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 Appeal from the Ohio Power Siting Board, Case No. 20-1605-EL-BGN

REPLY BRIEF ON BEHALF OF APPELLANT BIRCH SOLAR 1, LLC

BRICKER GRAYDON, LLP

Kara Herrnstein (0088520)
Dylan F. Borchers (0090690)
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Email: kherrnstein@brickergraydon.com
dborchers@brickergraydon.com

Counsel for Appellant
Birch Solar 1, LLC

David Yost (0056290)
Attorney General of Ohio

Stephen W. Funk (0058506)
Emily Anglewicz (0083129)
Roetzel & Andress, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
Telephone: (330) 849-6602
Facsimile: (330) 376-4577
30 East Broad Street, 26th Floor
Email: sfunk@ralaw.com
eanglewicz@ralaw.com

Outside Counsel for Appellee
Ohio Power Siting Board

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page Nos.

CASES

STATUTES

I. INTRODUCTION

> *"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," filed October 20, 2022, at ¶ 73; Appx. 71.)

The gist of the Appellee's brief is that the Ohio Power Siting Board ("OPSB" or "Board") denies that it improperly deferred to the opinion of local governments to the exclusion of everything else. However, while the Board states in its Order that it conducted a full evidentiary balancing analysis as mandated by the Ohio Legislature, in fact it simply allowed the opinion of a few local governments to outweigh everything else in the record combined. Appellee argues that, because the Board believes it applied the "broad lens" standard, the Court need not consider whether it did so or not.

The Board spends most of its brief, for the first time at any point in this case, relying on the testimony of project opponents from the local public hearing and arguing that the Court should not "reweigh" the evidence that the Birch Solar Project would negatively impact local concerns. Project opponents raised potential concerns regarding everything from decommissioning to local zoning to property value, and the Board argues now that the Court should consider those concerns in its own analysis. But the Board itself did not do so. The Board's Order does not rely upon a single one of the unsubstantiated local concerns now cited in Appellee's Brief. There is no valid reason for the Appellee's Brief to discuss them now.

The Court must review the Board's determination—not what the Board now claims to have determined, but what it *actually* determined. That is the purpose of an appeal and judicial review of agency action. This Court recently confirmed that, contrary to the Board's arguments here,

whether the Board believes it correctly applied the law or its regulations is not entitled to deference. That is the loud and clear message from *In re Application of Alamo Solar I, L.L.C.,* 2023-Ohio-3778, ¶¶12-14.

Whether or not opposition from local governments can trump *everything else* in the record in a state-wide siting process is a question of law for the Court. Does the public-interest determination required by R.C. 4906.10(A)(6) allow the Board to deny a large-scale generation project on private land simply because a local government opposes it? The answer, of course, always has been no. It remains so today.

As set forth in the Appellant's Brief and below, the Court should restore the state-wide siting process for these important projects, overturn the Board's Order and Order on Rehearing, and remand with instructions for the Board to exercise its independent judgment on behalf of Ohio and apart from local politics. Because there are *no* findings of negative impacts by the Board in the record, the Court should go further and direct the Board to approve the joint stipulation and grant Birch a certificate of environmental compatibility and public need.

II. LAW AND ARGUMENT

A. The Board's Order is Not Based on Factual Findings of Impacts to the Local Community, but Solely on the Opinions of Local Government Officials

Appellee spends much of its Brief reciting and quoting the testimony of project opponents from the local public hearing as evidence that the Project would negatively impact the local community. (Appellee Brief, 6-12; 29-36.) The Court should not "reweigh" this evidence, Appellee argues.

The problem is that the Board itself did not weigh evidence in the first place. None of the evidence from the local public hearing played any role in the Board's Order, and the Board did not find that the Project would have any of the negative impacts claimed by the opponents. Appellee

is now attempting to reframe this appeal as a dispute over the weight of adverse factual findings regarding the Project, even though the Board did not make any adverse factual findings. This is misdirection.

Specifically, Appellee's Brief repeatedly argues that opponents of the Project testified under oath at the local public hearing, which is a statutorily-required open forum for the public-at-large to express their concerns to the Board. (Appellee Brief, 6-12; 29-36.) To be sure, as is typical for public hearings, project and industry opponents gathered to testify that they feared property value diminution, failures with stormwater management, insufficient project decommissioning and maintenance, incompatibility with local zoning, sound and visual impacts, and impacts to wildlife and aquifers. (*Id*.) These are the concerns raised for every large development project, solar or not. Likewise, the Appellee's Brief points to the Project layout in the Application, suggesting it is "extraordinarily large" and "will not be located in an industrially-zoned area." (*Id.* at 6.) On this point, Appellant twice quotes a written statement from Shawnee Township Trustees that "[p]rojects of this size are not suitable for areas abutting residential properties in any jurisdiction." (*Id.* at 16, 21.)

The Board itself does not share any of these concerns and, for some, the law would not allow it to. The Board's Order does not identify a single substantive issue with the Project's layout, safety, aesthetics, or any other concern now quoted in the Appellee's Brief. ("Order" at ¶ 73; Appx. 071.) This is in keeping with the report and testimony of the Board's Staff, which found no technical or aesthetic concerns with the Project. (Staff Report of Investigation Recommending Denial of Certificate, filed October 20, 2021, "Staff Report"; Suppl. 176; Pre-filed Testimony of James S. O'Dell, filed May 11, 2022, at, 4:9-14; Suppl. 405.) Further, as this Court has ruled before, local zoning is preempted by the state siting process. R.C. 4906.13(B). *State ex rel. Ohio*

Edison Co. v. Parrott, 73 Ohio St.3d 705, 654 N.E.2d 106 (1995). None of these concerns factored into the Board's Order.

This was explicit from the Board. On rehearing, the Project asked the Board to reconsider any reliance on concerns raised in unsubstantiated local testimony, and the Board responded that it relied on "universal opposition from local governments and residents," not the content of that opposition. ("Order on Rehearing," filed June 15, 2023 at ¶¶ 20, 22; Appx. 116.) The Board explained that the "issue" supporting denial was the "manifest opposition to the proposed project." (*Id.* at ¶ 22; Appx 116.) The Board concluded that, despite having identified only positive impacts from the Project, it "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)." (*Id*. at ¶ 29, Appx. 120.) The Board's Staff reiterated this position in its briefing in another pending case: "[T]he Board has denied the applications of Birch Solar, Kingwood Solar, and Cepheus Energy projects *due to unanimous local government opposition*." *In re Fountain Point Solar, LCC*, Case No. 21-1231-EL-BGN, Reply Brief of Staff of Ohio Power Siting Board, filed October 16, 2023.

There is a reason why the evidence relied on in Appellee's Brief appeal is not reflected in the Board's Order. It would have been alarming if the Board or its Staff had found, for example, that a local resident's uncorroborated testimony regarding the Project's decommissioning plan—which is controlled by statute and must be approved by the Board prior to construction—was a valid reason to deny a project, as the Appellee's Brief seems to suggest now. *See* R.C. 4906.21 (statutory decommissioning plan for solar generation.) If the Board held that a local opponent's opinion on decommissioning negates the requirements of the law and the regulator's approval, there is no siting process left. Similarly, if the Board adopted the Shawnee Township Trustees'

position that solar projects should be banned, across the board and in every case, from areas near "residential properties in any jurisdiction," it would be required to deny many, if not all, of the projects in Ohio. Of course, the Board did neither of these things. The Appellee's Brief should not suggest that it did so now.

Another reason that the Board's Order did not rely on the local testimony now cited in the Appellee's Brief is that there is no evidence in the record substantiating that this testimony has any basis in fact. For example, Appellee cites a number of local residents who testified at the local public hearing that they were exclusively or primarily concerned about impacts to their residential property values. (Appellee's Brief, 9-10.) There is not a single piece of evidence in the record demonstrating that such an impact would exist. This Court has ruled that it is not enough for opponents to identify potential concerns, they must provide "credible evidence" substantiating these concerns. *In re Application of Firelands Wind, L.L.C.*, 2023-Ohio-2555. *See also In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 31 (ruling that the Board properly disregarded unreliable resident testimony regarding potential dangers of wind turbine incidents). This testimony was properly disregarded by the Board, and it should not be drug out now on appeal.

Further, as a final reason Appellee's argument must be rejected, Appellee does not accurately portray the record at the time of the Order.

- First, a number of the local public hearing testimonies highlighted by the Appellee are from landowners who intervened in the case but settled their opposition to the Project and withdrew. (Appellee Brief, at 15, discussing the Buzard family, the Fisher family, and Elen Wieging); (Local Public Hearing Tr. at 93:22, 256:11-12; 258:15-17, Supplemental Suppl. 001 (Identifying landowners as members of intervening group));

(Notice of Withdrawal, filed May 16, 2022, Suppl. 439.) These comments were resolved and should have no bearing

- Second, the initial "extraordinarily large" Project layout pointed to in Appellee's Brief is not the layout. (*Id.* at 6.) In response to feedback and requests from the community, the Project reduced the initial layout and increased its setbacks multiple times prior to the Board's Order. (*See, e.g.*, Initial Brief of Birch Solar 1, LLC in Support of the Joint Stipulation and Recommendation and Issuance of the Certificate at 18, filed July 15, 2022, Suppl. 545; Notice of Enhanced Commitment for Setbacks and Screening, filed October 19, 2022.)
- Third, Appellee insists that there was "universal" local government opposition to the Project because the Board of Commissioners of Auglaize County and the Board of Township Trustees of Logan Township were opposed to the Project, despite their stated neutrality. (Appellee Brief, at 17-18.) Both of those local governments filed an amicus brief in this case asking that their position in the Joint Stipulation be respected. (Amicus Brief of The Board of Commissioners, filed December 8, 2023; Joint Stipulation, filed May 16, 2022, Suppl. 442, taking "no position on whether a certificate should be issued for the facility.")
- There is not universal opposition to the Project from the public or the local governments. As set forth in the Appellant's Brief, the record below was not as one-sided as Appellee claims. Among others, the Project was actively supported by the Ohio Chamber of Commerce, the Lima/Allen County Chamber of Commerce, state legislators, and the local resident group Allen Auglaize Coalition for Reasonable

Energy ("AACRE"). This support is further reflected in the diverse amicus filings in this Court on behalf of the Project.

These misstatements aside, it is unclear why Appellee points to any of the negative local public hearing testimony or public comments now. These concerns were not accepted or relied upon by the Board in issuing its Order. The one and only reason the Board gave to determine that the Project fails to meet the public interest requirement was the existence of opposition from local governments. That is all that is before the Court.

B. Whichever Way Appellee Reframes the Board's Analysis Now, the Board Itself Admits that Local Opposition Was *All* That Mattered Here

R.C. 4906.10(A)(6) is clear in what it requires: the Board must make a determination "that the facility will serve the public interest, convenience, and necessity." The Board wants the Court to defer to its interpretation of what public interest means. (See, e.g., Appellee's Br. at 2-3.) That is, the Board would like to continue to apply its very new and very recent interpretation allowing local government opposition to "determine" the public interest. While the Board may want that level of deference, that is simply not what this Court does. The Court has made it clear that there is no requirement 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. The requirements to obtain a certificate of environmental compatibility and public need are set by the General Assembly, not the Board.

Here, the Board exceeds its authority. The Board contends that, because R.C. 4906 does not define "public interest," this means it is a policy judgment that requires this Court to defer. Not so. The public interest is not some abstract phrase that cannot be determined. As noted in Birch Solar's initial brief, public interest has long been defined and used as benefitting or protecting the common good and interest and is not so narrow as to mean solely the interest of those hyper-local

to the project. *See, e.g., 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) (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 particular localities, which may be affected by the matters in question.") Access to energy is, of course, a public good. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc*., 16-253-GA-BTX, at 82-83, November 21, 2019); (Order, Opinion, and Certificate, *In re Application of Champaign Wind*, LLC, 12-160-EL-BGN, at 3, May 28, 2013). More than that, it is a public necessity. Electricity is necessary for economic development, industry and agriculture to function, and day-to-day survival. (*See* various Amicus Curiae Briefs in Support of Appellant, filed October 23, 2023.) And Ohio, already, does not have enough. (Amicus Curiae Brief of Ohio Independent Power Producers, filed October 23, 2023) (explaining that Ohio relies on imports for up to one-fourth of its electricity needs).

Appellee next argues that the Board conducted a full evidentiary hearing balancing analysis as mandated by the Ohio Legislature. (*See, e.g.,* Appellee's Brief at 29.) It is simply that, Appellee concludes, that the balancing test gives the opinion of local governments more weight than everything else combined. (*Id*.) Furthermore, it did not cite any other reason for its decision, making local government opinion the sole factor in their public interest, convenience and necessity finding. As set forth above, while Appellee argues that their public interest, convenience and necessity determination relied on the "impacts on local residents who live nearby" (*Id.* at 30), it ignores that the Board did not identify a single *impact* on local residents—all it identified was *opposition*. If this is a "balancing" analysis, the Board's scale is broken. This singular focus on the

opinion of local government officials runs afoul of what the Board must determine by statute: the public interest, convenience, and necessity.

C. The Board Failed to Weigh the Evidence Before it At All

The Board argues that it properly weighed evidence when, in reality, it did not weigh anything at all. The Court has ruled that the Board's "decision is unreasonable when the evidence clearly does not support it." *In re Application of Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 16. Here, the Board itself has acknowledged that there was evidence of diverse public benefits on one side of the scale, and there was nothing but the existence of opposition from local governments on the other side. (Order on Rehearing. at ¶ 29, Appx. 120.) The Board points out "this court is not tasked with making any factual findings." We agree. This is not a dispute over the facts of the case, or re-weighing the evidence, as the Board claims—it is an issue of whether the Board followed the procedure laid out in the law in the first place.

The Board's Order did not even bother to make findings as to six of the seven required siting criteria under R.C. 4906(A), reasoning that these statutory criteria did not matter in light of the existence of local government opposition. (Order at ¶ 73; Appx. 072.). The Board determined that local government opposition existed and stopped its own analysis in its tracks.

Even if this is a "balancing" of evidence as the Board argues, it is unreasonable.

III. CONCLUSION

The Court should review what the Board *actually* determined in this case, which was to deny the Birch Solar Project solely on the basis of local government opposition.

The consequences of allowing this decision to stand are significant to the future of Ohio's siting and development. If local government opposition renders everything else before the Board irrelevant in a siting decision, there is no point to the General Assembly requirement for the Board to apply the statutory R.C. 4906(A) criteria. There is no point to R.C. 4906.13(B), which forbids

the Board from requiring local approval in siting decisions. There is no point to Ohio's constitutional prohibition against statutorily-empowered agencies like the Board delegating their exclusive decision-making authority to others. There is no point to SB52, enacted in 2021, which codified an official process for incorporating local government opinions into future solar projects and which specifically grandfathered existing projects like Birch. Indeed, if all that matters in a state-wide siting decision is whether the local governments approve or not, there is no point to the Board at all.

The Court should reverse the Board's order and remand for a rehearing consistent with Ohio law and apart from local politics. Alternatively, because there are *no* findings by the Board of negative impacts in the record, the Court should go further and direct the Board to approve the joint stipulation and grant Birch a certificate of environmental compatibility and public need.

Respectfully submitted,

/s/Kara Herrnstein

BRICKER GRAYDON LLP

Kara Herrnstein (0088520) *(Counsel of Record)*
Dylan F. Borchers (0090690)
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-Mail: kherrnstein@brickergraydon.com
dborchers@brickergraydon.com

Attorneys for Birch Solar 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Merit Brief was served upon the parties of record this 19th day of January 2024 via electronic transmission.

/s/ Kara Hernstein
Kara H. Herrnstein (0088520)

Stephen W. Funk (0058506)
Emily Anglewicz (0083129)
Roetzel & Andress, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
sfunk@ralaw.com
eanglewicz@ralaw.com

Outside Counsel for Appellee
Ohio Power Siting Board

James B. Hadden (0059315)
Murray Murphy Moul + Basil LLP
1114 Dublin Road
Columbus, OH 43215
hadden@mmmb.com

Counsel for Amicus Curiae,
American Clean Power Association,
MAREC Action, and Utility Scale Solar
Energy Coalition of Ohio

Karin Nordstrom (0096713),
Chris Tavenor (0096642),
Ohio Environmental Council
1145 Chesapeake Ave., Suite I
Columbus, OH 43212
knordstrom@theoeoc.org
ctavenor@theoec.org

Counsel for Amicus Curiae
Ohio Environmental Council

Terrence O'Donnell (0074213)
Manuel D. Cardona (0098079)
Dickinson Wright PLLC
180 East Broad Street, Suite 3400
Columbus, Ohio 43215
todonnell@dickinson-wright.com
mcardona@dickinson-wright.com

Counsel for Amicus Curiae,
Ohio Chamber of Commerce

Robert Dove (0092019)
65 East State Street, Suite 1800
Columbus, OH, 43215
rdove@keglerbrown.com

Counsel for Amicus Curiae
International Brotherhood of Electrical
Workers Local Union 32

Selena Kyle (008101)
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
skyle@nrdc.org

Counsel for Amicus Curiae
Natural Resources Defense Council

Devan K. Flahive (0097457)
Nelson Mullins Riley & Scarborough
1100 Superior Avenue, Suite 2000
Cleveland, Ohio 44114
devan.flahive@nelsonmullins.com

Counsel for Amicus Curie,
Ohio Independent Power Producers

Eric L. Christensen
Beveridge & Diamond PC
600 University Street, Suite 1601
Seattle, WA 98101
EChristensen@bdlaw.com
JReagan@bdlaw.com
AThompson@bdlaw.com

Counsel for Amicus Curiae
Allen Auglaize Coalition for Reasonable Energy

Kimberly W. Bojko (0069502)
Emma Y. Easley (0102144)
Carpenter Lipps LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
bojko@carpenterlipps.com
easley@carpenterlipps.com

Counsel for Amicus Curiae,
Ohio Manufacturers' Association Energy Group

Edwin A. Pierce (0023846)
Auglaize County Ohio Prosecutors Office
201 Willipie Street, Room 309
Wapakoneta, OH 45895
epierce@auglaizecounty.org

Attorney for Amicus Curiae
Board of County Commissioners of Auglaize County, Ohio and Board of Township Trustees of Logan Township, Auglaize County, Ohio

Jack A. Van Kley (0016961)
Van Kley Law, LLC
132 Northwoods Blvd., Suite C-1
Columbus, OH 43235
jvankley@vankley.law

Attorney for Amicus
Curiae Citizens for Greene Acres, Inc.

Daniel A. Brown (0041132)
Brown Law Office LLC
204 S. Ludlow St., Suite 300 Dayton, OH
dbrown@brownlawdayton.com

Attorney for Amicus Curiae
Board of Trustees of Cedarville Township

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

BRICKER GRAYDON LLP

Kara Herrnstein (0088520)
Dylan F. Borchers (0090690)
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Email: kherrnstein@brickergraydon.com
dborchers@brickergraydon.com

Counsel for Appellant Birch Solar 1, LLC

David Yost (0056290)
Attorney General of Ohio

Stephen W. Funk (0058506)
Emily Anglewicz (0083129)
Roetzel & Andress, LPA
222 S. Main Street, Suite 400
Akron, OH 44308
sfunk@ralaw.com
eanglewicz@ralaw.com

Outside Counsel for Appellee Ohio Power Siting Board

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Fountain Point Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Logan County, Ohio.	)))))))	Case No. 21-1231-EL-BGN

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE OHIO POWER SITING BOARD

Dave Yost
Attorney General

John H. Jones
Section Chief
Public Utilities Section

Janet Gregory
Amy Botschner O'Brien
Assistant Attorneys General
Public Utilities Section
30 E. Broad St., 26th Floor
Columbus, Ohio 43215
614.644.8599 (telephone)
866.849.3176 (fax)
Janet.Gregory@OhioAGO.gov
Amy.BotschnerOBrien@OhioAGO.gov

On Behalf of the Staff of the
Ohio Power Siting Board

October 16, 2023

TABLE OF CONTENTS

PAGE

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Fountain Point Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Logan County, Ohio.	)))))))	Case No. 21-1231-EL-BGN

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE OHIO POWER SITING BOARD

INTRODUCTION

On April 11, 2022, Fountain Point Solar LLC (Fountain Point or Applicant) filed its application (Application) for a certificate to construct an electric generation facility in Logan County, Ohio. The application was later amended on May 16, 2022, and August 23, 2022 (Amended Application), with Fountain Point seeking approval to construct a 280-megawatt solar-powered electric generation facility on approximately 2,768 acres (as opposed to 3,860 acres) (Project).[1] OPSB Staff filed a report of investigation (Staff Report) recommending approval of the certificate on November 29, 2022.

On July 24, 2023, Fountain Point and the Ohio Farm Bureau Federation (OFBF) filed a Joint Stipulation and Recommendation (Stipulation) for the Project. Both Fountain

[1] Staff recommends approval of the Fountain Point Solar Project as amended on May 16, 2022 and August 23, 2022, further amended through the Joint Stipulation, and finally amended at hearing through the Applicant's stipulation to preclude construction in Rushcreek Township.

Point and OFBF signed the Stipulation. The other parties, Logan County Board of Commissioners (Commissioners), Rushcreek Township Trustees (Rushcreek Township), and Citizens Against Fountain Point LLC (CFP), did not sign the Stipulation. As of the evidentiary hearing on August 15, 2023, the Project would not be constructed in Rushcreek Township,[2] but be solely built in Bokescreek Township, Logan County, Ohio.

Pursuant to the briefing schedule established by the Administrative Law Judge, the Staff filed an initial post-hearing brief on September 18, 2023. Briefs were also filed by the Applicant, CFP, and Rushcreek Township. In this Reply Brief, Staff will focus primarily on the arguments made by Bokescreek Township, as the Rushcreek Township portion of the project was extracted during the course of the hearing. The Staff will address the arguments made by CFP. As the Staff demonstrated in its Initial Brief, the Stipulation is in the public interest, providing substantial benefits to the public in the form of jobs and direct and indirect economic benefits. The Project is supported by numerous government officials and leaders. In addition, the Stipulation includes several conditions to ensure that the impact of the Project on the public is minimized, including conditions regarding the protection of farmland and the maintenance and repair of drain tiles. The Staff again respectfully requests that the Board approve the Stipulation and issue a Certificate to Fountain Point for the Project.

[2] Transcript at 24.

ARGUMENT

I. The Board should determine that the Project, with conditions as recommended in the Staff Report and satisfactorily modified and added to in the Stipulation, satisfies the criteria of R.C. 4906.10(A).

After a full investigation, Staff's review analyzed the socioeconomic impacts, ecological impacts, and impacts on public services, facilities, and safety to identify the nature of the facility's environmental impacts. Staff considered, inter alia: demographics, land use, cultural and archaeological resources, aesthetics, economics, surface waters, threatened and endangered species, vegetation, roads and bridges, public and private water supplies, construction noise, operational noise, communications, and decommissioning. The Staff Report discusses each of the R.C. 4906.10(A) criteria and explains Staff's recommendations related to each of the criteria.[3] The Staff Report provides the Board with a sound, objective, evidentiary basis for determining the existence of all R.C. 4906.10 criteria, and supports the Board's issuance of a certificate conditioned as the Stipulation has recommended. The initial brief submitted by CFP argues that the Project does not satisfy R.C. 4910.10(A)(6). The Staff will address these arguments below.

A. R.C. 4906.10(A)(6) – The facility will serve the public interest, convenience, and necessity.

a. Public Interaction and Participation

In its initial brief, CFP erroneously argues that the opposition from the public to the Project and some local government opposition should be reason to not approve of the

[3] Staff Report at 10-46.

Project. While there is public and local government opposition, it is not unanimous. Furthermore, any opposition to the Project from Rushcreek Township and public comments from citizens of Rushcreek Township is mitigated by the fact that the Project will not be built in Rushcreek Township.

When considering public support, the Board has previously approved certificate applications when there has been mixed approval amongst the public, government entities, and township trustees.[4] For instance, the Board has approved of South Branch Solar and Dodson Creek Solar projects even though they received mixed support from the public, government entities, and township trustees.[5] The Board has denied applications when there has been unanimous opposition of every local government entity representing the area in which the project is to be located.[6] For instance, the Board has denied the applications of Birch Solar, Kingwood Solar, and Cepheus Energy projects due to unanimous local government opposition.[7]

As the Staff addressed in its Initial Brief, the Staff Report mentions that the Project has varied interests, rather than a prominent, compelling, one-sided opposition.[8] Staff's review of the comments filed on the docket and the local public hearing testimony, when combined with the removal of comments from Rushcreek Township, indicate that public opinion regarding this Project is divided.

---

4 Staff Report at 43.
5 Opinion and Order 21-0669-EL-BGN; Opinion and Order 20-1814-EL-BGN.
6 Transcript at 130-131.
7 Opinion and Order 20-1605-EL-BGN; Opinion and Order 20-0117-EL-BGN; Opinion and Order 21-0293-EL-BGN
8 Staff Report at 34.

Furthermore, the Project is supported by OFBF, who signed the Stipulation. It is also supported by Applicant's witness Larry Mouser, testifying in his individual capacity, and who is also a Township Trustee for Bokescreek Township. Mr. Mouser based his support on the Project because it will help the community through its "revenue that will bring into the School District, the County, and the Township, I think it's estimated somewhere over $2 million a year."[9]

In addition, Staff witness Jess Stottsberry has testified that "Bokescreek Township, which contains approximately 90% of the project area, appear to be supportive of the project. Comments seem to reflect that two of the Bokescreek Township trustees are landowners who are forgoing votes that would presumably be in support of the project, and the remaining trustee supports the project."[10] While Bokescreek Township has not formally acted to support the Project, Mr. Stottsberry explained that "My understanding would be of these two Trustee members are – are active participants in the project, they would support the project. Otherwise, they would not be active participants."[11]

Here, CFP's argument fails as there is no unanimous opposition from the local government entities. As Rushcreek Township is no longer part of the Project, the Staff will only consider the government entities affected by the Project. In this case, Mr. Mouser, a Bokescreek Township Trustee, has given his individual support of the Project. The two other trustees are active participants in the Project and are also assumed to be in support of the Project as they have not voiced any opposition. In addition, there was

---

9 Transcript at 15, lines 14-17.
10 Staff Exhibit 8 at 4, lines 4-9.
11 Transcript at 128, lines 6-9.

support (which CFP failed to address) from Benjamin Logan Public School Superintendent John Scheu, State Representative William Seitz, and Ohio Chamber of Commerce President & CEO Steve Stivers.[12]

Further, the Staff Report notes that although there is some opposition from the local government entities, it is not unanimous. [13] However, the Staff Report found that the Logan County Commissioners' opposition is a recent change in position, rather than a consistent rejection of the project. This provides evidence of the robust debate and consideration of the project rather than its outright rejection in the community.[14] Thus, in keeping with the Board's past decisions, the Staff supports the Staff Report recommendation that the proposed facility would serve the public interest, convenience, and necessity.[15]

b. The Project will minimize impacts to the farmland.

CFP also incorrectly argues that the removal of farmland will be against the public interest, health, safety, and welfare. Significantly, however, the OFBF is a signatory to the Stipulation. The OFBF is an organization that advocates for the interests of agriculture. According to its motion to intervene in this case, the OFBF is "a non-profit organization representing agricultural interests at the state and local levels with member families in every county, including hundreds of families in Logan County."[16]

---

12 Staff Exhibit 8 at 3, lines 13-15.
13 Staff Report at 43; Staff Exhibit 8 at 3, lines 16-18; Transcript at 132.
14 Staff Report at 43.
15 *Id.* at 44.
16 OFBF Motion to Intervene at 1.

Furthermore, OFBF has stated that its "interests lie in ensuring appropriate consideration of drainage infrastructure, soil conservation, and best practices for remediation on agricultural land."[17] That the OFBF--an organization dedicated to representing agricultural interests and member families--strongly supports the Stipulation and its conditions demonstrates that the Project is compatible with agriculture in the Project area and the public's interests are being protected.

CFP's argument lacks merit as the Stipulation requires the Applicant to file an agricultural protection plan that is designed to minimize impacts to agricultural land use during the construction, operation, maintenance, and decommissioning.[18] The Stipulation also requires the Applicant to follow best management practices for preserving agricultural land.[19] As demonstrated by the record, the proposed Project serves the public interest, convenience, and necessity in its dedication to minimizing impacts to the farmland.

c. Drainage tile protection

CFP also argues that damage to the drainage tiles will harm the public and land surrounding the Project. However, the Staff Report and Stipulation refute this argument.

CFP relies on testimony from sixth generation farmer Cliff Cronkelton, who testifies that it is near impossible to locate the tiles.[20] However, the argument is diminished, as the Staff Report found that the Applicant utilized information from

---

17 *Id*. at 3.
18 Stipulation at 6, Condition 22.
19 *Id*. at 8.
20 CFP's Initial Brief at 12.

landowners, contacted the Logan County Soil Conservation District for information on county-maintained drain tiles, and used aerial imagery to identify the locations of existing drain tiles within the project area. In addition, the Staff Report stated that the Applicant has supplied a Drainage Tile Mitigation Plan with its OPSB application. The Staff Report discusses avoidance, repair, maintenance, and mitigation details of all known drain tile locations.

The Staff Report also found that the Applicant has committed to repair any drain tile found to be damaged by the project during the operational life of the project.[21] This is reinforced in the Stipulation where it states that the "Applicant shall avoid, where possible, or minimize to the extent practicable, any damage to functioning field tile drainage systems and soils resulting from the construction, operation, and/or maintenance of the facility in agricultural areas."[22] "Damaged field tile systems shall be promptly repaired or rerouted to at least original conditions or modern equivalent at the Applicant's expense to ensure proper drainage."[23] In furtherance of the commitment to mitigating damage to the tiles, the Stipulation states that the "Applicant shall consult with owners of all parcels adjacent to the property, the county soil and water conservation district, and the county to request drainage system information over those parcels."[24] The "Applicant shall also consult with the county engineer for tile located in a county maintenance/repair ditch as detailed further in a road use and maintenance agreement ("RUMA")."[25]

---

21 Staff Report at 45.
22 Stipulation at 6, Condition 21
23 *Id.*
24 *Id.*
25 *Id.*

In addition, CFP's testimony and photographs from Intervenor Kara Slonecker in regard to the drainage titles in this case are irrelevant. CFP attempts to use Ms. Slonecker's testimony and photographs of a different solar facility to argue that this Project will not protect the drainage tiles. Staff disputes the effort to correlate the projects in the manner intended by Ms. Slonecker, as she provides no evidence connecting the projects. As such, we cannot know what (if any) the mitigating conditions that project followed. Thus, the testimony and photographs should not be considered as they do not pertain to the project at hand and there is no evidence connecting the two projects.

Staff believes that its recommended conditions from the Staff Report will adequately mitigate any impacts and allow the Board to find that the Project, with the Stipulation's recommended conditions, will have an overall minimal adverse environmental impact. The Staff Report provides the Board with an evidentiary basis for determining that the Project meets all of the R.C. 4906.10 criteria. Staff recommends that the Board issue a certificate containing the conditions in the Stipulation.

Because the Stipulation adopts all the recommended conditions from the Staff Report and the Staff supports the modifications made to the Stipulation's conditions, the Stipulation is therefore supported by the Staff.

CONCLUSION

The Staff respectfully requests that the Board adopt the Joint Stipulation and Recommendation, as described and modified by Staff's testimony at hearing.

Respectfully Submitted,

Dave Yost
Attorney General

John H. Jones
Section Chief
Public Utilities Section

/s/ Janet Gregory
Janet Gregory
Amy Botschner O'Brien
Assistant Attorneys General
Public Utilities Section
30 E. Broad St., 26th Floor
Columbus, Ohio 43215
614.644.8599 (telephone)
866.849.3176 (fax)
Janet.Gregory@OhioAGO.gov
Amy.BotschnerOBrien@OhioAGO.gov

On Behalf of the Staff of the
Ohio Power Siting Board

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Reply Brief** has been served upon the below-named counsel via electronic mail, this 16th day of October, 2023.

/s/ Janet Gregory
Janet Gregory
Assistant Attorneys General

Parties of Record:

JSecrest@dickinson-wright.com;
cpirik@dickinsonwright.com;
Dlockshaw@dickinson-wright.com;
mmcdonnell@dickinsonwright.com;
lcurtis@ofbf.org;
lhetrick@ofbf.org;
cendsley@ofbf.org;
lslone@mdllp.net;
bparcels@Iogancountyohio.gov;
kdd@planklaw.com;

Attorney Examiners:

Greta.See@puco.ohio.gov
Isabel.Marcelletti@puco.ohio.gov

Summary: Reply Brief Submitted on Behalf of the Staff of the Ohio Power Siting Board electronically filed by Mrs. Kimberly M. Naeder on behalf of OPSB.