

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
ANGELINA SOLAR I, LLC FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED.

CASE NO. 18-1579-EL-BGN

ORDER ON REHEARING

Entered in the Journal on November 18, 2021

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by the Concerned Citizens of Preble County, LLC, Robert Black, Marja Brandly, Campbell Brandly Farms, LLC, Michael Irwin, Kevin and Tina Jackson, Vonderhaar Family ARC, LLC, and Vonderhaar Farms, Inc.

II. PROCEDURAL BACKGROUND

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

{¶ 3} Angelina Solar I, LLC (Angelina or Applicant) is a person as defined in R.C. 4906.01.

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

{¶ 5} On December 3, 2018, Angelina filed its application with the Board for a certificate of environmental capacity and public need for an 80 megawatt (MW) solar-powered electric generation facility in Preble County, Ohio (the Facility or Project).¹

{¶ 6} By Entry dated April 18, 2019, the administrative law judge (ALJ) granted intervention to the following parties, all of whom filed timely notices of intervention or

¹ The application seeks approval of up to 80 MW of installed capacity, but studies panel locations that could accommodate a 100 MW project for engineering flexibility in the final design.

motions to intervene: the Preble County Commissioners (County Commissioners); Kyle Cross, the Preble County Engineer (County Engineer); Preble County Soil & Water Conservation District, Preble County, Ohio (Preble SWCD); the Board of Trustees of Israel Township, Preble County, Ohio (Israel Trustees); the Board of Trustees of Dixon Township, Preble County, Ohio (Dixon Trustees); the Preble County Planning Commission, Preble County, Ohio (Planning Commission); the Eaton Community School District (ECSD); the Ohio Farm Bureau Federation (OFBF); and Concerned Citizens of Preble County, LLC, Robert Black, Marja Brandly, and Michael Irwin, Campbell Brandly Farms, LLC, Kevin and Tina Jackson, Vonderhaar Family ARC, LLC, and Vonderhaar Farms, Inc. (collectively, CCPC or Citizens).

{¶ 7} On June 14, 2019, Applicant filed a joint stipulation and recommendation (Stipulation) executed by Angelina, OFBF, County Commissioners, County Engineer, Preble SWCD, Israel Trustees, Dixon Trustees, Planning Commission, and Board Staff (Staff).

{¶ 8} On July 29, 2020, Applicant filed an Amended and Restated Stipulation (Amended Stipulation) executed by Angelina, OFBF, County Commissioners, County Engineer, Preble SWCD, Dixon Trustees, Planning Commission, and Staff (Signatory Parties).

{¶ 9} By Opinion, Order, and Certificate dated June 24, 2021, the Board issued a certificate of environmental compatibility and public need to Angelina for the construction, operation, and maintenance of the proposed solar-powered electric generation facility, subject to the conditions set forth in the Amended Stipulation and consistent with the Board's Order.

{¶ 10} R.C. 4906.12 provides that R.C. 4903.02 to 4903.16 apply to any proceeding or order of the Board in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission). R.C. 4903.10 provides that any party to a proceeding before the Commission may apply for rehearing with respect to any matter determined in that proceeding within 30 days after entry of the order upon the journal of the Commission.

The statute further directs that applications for rehearing be in writing and set forth specifically the ground or grounds on which the party seeking rehearing considers an order unreasonable or unlawful. Additionally, Ohio Adm.Code 4906-2-32 provides that any party may file an application for rehearing within 30 days after an order has been journalized by the Board in the manner, form, and circumstances set forth in R.C. 4903.10.

{¶ 11} On July 23, 2021, CCPC filed an application for rehearing of the Board’s June 24, 2021 Opinion, Order, and Certificate.

{¶ 12} On August 2, 2021, Angelina filed a memorandum contra the application for rehearing.

{¶ 13} By Entry dated August 20, 2021, the ALJ granted CCPC’s application for rehearing for the express purpose of affording the Board more time to consider the issues raised in the application pursuant to Ohio Adm.Code 4906-2-32(E).

III. DISCUSSION

{¶ 14} As an initial matter, Angelina asserts that the Board lacks jurisdiction over the Citizens’ application for rehearing, arguing that the application fails to present any ground for rehearing specific enough to comply with the rehearing statute. Angelina states that R.C. 4903.10 governs applications for rehearing and that its requirements are jurisdictional. Here, Angelina points to the requirement in R.C. 4903.10 that the party requesting rehearing “set forth specifically the ground or grounds on which the [party] considers the order to be unlawful” and claims that the Citizens’ application for rehearing fails this jurisdictional requirement. Quoting the Supreme Court of Ohio, Angelina argues that “the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant’s application for rehearing used a shotgun instead of a rifle to hit that question.” Memorandum Contra at 3 citing *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 248, 638 N.E.2d 550, 553 (1994), quoting *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 378, 86 N.E.2d 10, 23 (1949).

{¶ 15} Quoting the Citizens’ filing, Angelina posits that CCPC’s application for rehearing is jurisdictionally insufficient because it raises only two conclusory grounds for rehearing:

The Board did not find and determine the nature of the probable environmental impact of the [Project] under R.C. 4906.10(A)(2), because [Angelina] failed to provide the information in the evidentiary record required by the Board’s rules necessary to make such a finding and determination; [and]

The Board erred in finding and determining that the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations, pursuant to R.C. 4906.10(A)(3).

(Application for Rehearing at 1-2.) Angelina states that these two paragraphs followed by the approximately three pages of “examples” of “the Board’s failures to comply with R.C. 4906.10(A)(2), (3), and (6)” are not sufficiently specific to bestow jurisdiction upon the Board to hear them.

{¶ 16} The Board disagrees. We find that CCPC’s filing does not suffer the level of vagueness deemed fatal to review. See *In re Application of Icebreaker Windpower, Inc.*, Case No. 16-1871-EL-BGN, Order on Rehearing (Oct. 8, 2020) at ¶ 29; *In re Application of The Ohio State University*, Case No. 19-1641-EL-BGN, Entry on Rehearing (Jan. 21, 2021) at ¶ 27. To the contrary, reading the application for rehearing as a whole, the Board identifies five assignments of error for its review: (1) the Board erred in determining that it has the information necessary to find and determine the nature of the Project’s probable environmental impact under R.C. 4906.10(A)(2); (2) the Board erred in opining that the Project represents the minimum adverse impact under R.C. 4906.10(A)(3); (3) the Board erred in opining that the Project will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6); (4) the Board erred by delegating its duties to Staff and other governmental agencies for approving post-certificate plans and submittals; and (5) the Board erred by approving the Amended Stipulation because it violates important regulatory principles and is contrary to the public interest.

A. *First Three Assignments of Error*

{¶ 17} Because CCPC presents and argues its first three assignments of error together, the Board will also address them as a whole. In essence, CCPC argues that the Board erred in finding and determining the three specified statutory criteria: the nature of the probable environmental impact under R.C. 4906.10(A)(2); the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations under R.C. 4906.10(A)(3); and the facility will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). Interwoven through the Citizens' first three assignments of error is the argument that the evidentiary record lacks the information required by the Board's rules that would have properly informed the Board on each of the allegedly faulty statutory determinations.

{¶ 18} In the first assignment of error, the Citizens assert that the Board erred in finding and determining the nature of the Project's probable environmental impact with regard to: visual (i.e., aesthetic and viewshed) impacts; visual impacts from lighting; operational noise; construction noise; damage to field drainage tiles; crime and/or criminal access; groundwater contamination; emergency services; motorist safety at intersections; vegetation, including noxious and invasive weeds; plants and wildlife, including those impacts on wildlife that will result in crop and livestock damage on nearby farms; drainage and flooding (i.e., quantity of surface water drainage); water quality (i.e., quality of surface water drainage); solid waste; traffic impacts; and setbacks.

{¶ 19} In the second assignment of error, CCPC asserts that the Board erred in opining that the Project represents the minimum adverse impact under R.C. 4906.10(A)(3) with regard to the same list of topics outlined above, with the additional consideration of the alleged destruction of prime farmland.

{¶ 20} In the third assignment of error, the Citizens assert that the Board erred in opining that the Project will serve the public interest, convenience, and necessity under R.C.

4906.10(A)(6). CCPC raises this argument two ways. First, the Citizens intermix their broad critique of the Board's consideration of field drainage tiles, crime, emergency services, and treatment of prime farmland under R.C. 4906.10(A)(2) and R.C. 4906.10(A)(3) with that under R.C. 4906.10(A)(6). Second, in a separate section of the application for rehearing, the Citizens set forth a related laundry list of ways in which they claim the Facility will harm the public.²

{¶ 21} Angelina broadly responds to all of CCPC's assignments of error by characterizing the application for rehearing as a regurgitation of the Citizens' post-hearing briefs. Thus, in the interest of preserving the Board's time and resources, and to prevent delay of the approved Project, Angelina urged the Board to allow the application for rehearing to be denied by operation of law pursuant to R.C. 4903.10(B). While we have declined to do so, the Board does note that CCPC's application for rehearing is, largely, a verbatim recitation of arguments raised in either the substitute initial post-hearing brief or the substitute reply brief. Consequently, and as was the case during our original analysis and determination reflected in the Opinion, Order, and Certificate, any claim or argument raised by the application for rehearing that was not specifically discussed herein was, nevertheless, thoroughly and adequately considered by the Board and is denied.

{¶ 22} Specific to the first three assignments of error, Angelina counters that the Board properly determined that the Facility satisfies all eight statutory criteria required for the issuance of a certificate under R.C. 4906.10(A)(1)-(8). According to Angelina, the Board's highly detailed opinion sets forth the evidence and arguments for each statutory element and makes the required findings based on the record. As such, Angelina asserts that the Board carefully and thoroughly determined the nature of the probable environmental impact of the Facility, properly opined that the Facility represents the minimum adverse

² The Board notes that, except for small changes to tense, reference to the application versus the record, and omitting reference to R.C. 4906.10(A)(3), this portion of the application for rehearing is a recitation of pages 87-89 of CCPC's substitute initial post-hearing brief. The Board's Opinion, Order, and Certificate thoroughly and adequately addressed these concerns. Opinion, Order, and Certificate (June 24, 2021) at ¶ 335-336.

environmental impact, and correctly concluded that the Facility will serve the public interest, convenience, and necessity. In support, Angelina parses the Opinion, Order, and Certificate to point out how and where the Board analyzed and declined CCPC's arguments against the statutory findings of R.C. 4906.10(A)(2) (socioeconomic, ecological, public services, facilities, and safety), R.C. 4906.10(A)(3) (all considerations from R.C. 4906.10(A)(2) and setbacks), and R.C. 4906.10(A)(6) (public interest, convenience, and necessity concerns, including emergency services and crime).

{¶ 23} Angelina also addresses CCPC's general contention that the evidentiary record is incomplete and lacks information required by the Board's rules. Angelina asserts that CCPC continues to conflate rules regarding an application and the statutory requirements the Board must decide in granting or denying a certificate. Angelina emphasizes that Staff's completeness determination, made in February 2019, triggered a more strenuous investigation into the application pursuant to the criteria in R.C. 4906.10(A). Angelina states that this investigation, combined with evidence and testimony from multiple days of hearings, created a robust record which supports the Board's decision. In short, citing to Paragraphs 362-365 of the Opinion and Order, Angelina contends that the Board already considered and rejected CCPC's argument regarding whether the record contains the information necessary to inform the Board's statutory analysis.

{¶ 24} The Board finds the Citizens' first three assignments of error to be without merit. As argued by Angelina, and based on our own painstaking review, it is apparent that the Citizens' first three arguments on rehearing were previously raised during post-hearing briefs, with large swaths being verbatim recitations, and were rejected in our issuance of the Opinion, Order, and Certificate. The Board addressed each of the identified topics within the confines of the statutory criteria deemed most suitable, but with each we ascertained the nature of the probable environmental impacts and determined whether the Facility represents the minimum adverse environmental impact. Specifically, the Board addressed visual and lighting impacts (¶ 131-147, 152, 232-234, 293-242); operational noise (¶ 207-224, 228); construction noise (¶ 200-206, 226); potential damage to field drainage tiles (¶ 293-306,

307-310); crime and/or criminal access (§ 283-287, 288); groundwater contamination (§ 252-262, 263); emergency services (§ 276-282, 288); motorist safety at intersections (§ 196, 199, 225); vegetation, including noxious weeds (§ 181-185, 189); plants and wildlife, including those impacts on wildlife that could result in crop and livestock damage on nearby farms (§ 169-179, 187-188); drainage and flooding, i.e., the quantity of surface water drainage (§ 155-163, 165-168, 186); water quality, i.e., the quality of surface water drainage (§ 163-164, 186); solid waste (§ 264-267, 268); traffic impacts (§ 190-195, 197-198, 225); agricultural land (§ 290-296, 307); and the Project's setbacks (§ 213, 232-238, 239-242). And, to the extent that CCPC believes that the nature of the environmental impact or the minimum adverse environmental impact was not determined because it was not specifically addressed under the section dedicated to R.C. 4906.10(A)(2) or R.C. 4906.10(A)(3), the Board openly specified that was not the case. Opinion, Order, and Certificate (June 24, 2021) at ¶ 119. Furthermore, the Board fully considered the record evidence in determining that the Facility will serve the public interest, convenience, and necessity (§ 273-289, 335-336).

{¶ 25} In short, CCPC fails to present any new argument regarding the required statutory findings, findings made by this Board upon full consideration of the record evidence. We decline the invitation to reweigh the evidence, which is, essentially, what CCPC requests in its application for rehearing. CCPC's disagreement with our determinations simply does not merit rehearing. *See In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2021-Ohio-3301, at ¶ 50. CCPC's first three assignments of error are denied.

B. Fourth Assignment of Error

{¶ 26} The Citizens further allege that the Board erred by delegating its duties to Staff and other governmental agencies for approving post-certificate plans and submittals. CCPC claims that this alleged unlawful delegation unfairly undermines the purpose of the evidentiary hearing, relieves Angelina of its burden of proof during the adjudication, circumvents the Board's application of the statutory criteria under R.C. 4906.10(A), circumvents statutory rights of public participation and public notice, and otherwise

deprives the intervenors of due process. CCPC states that, in issuing the Opinion, Order, and Certificate approving the Amended Stipulation, the Board is not simply issuing a certificate that calls upon Staff to monitor compliance with post-certificate conditions but is entrusting Staff to obtain and evaluate plans and similar information to determine whether the Project complies with the criteria in R.C. 4906.10(A). The Citizens maintain that any attempt to introduce new details for facility design after certification deprives intervenors and the public of their rights to fully test and comment upon the Facility.

{¶ 27} Responding, Angelina states that the Board has already considered CCPC's arguments on this issue and properly determined that the post-certification submissions and Staff's ongoing post-certification role is appropriate. Angelina clarifies that, contrary to CCPC's characterizations, none of the post-certificate submissions are studies; rather, they are plans related to the construction and operation of the Facility like those regularly required with similar projects consistent with case law. Angelina contends that the Board correctly recognized the Supreme Court of Ohio's affirmance of this practice, i.e., Staff's continued monitoring to ensure compliance with the Board's conditions, in *In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869. Angelina further contends that the post-certificate submittals in this matter are similar to, but much less than, what Buckeye Wind's certificate required.

{¶ 28} The Board is not persuaded by CCPC's fourth assignment of error, which is denied. Like the arguments presented under the first three assignments of error, CCPC's assertions here were raised during post-hearing briefs, duly considered by the Board, and determined to be without merit. Opinion, Order, and Certificate (June 24, 2021) at ¶ 338-344, 360-363. CCPC has raised no new argument on this topic. Instead, the Citizens repeat their previous citation to and reliance upon the dissent in the *Buckeye Wind* case and groundlessly reassert that their due process rights have been violated. Here, the Board reiterates our findings that CCPC was able to fully participate in this proceeding (from the discovery process through presenting and cross-examining witnesses at the evidentiary hearing and submitted post-hearing briefs), and the public was included both pre- and post-

application via public information meetings, local hearings, and public comment with continuing rights to participate through the complaint process outlined in—and required by the Board through—Condition 13 of the Amended Stipulation. Opinion, Order, and Certificate at ¶ 363. In short, we reject CCPC’s repeated suggestion that the Board failed to make the statutory determinations required to issue the certificate because it granted a certificate pursuant to conditions that will be monitored by Staff to ensure compliance. We further reject CCPC’s reiterated assertion that the Board violated due process rights in granting the certificate.

C. Fifth Assignment of Error

{¶ 29} In its last assignment of error, CCPC asserts that the Board erred by approving the Amended Stipulation because it violates important regulatory principles and is contrary to the public interest. In support of this argument, the Citizens state that Angelina failed to sustain its burden regarding the Amended Stipulation citing a purportedly incomplete record, as well as the Amended Stipulation’s unlawful delegation of the Board’s duties to Staff, and arguing that the Project will not represent the minimum environmental impact as required by R.C. 4906.10(A)(3) nor serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). CCPC further challenges the stipulation process, alleging that a stipulation signed by allied parties over the objection of others is not entitled to any level of deference; instead, the Board may take note of the stipulation, but must independently determine what is just and reasonable from the record evidence.

{¶ 30} Throughout its memorandum contra, Angelina counters each of the points asserted, i.e., the completeness of the record, any alleged improper delegation of authority, and whether the Board made the requisite statutory findings to issue a certificate under R.C. 4906.10. Angelina maintains that the Board accurately determined that the Amended Stipulation was reasonable and satisfied the Board’s criteria for stipulations. Angelina emphasizes that the Board properly adhered to regulatory practices and procedures while examining a robust record and determining each of statutory criteria, including whether the

Project represents the minimum adverse environmental impacts under R.C. 4906.10(A)(3) and would serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6).

{¶ 31} The Board finds CCPC's final assignment of error, which essentially combines the first four asserted errors and rephrases them as a condemnation of the Board's analysis of the Amended Stipulation, to be without merit. As we determined above, in issuing the certificate, the Board did not improperly delegate any of its statutory duties to Staff or any other entity. Instead, the Board complied with applicable precedent from the Ohio Supreme Court, which has affirmed that the Board "[does] not improperly delegate its responsibility to grant or deny a provisions certificate when it allow[s] for further fleshing out of certain conditions of the certificate." *Buckeye Wind*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, at ¶ 18. In our Opinion, Order, and Certificate, we thoroughly addressed CCPC's "intertwined arguments regarding delegation, due process, and the completeness of the [record]" in finding that the Amended Stipulation is consistent with regulatory principles and practices of power siting. Opinion, Order, and Certificate (June 24, 2021) at ¶ 360; 337-364. We find that CCPC has presented the Board with no argument justifying a different conclusion here.

{¶ 32} Similarly, we reject the repeated contention that the Amended Stipulation is contrary to the public interest. Once again, CCPC's assignment of error on rehearing raises identical arguments to those in post-hearing briefs. (Compare Post Hearing Brief (Dec. 11, 2020) at p. 89-91; Application for Rehearing (July 23, 2021) at p. 120-122.) The Board has already comprehensively considered the Citizens' assertion (Opinion, Order, and Certificate (June 24, 2021) at ¶ 319-336) and finds that CCPC has presented no cause to re-examine our determination on rehearing.

{¶ 33} CCPC's fifth assignment of error is, therefore, denied.

D. Board Conclusion

{¶ 34} The Board has reviewed and considered all claims and arguments contained in the application for rehearing and, based on the foregoing, finds that the Citizens' application for rehearing is without merit. The Board finds that the Citizens have raised no new arguments nor brought to our attention any error demonstrating that our prior consideration of this matter was inadequate, against the manifest weight of the evidence, or otherwise unlawful and unreasonable. Accordingly, as to each of the claimed errors, we affirm the determinations made in our June 24, 2021 Opinion, Order, and Certificate.³

IV. ORDER

{¶ 35} It is, therefore,

{¶ 36} ORDERED, That the application for rehearing filed by CCPC be denied. It is, further,

³ Any claim or argument raised by the application for rehearing that was not specifically discussed herein was, nevertheless, thoroughly and adequately considered by the Board and is denied.

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

BOARD MEMBERS:

Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Jack Christopher, Designee for Lydia Mihalik, Director
Ohio Department of Development

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

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

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

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

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