BEFORE
THE OHIO POWER SITING BOARD

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

EVS, INC.'S MEMORANDUM CONTRA NEW MARKET SOLAR PROJECTCO 1, LLC AND NEW MARKET SOLAR PROJECTCO 2, LLC'S MOTION TO QUASH

I. INTRODUCTION

Pursuant to the Administrative Law Judge's ("ALJ") November 7, 2023, Entry, EVS, Inc. ("EVS") files this Memorandum Contra to New Market Solar ProjectCo 1, LLC and New Market ProjectCo 2, LLC (collectively, "New Market Solar") Motion to Quash EVS' Motion for Subpoenas. New Market Solar complains the subpoenas are unreasonable and oppressive and then again attempts to proffer its expectation of what EVS may argue as the basis for urging the ALJ to deny EVS' request despite having zero insight into EVS' strategy in the proceeding. New Market Solar claims EVS' subpoenas were filed in an effort 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."[1] EVS has already stated, when faced with the same arguments in opposition to its intervention, EVS does not intend to litigate fault in this proceeding.

Instead, EVS' subpoenas seek witnesses who can speak to the design and review process, what setbacks were presented in the review and approval process, and how through that process,

[1] New Market Solar Motion to Quash p. 1.

the setbacks currently in place are in compliance with the language found in the Opinion and Order approving the Project. The very issue – whether or not the Project is in compliance – New Market identified as the purpose of the hearing.[2] For this reason and others as more fully explained below, the ALJ should deny New Market Solar's Motion to Quash EVS' subpoenas.

II. ARGUMENT

A. EVS' subpoenas are not facially invalid.

New Market Solar's initial complaint is that the subpoenas are invalid on their face because the subpoenas seek to compel the appearance of individuals or entities that are not controlled by New Market Solar.[3] This is a disingenuous characterization. The subpoenas are directed to compel the appearance of specific individuals of whom EVS has no knowledge, but who were necessarily involved in this proceeding. Therefore, each subpoena served on New Market seeks "the person or persons employed or contracted by New Market Solar ProjectCo 1, LLC and or New Market Solar ProjectCo 2, LLC or their respective owners or predecessors in interest" who are most knowledgeable of the actions or issues described in the subpoena. Stated differently, it is the functional equivalent of asking for a corporate representative to be appointed.

New Market Solar immediately cries foul based on the language "the person or persons employed or contracted by New Market Solar ProjectCo 1, LLC and or New Market Solar ProjectCo 2, LLC or their respective owners or predecessors in interest" and argues EVS seeks to compel New Market Solar to produce third party witnesses. That is simply not true. EVS chose that language for the subpoenas because this Project was originally submitted by a company named Hecate Energy Highland 4, LLC ("Hecate 4").[4] A portion was then transferred to another

[2] New Market Memorandum in Support of Motion to Quash ("Memorandum") p. 4.
[3] Id. p. 5.
[4] Notice of Project Update and Compliance with Various Conditions p. 1 (May 20, 2022.)

entity knowns as Hecate Energy Highland 2, LLC ("Hecate 2").[5] Since then, the Hecate 4 entity has been renamed New Market Solar ProjectCo 2, LLC and Hecate 2 has been renamed New Market Solar Project Co 1, LLC.[6] Both of which, upon information and belief, are owned by Highland Cincinnati Solar, LLC owned by Algonquin Power & Utilities Corp. dba Liberty Power.[7] Again, all New Solar had to do was appoint someone.

EVS does not know which individuals within this web of companies were involved in the design process. Further, and more importantly, EVS did not want New Market Solar to refuse to produce individuals if the subpoenas were narrowly tailored to New Market Solar, but the individual was employed or contracted by one of the Hecate entities or another company in the chain of ownership of this Project. EVS must not be prejudiced by the corporate organizational decisions of the applicant in this proceeding and its litany of successive entities. Further, it must be noted that **at no point in its Motion to Quash does New Market Solar claim it cannot produce such individuals or that such individuals are not under its employ or that it would somehow be unduly burdensome**.

Rather, New Market Solar obfuscates– exactly what EVS was attempting to account for in the language it used – and attempts to quash the subpoenas on the grounds they may require New Market Solar to produce witnesses outside of its employ- without ever affirmatively stating that the subpoenas will. To the extent New Market Solar seeks to quash the subpoenas on the grounds the subpoena *could* seek to compel the company to produce a witness outside of its

[5] Id.
[6] Id.
[7] https://newmarketsolar.com/?page_id=16 and the Direct Testimony of Yuri Otarov p. 1 lines 3-5.

control, at a minimum New Market Solar should be required to show the subpoena *will* because New Market Solar has no employees with information relevant to the subpoenas.

EVS respectfully requests that the ALJ reject New Market Solar's argument regarding an alleged harm of producing individuals outside of its control – especially when New Market Solar did not affirmatively state that would occur. To the extent New Market Solar claims it has no witnesses responsive to the subpoenas then that issue can be discussed and resolved at the hearing. Currently, however, a Motion to Quash should not be granted based on conjecture.

B. Each of the subpoenas seek information relevant to whether the setbacks are compliant which is the very issue New Market solar identified is a core issue to the proceeding.

New Market Solar's other argument in support of quashing the subpoenas is that they seek information New Market Solar deems irrelevant to the proceeding.[8] The subpoenas seek individuals affiliated with New Market Solar or its owners or predecessors in interest who did any of the following:

1. Discussed the project setbacks with any Ohio Power Siting Board Staff member, agent, or Board member;
2. Who approved final construction drawings for submission to the Ohio Power Siting Board;
3. Was responsible for reviewing and approving design and or construction drawings for the Project at 30%, 60%, and 90% completion; and
4. Who approved any drawings identifying any equipment setbacks submitted to the Board.

New Market Solar argues that the review and approval process are irrelevant to whether or not the project as designed now is in compliance.[9] New Market Solar alleges, as it did in its denied Memorandum Contra to EVS' Petition to Intervene, that EVS only wants to argue about

[8] Memorandum p. 5.
[9] Id.

culpability for non-compliance.[10] Again, this is not the case and New Market Solar's repetition of this rejected argument does not breathe into it new life and sudden validity. EVS is seeking information related to the review and approval process because it goes to the heart of the issue in this case – what are the setback requirements and is the Project in compliance with those requirements. New Market Solar clearly has its own position regarding what the setbacks are and whether or not the Project complied with the setbacks. However, New Market Solar's position is not EVS's position and as a party to this proceeding EVS has every right to establish facts for the record which support its theory of the case. That is true regardless of whether New Market Solar agrees with EVS's position.

The review and approval process of the Project's design contains information relevant to what setbacks were presented to the Board Staff and what setbacks were approved by the Board Staff. It is well established that Ohio Power Siting Board Staff have the authority to review, consider, and accept additional information regarding a project even after the granting of a certificate.[11] The Ohio Supreme Court states, that "R.C. 4906.10(A) allows a certificate to be issued *upon such conditions as the board considers appropriate*. The statutes authorize a dynamic process that does not end with the issuance of a construction certificate."[12]

In this case, the Opinion and Order granting the certificate included the language:

> The Applicant shall install the facility, utilize equipment and construction practices, and implement mitigation measures as described in the application and as modified and/or clarified in supplemental filings, replies to data requests, and recommendations in the Staff Report of Investigation, as modified by this Joint Stipulation and Recommendation as modified by the Opinion, Order, and Certificate.[13]

[10] Id.
[11] *In re Application of Buckeye Wind*, L.L.C., 131 Ohio St.3d 449, ¶ 2012-Ohio-878 ¶16.
[12] Id. (Emphasis in the original).
[13] Opinion and Order ¶77 (March 18, 2021) and Joint Exhibit 1 p. 2.

Neither the Opinion and Order nor the Joint Stipulation contains a 100-foot setback. Rather the language in the very first condition to the certificate requires reliance on supplemental filings which, per the language of the condition, could modify the manner in which the facility should be constructed. EVS is entitled to put forth evidence to support its position that the setbacks were established as part of the review and approval process that were not 100-feet, those setbacks became effective under the plain language of the certificate, and the Project is in fact in compliance with those setbacks.

The information contained in the subpoenas is directly relevant to these determinations and is not in any way geared toward establishing culpability as alleged by New Market Solar. Therefore, EVS respectfully requests the ALJ deny New Market Solar's Motion to Quash the subpoenas for alleged irrelevance because they are directly relevant to the issues in this adjudicatory hearing. EVS asserts that counsel for New Market misses the point. To be clear, EVS intends to establish two fundamental factual issues at the hearing: 1) That there was never a clearly articulated 100-foot setback requirement in the Certificate or the Application, and 2) if there ever was a 100-foot setback requirement it was "modified by supplemental filings" pursuant to the Certificate, Stipulations and Conditions, paragraph (1).

C. EVS agrees with New Market Solar that the Board should rely on the Rule of Civil Procedure wherever practicable.

In its Motion to Quash, New Market Solar requests the ALJ follow the guidance in the Rules of Civil Procedure and EVS agrees. As discussed above, none of the subpoenas are unreasonable or oppressive. Each subpoena is narrowly tailored to seek individuals with specific knowledge of the review and approval process who worked on behalf of the Project to get it approved and constructed. The Ohio Rules of Civil Procedure provide guidance as to when a

subpoena should be quashed. Rule 45(C)(3) states that on a timely motion the court from which the subpoena was issued shall quash or modify the subpoena if it does any of the following:

a) Fails to allow reasonable time to comply;
b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;
c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ.R. 26(B)(7)(h), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;
d) Subjects a person to undue burden.

Rule 45(C)(4) states that before filing a motion to quash a person resisting the subpoena shall attempt to resolve any claim of undue burden through discussions with the issuing attorney.

New Market Solar failed to make any of the claims in the Civil Rules they are asking the ALJ to enforce necessary for quashing a subpoena with the arguable exception of undue burden. New Market Solar claims the subpoenas are unreasonable and oppressive which could be interpreted as analogous with undue burden. However, New Market Solar made no attempt to resolve that undue burden as required by the Rule before filing a motion to quash. New Market Solar simply moved to quash the subpoenas on grounds not listed in the rules and further not supported by the circumstances of this proceeding. Therefore, under the very rules New Market Solar is imploring the ALJ to enforce New Market Solar is not entitled to its Motion to Quash.

III. CONCLUSION

For the foregoing reasons, EVS respectfully requests that the ALJ deny New Market Solar's Motion to Quash.

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CERTIFICATE OF SERVICE

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/s/ Robert Dove
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Summary: Memorandum Contra New Market Solar ProjectCo 1, LLC and New Market Solar ProjectCo 2, LLC's Motion to Quash electronically filed by Mr. Robert Dove on behalf of EVS, Inc. .