

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of Hecate)
Energy Highland 4 LLC for a Certificate of) Case No. 20-1288-EL-BGN
Environmental Compatibility and Public Need.)

**New Market Solar ProjectCo 1, LLC and New Market ProjectCo 2, LLC's
Motion to Quash and Request for Expedited Ruling**

Pursuant to Ohio Administrative Code Rule 4906-2-23, New Market Solar ProjectCo 1, LLC and New Market ProjectCo 2, LLC (collectively, “New Market Solar”) move to quash the four subpoenas issued to them on November 3, 2023 for various persons to appear as witnesses for Intervener EVS, Inc. (“EVS”) at the November 14, 2023 hearing in this matter. New Market Solar moves to quash the four subpoenas (the “Subpoenas” attached hereto) on the grounds that they are unreasonable and oppressive in that they compel New Market Solar to provide witnesses that it has no control over and that they seek information not relevant to the purpose of the hearing. The reasons supporting this Motion are set forth more fully in the accompanying memorandum in support. Additionally, pursuant to Ohio Adm.Code 4906-2-27(C), New Market Solar requests expedited consideration of this motion to quash. Wherefore, New Market Solar respectfully moves for the Subpoenas to be quashed.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

When EVS sought to intervene in this matter, New Market Solar raised concerns that EVS would use this proceeding as an arena to litigate entirely unrelated contractual claims/defenses – essentially converting a hearing about whether or not the Project is in compliance into a hearing about why EVS thinks any non-compliance is actually Staff, New Market Solar, or anyone else’s fault. Unfortunately, New Market Solar’s concern has come to fruition. As evidenced by the Subpoenas, EVS apparently wants to use the hearing to try and assist it on contractual matters that have no bearing on the issue of whether the Project’s design is in non-compliance with the Project’s Certificate. To that end, EVS has issued Subpoenas that force New Market Solar to produce witnesses not even under its control to appear at the hearing for topics that are totally irrelevant to the hearing. If the Subpoenas are not quashed, what should be a straightforward and fact-based hearing will morph into a prolonged and convoluted hearing on irrelevant matters. Given the pending hearing date, New Market Solar requests expedited treatment of this motion pursuant to Ohio Adm.Code 4906-2-27(C).

II. LAW AND STANDARD

The Ohio Power Siting Board’s (the “Board”) regulations give it authority to quash subpoenas “if it is unreasonable or oppressive.” Ohio Adm.Code 4906-2-23(C). Similarly, Ohio Adm.Code 4906-2-09 empowers the ALJ to take such actions as are necessary to “prevent the presentation of irrelevant or cumulative evidence” and “assure the hearing proceeds in an orderly and expeditious manner.” Further, the Supreme Court of Ohio has held that the Board (or administrative law judge (“ALJ”)) is required to quash a subpoena where it subjects an entity to

an “undue burden.” *In re Champaign Wind, L.L.C.*, 146 Ohio St. 3d 489, 494 (affirming ALJ’s quashing of a subpoena that was overbroad and sought information irrelevant to the scope of the Board proceedings). Lastly, in Board proceedings, “the Rules of Civil Procedure should be used wherever practicable.” *See* R.C. 4903.082 and 4906.12, and Civ.R. 45(C)(3)(d). The ALJ should exercise their authority here to maintain order at the hearing, prevent the presentation of irrelevant evidence, and to avoid the imposition of an undue burden on New Market Solar.

III. ARGUMENT

The Subpoenas should be quashed. First, each of the Subpoenas is plainly invalid on its face in that each Subpoena attempts to subpoena persons and/or entities that are not controlled by New Market Solar. Indeed, each of the Subpoenas compel appearances by persons “contracted by” New Market Solar “or their respective owners or predecessors in interest.” Second, each of the Subpoenas is unreasonable and oppressive in that each Subpoena seeks information irrelevant to the issue of whether the Project is not in compliance with the Certificate. *See, e.g., In the Matter of the Application of Kingwood Solar I, LLC for a Certificate of Environmental Compatibility and Public Need*, 2023 Ohio PUC LEXIS 954 at *31 (affirming ALJ’s denial of subpoena where it sought testimony “irrelevant to the Board’s ultimate decision.”). The purpose of the hearing is uncomplicated: ***to determine if the Project is in compliance or not; and if not to determine the next steps for the Project.*** Simply, the Subpoenas force witnesses to appear at the hearing whose testimony has nothing to do with that purpose and the Subpoenas should be quashed.

A. Each of the Subpoenas are invalid on their face in that they compel New Market Solar to produce witnesses of various third parties beyond New Market Solar's control including their contractors, owners, and predecessors in interest.

The Subpoenas are facially invalid in that they seek to compel New Market Solar to produce witnesses of *other third parties*.¹ It is axiomatic that a party cannot be forced to provide witnesses that it has no control over. See *Lowe v. Univ. Hosps. Of Cleveland*, 8th Dist. Cuyahoga No. 80341, 2002-Ohio-4084, ¶ 23 (holding that it is “arbitrary and unreasonable” to require a party to produce witnesses it has no control over). Each of the Subpoenas compel New Market Solar to produce persons “contracted by [New Market Solar] or their respective owners or predecessors in interest.” Under EVS’s view, it can compel New Market Solar to round-up any third-party witnesses that might have information related to their irrelevant requests and somehow order them to appear at the hearing. That is not how subpoenas work and for that reason, the Subpoenas should be quashed.

B. The Subpoenas seek irrelevant information and impose an undue burden upon New Market Solar.

While the Subpoenas are invalid on their face, they should be quashed for the independent reason that they each seek testimony that is irrelevant to the proceeding. A review of the Subpoenas shows that each seeks testimony irrelevant to this proceeding:

- The first Subpoena requires attendance of those persons (including persons clearly beyond New Market Solar’s control) “responsible for reviewing and approving design and or construction drawings for the [Project] at 30%, 60%, and 90% completion.”

¹ The Subpoenas also seek to compel attendance by New Market Solar “employees”, however, as EVS is well-aware, these are project-level entities that do not have employees.

- The second Subpoena requires attendance of those persons (including persons clearly beyond New Market Solar’s control) “who approved final construction drawings for submission to the Ohio Power Siting Board for the [Project].”
- The third Subpoena requires attendance of those persons (including persons clearly beyond New Market Solar’s control) “who approved any drawings identifying any equipment setbacks submitted to the Ohio Power Siting Board for the [Project].”
- The fourth Subpoena requires attendance of those persons (including persons clearly beyond New Market Solar’s control) “who discussed the project setbacks with any [Staff] member, agent, or Board member for the [Project].”

The first three subpoenas command that New Market Solar produce witnesses (even from third parties) who reviewed and/or approved of design and construction drawings at various stages of the project. However, testimony from the person or persons who reviewed and approved the Project design and construction drawings at various stages has no bearing on whether or not the Project is in compliance. No matter what those witnesses say, it would have no impact on the ultimate question: whether or not the Project is in compliance.

EVS, of course, knows as much. Witnesses on that topic are not sought for purposes of determining whether the Project is in compliance, but in order to determine *who has culpability for any non-compliance*. Answering the question of compliance requires only an understanding of the Project design and construction, not who approved those designs and why – the aim of the Subpoenas. EVS seeks testimony from these witnesses not because they have relevant information about the design or as-built layout of the Project, but in hopes that those witnesses might provide beneficial testimony it can use in any contractual disputes or potential future litigation. The ALJ

should quash the first three Subpoenas because those witnesses cannot offer testimony that has bearing on the ultimate question of compliance with the Certificate.

The fourth subpoena seeks testimony about conversations with Staff and Board members about the Project setbacks. Testimony about discussions that potentially occurred between the Staff and/or Board about the Project setbacks is not only overly broad but again appears to be seeking to assign blame for any potential noncompliance, and does nothing to answer the question of whether the Project is, in fact, in compliance.² Accordingly, the Subpoena seeks irrelevant witnesses and should be quashed.

To summarize, the Subpoenas force New Market Solar to produce witnesses it has no ability to control for a variety of topics that have no bearing on the discrete issue of the hearing. For these reasons, the Subpoenas should be quashed.

IV. CONCLUSION

For the reasons stated herein, the Subpoenas should be quashed. Given the pending hearing date, New Market Solar also requests expedited ruling on this motion pursuant to Ohio Adm.Code 4906-2-27(C). New Market Solar has contacted counsel for EVS and Board Staff and EVS opposes the request. New Market Solar cannot certify if Board Staff agrees to an expedited ruling.

Respectfully submitted,

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² New Market Solar will offer the testimony of its Project Manager and Staff will also offer testimony given that it is Staff's burden to prove non-compliance. EVS will have ample opportunity to cross-examine any witnesses to the extent its questions are relevant to the ultimate issue before the ALJ – whether the Project is, in fact, in compliance.

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will automatically serve notice of the filing of this *Motion to Quash* to those individuals referenced on the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the *Motion to Quash* has been emailed to the following on November 6, 2023:

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Summary: Motion Motion to Quash electronically filed by Mr. Michael J. Settineri on behalf of New Market Solar ProjectCo 1, LLC and New Market Solar Project Co 2, LLC.