or the supply) of electricity from regulated monopoly investor-owned utilities (“IOUs”) to the competitive market. Today, new power generation facilities in Ohio are developed, constructed, and operated by non-utility companies.

The development of new power generation facilities is a multi-year process, requiring significant investment of capital. Unlike capital spent by IOUs, which is ultimately collected from

captive ratepayers, generating facilities in Ohio are privately financed. Development risk placed entirely on these private companies and their investors – not captive ratepayers.

New investment in power generating facilities can bring multiple benefits to the local communities and regions where they locate. The benefits include jobs and increased tax revenues for local governments and schools. New facilities support the broader growth of new and diverse industries locating in Ohio through infrastructure improvements and the increased supply of clean and affordable energy.

Importantly, new investment in generating facilities is critical to ensure that the electric grid has adequate resources to maintain reliability. Recent testimony from a Commissioner of the Federal Energy Regulatory Commission to the U.S. Senate Energy and Natural Resources Committee stated the situation candidly:

[The power grid] is heading for a reliability crisis. I do not use the term “crisis” for melodrama, but because it is an accurate description of what we are facing. I think anyone would regard an increasing threat of system-wide, extensive power outages as a crisis.

Full Committee Hearing to Conduct Oversight of FERC, Before the Senate Committee on Energy & Natural Resources, 118th Cong. (2023) (Opening Statement of Mark C. Christie, Commissioner, Federal Energy Regulatory Commission).

Ohio is located within the PJM Interconnection regional transmission organization, the largest regional transmission system in the country in terms of customers. PJM has recently identified reliability concerns due to the ongoing retirement of older generating facilities and increases in demand. PJM Interconnection, *Energy Transition in PJM: Resource Retirements, Replacements & Risks*, <https://www.pjm.com/-/media/library/reports-notice/special-reports/2023/energy-transition-in-pjm-resource-retirements-replacements-and-risks.ashx> (accessed Oct. 12, 2023). Projections by PJM indicate that unless there is the quick integration of

new generating facilities, there may be insufficient resources to cover peak demand requirements.
Id.

Several factors can attract a developer and investment to a particular state or region, one being the predictability of the siting process. Adherence to statutory mandates is foundational for this predictability. For decades, the OPSB's siting process has encouraged electric generating facility investment in Ohio, including over \$10 billion in private investment in new power plants by OIPP members. The OPSB is staffed with capable technical experts who apply Ohio's rules for siting of large-scale generation facilities in a manner that is both demanding and fair. This includes ample opportunity for local input on potential projects.

The Ohio General Assembly defined the criteria by which the OPSB must base its decision when granting or denying a certificate application in R.C. 4906.10. Of these, the only criteria at issue in this case is whether the project is in the "public interest" under R.C. 4906.10(A)(6). In *Birch*, the OPSB deemed the local government opposition to land use for a major utility facility as dispositive for this determination. The Board's finding in that regard was unreasonable and unlawful because the inquiry under R.C. 4906.10(A)(6) does not turn on a project's local popularity.

The OPSB's decision in *Birch* thus erodes fairness and predictability in the permitting process upon which new investment in power generating facilities relies. (*See* Opinion & Order; Birch Solar Appx. 051.) Under the statutory framework in effect for the Board's review of this Project (*i.e.*, Senate Bill 52 does not apply), local governments did not have any authority to prohibit or restrict major utility facility development. Still, the OPSB denied Birch Solar's application for a single reason: opposition by local governments. (*Id.* at ¶ 72.; Birch Solar Appx. 071.) But local government preference is not the same as local impacts, which the OPSB should

be examining under the public interest criterion. The opposing local governments did not present any record evidence of negative local impacts from the Project. For that reason, the *Birch* decision undermines the legitimacy, statutory authority, and technical expertise of the OPSB. This in turn will discourage investment in new energy projects necessary to support grid stability and promote economic development.

It is noteworthy that the cost of simply getting a new generating facility application to submittal to the OPSB is often millions of dollars of at-risk development capital. These costs include securing property (site control), obtaining grid interconnection agreements, conducting a myriad of environmental analyses, and significant preliminary engineering and design. The OPSB's regulations demand high technical standards for applicants, requiring significant resources to prepare an application. In turn, applicants have traditionally been able to rely on a fair and evidence-based review of the proposed project.

The OPSB's decision to defer entirely to local government opposition when determining whether a project is in the public interest is an unlawful departure from precedent in cases where a project was opposed by the local government entity for land use/zoning/political reasons. Prior to *Birch*, the OPSB recognized that a project's benefits for reliability and electricity supply to the state, the public, and the grid outweigh local opposition for purposes of the "public interest" criterion in R.C. 4906.10(A). For example, in *In re Duke Energy Ohio*, the OPSB approved a project even though there were "thousands of comments from members of the general public, local organizations, and local officials" and unanimous opposing intervention from multiple local governments. *In re: Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Opinion and Order, at 82-83, 2019 OHIO PUC LEXIS 1497 (Nov. 21, 2019). Similarly, in *In re Champaign Wind*, the OPSB ruled that a project benefited the public even though all local governments actively opposed

the project. In that case, the OPSB correctly 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.” *In re: Application of Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Opinion and Certificate at 3, 2013 WL 2446463, May 28, 2013. The OPSB’s decision in *Birch* offered no basis or explanation for its departure from precedent whereby local opposition was weighed against the record evidence about the project. There was no operative change in statute or rulemaking to justify the OPSB’s conclusion that local opposition controlled the outcome. The *Birch* decision was thus unlawful and unreasonable.

b. The OPSB’s deference to local government opposition to the Project is contrary to the statutory purpose and processes of the siting board established by the Ohio General Assembly and as set forth in regulation.

The Ohio General Assembly granted the OPSB exclusive jurisdiction over “major utility facilities,” including power generating facilities with a capacity of 50 MW or greater. Chapter 4906 and associated promulgated rules establish an evidence-based siting process. This process includes Staff’s technical analysis of the application, intervention, discovery, hearings, and the opportunity to present witnesses and testimony, subject to cross examination. *See generally*, Ohio Adm.Code Chapter 4906-2. The OPSB’s decision in *Birch*, however, renders these parameters and procedures meaningless.

R.C. 4906.13 prohibits a “political subdivision of this state” from requiring “any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility . . . authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” The Ohio Supreme Court has succinctly noted that “power siting projects are exempt from local regulation.” *State ex rel. State Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 707.

The *Birch* decision fundamentally contradicts R.C. 4906.13. The OPSB bases its decision to deny the Birch Solar application solely on local government opposition. The local government opposition did not participate in the evidentiary hearing, nor present any record evidence raising a specific concern or technical issues about the project. They simply communicated their disapproval, without any supporting evidence of negative local impacts, and the OPSB deferred. This outcome gravely concerns OIPP members, given their interest in developing and operating OPSB-jurisdictional electric generating facilities.

The projects developed and operated by OIPP members are state of the art combined cycle natural gas power plants that provide widespread benefits to Ohio. The facilities provide gigawatts of efficient and reliable power to Ohio's grid. According to the Ohio EPA, "Ohio's generation mix is being positively influenced by shale gas, renewables and energy efficiency which is keeping costs low, as well as reducing emissions." New Source Performance Standards for Greenhouse Gas Emissions from New and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emissions Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, Docket ID No. EPA-HQ-OAR-2017-0355; Ohio EPA Comments Proposed CAA Section 111(d)CO₂ for EGUs. In those same comments, the Ohio EPA also noted that carbon dioxide emissions from electric generation dropped by 38% since 2005. Each new combined cycle facility employs hundreds of construction workers and injects tens of millions of dollars into the local economy. The new natural gas power plants developed and operated by OIPP members promote grid stability and increase the generation supply available to support broader economic growth for all Ohioans.

The public interest standard established in the OPSB's *Birch* decision means that all these local, regional, and statewide benefits enabled by investments in new generation could be

subverted by political pressure and preferences of local governments, even for projects to which Senate Bill 52 does not apply.

In practice, the OPSB's decision also renders the evidentiary and hearing process established by statute and in the OPSB's rules effectively meaningless. Through statute and rule, siting decisions must be based on evidence developed through a uniform process. This process includes OPSB Staff technical analysis of the application, intervention, discovery, hearings, and the opportunity to present witnesses and testimony, subject to cross examination.

The evidentiary record in *Birch* is voluminous and overwhelmingly demonstrates that the application met the criteria established in R.C. 4906.10. To build this record, Birch submitted extensive technical reports and studies, all of which were supported by multiple expert witnesses in the evidentiary hearing. The contents of the application and the supporting witnesses were all subject to cross examination. In contrast, of the opposing local governments relied upon by the Board, only some of them even intervened in the proceeding and none participated in the evidentiary hearing. The OPSB's decision is clearly against the manifest weight of the evidence and is unsupported by the evidence. *Monongahela Power Co. v. Pub. Util. Comm.*, 2004-Ohio-6896, ¶ 29.

In addition, the consequence of the OPSB's decision is to render the investigation, intervention, and evidentiary process for siting under R.C. 4906 and O.A.C. 4906 functionally meaningless. The OPSB's decision extinguishes any obligation for local government intervenors to support their arguments with record evidence.

To be clear, OIPP recognizes the value of local government input as to local impacts or conditions that should be taken into account by the OPSB. OIPP's objection to the OPSB's decision in *Birch* is not that local governments' input should be dismissed or that the OPSB should

approve every application presented to it. However, each application should be determined on the record established in the siting process, not unsupported opinion. If there is a compelling evidence-based concern with a proposed project that cannot be adequately addressed by modifications to the project or conditions to mitigate the concern, it is reasonable for the Board to deny the application. Compare, *In re Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Opinion and Order at ¶ 68 (June 24, 2021) (denying a wind facility application on the basis of concerns related to underground karst formations and their impacts to groundwater that could not be satisfactorily mitigated by permit conditions contrast Republic denial due to technical karst issues vs. Firelands where the karst could be mitigated) and *In re Fireland Winds, LLC*, Case No. 18-1607-EL-BGN, Opinion and Order ¶ 83 (June 24, 2021) (approving a wind facility application despite opposition concerns about karst formations because the impact could be mitigated by foundation grouting). The siting process established in R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906 is a rigorous process with multiple opportunities for stakeholders to raise concerns and for those concerns to be investigated. However, this is not the process on which the Board relied in reaching its conclusion in *Birch*.

Because this Project was not subject to local government referendum or restriction, the OPSB's decision to delegate veto power to local governments was unlawful and unreasonable under R.C. 4906.10 and 4906.13. *Birch* also invalidates the evidentiary process established in the OPSB's rules. Further, this Court's reversing the OPSB's *Birch* decision will signal to developers of new generation resources that regulatory predictability in Ohio is a priority as well as that the OPSB will be held to task under the law as it is written.

IV. CONCLUSION

For the foregoing reasons, OIPP respectfully requests that the Court reverse the OPSB's denial of *Birch's* Certificate of Environmental Compatibility and Public Need because the Opinion

and Order erodes a fair and predictable permitting process upon which new investment in power generating facilities in Ohio relies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae Brief in Support of Appellant Birch Solar 1, LLC was served upon the parties of record this 23rd day of October 2023 via electronic transmission.

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