

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of Hecate Energy	:	
Highland LLC for a Certificate of	:	
Environmental Compatibility and	:	Case No. 20-1288-EL-BGN
Public Need for the Construction of the	:	
New Market Solar Project.	:	

**INITIAL BRIEF SUBMITTED ON BEHALF OF
THE STAFF OF THE OHIO POWER SITING BOARD**

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**On Behalf of the Staff of the
Ohio Power Siting Board**

December 19, 2023

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
Procedural History	3
ARGUMENT.....	3
A. Hecate failed to comply with Condition 8 of the Joint Stipulation, making setbacks of less than 100 feet impermissible.	3
CONCLUSION	8
CERTIFICATE OF SERVICE.....	9

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INTRODUCTION

This case concerns Hecate Energy Highland, LLC’s (“Hecate” or “Company”) failure to meet conditions the Ohio Power Siting Board (“OPSB” or “Board”) required for constructing a Solar Generation Facility in Highland County (“New Market Solar” or “Facility”). Hecate’s Application to construct the Facility and supplemental filings describe a 100-foot setback requirement.¹ The Board’s Opinion and Order² adopting the Stipulation and issuing Hecate a certificate of environmental compatibility and public need (“Certificate”) mandates 100-foot setbacks. But, in constructing the facility, Hecate did not incorporate property setbacks at least 100 feet from all property lines in at least 38 locations at New Market Solar. Hecate self-reported 39 setback violations on September 12, 2022.³ Ohio Power Siting Board Staff (“Staff”) performed a site inspection of the 39

¹ Application (September 2, 2020) at 22.

² Opinion and Order (March 18, 2021).

³ Compliance Inquiry Report (October 18, 2022) at 1.

self-reported violations and confirmed 38 setbacks shorter than the required 100 feet. Staff did not perform a comprehensive review of the entire project's setbacks due, at least in part, to private property access issues. Instead, Staff's setback review focused on the areas of reported violations that were capable of investigation from public access points.⁴

Hecate claims that construction setbacks of less than 100 feet are permissible based on its submission of engineering drawings via a sharefile site in March 2021 and/or via an email to Staff in June 2021. According to Hecate, these drawings reflected lesser setbacks, and Staff's failure to object to the drawings served as a modification of the setbacks the Board prescribed. Staff refutes Hecate's claim, explaining that its review and acceptance of final engineering drawings that depicted setbacks shorter than 100 feet does not absolve Hecate of the 100-foot requirement. Staff establishes that (1) it does not independently assess whether professional engineering drawings accurately depict Board-approved conditions for constructing a generation facility and (2) Staff could not authorize setbacks shorter than 100 feet without Board approval, which the Board never gave.

In the Opinion and Order issuing Hecate's Certificate to construct New Market Solar, the Board approved 100-foot setbacks. By Hecate's own admission and per Staff's investigation, the Company instead constructed setbacks shorter than the required 100 feet in at least 38 locations. By installing setbacks shorter than 100 feet, Hecate violated

⁴ *Id.* at 2.

the conditions of its Certificate and R.C. 4906.98, which requires construction of generation facilities be “in compliance with the certificate.”

PROCEDURAL HISTORY

On September 2, 2020, Hecate filed its application with the Board for a certificate to construct and operate New Market Solar. On January 22, 2021, parties filed a Joint Stipulation and Recommendation. Signatory parties included Staff, Hecate, and the Ohio Farm Bureau. On March 18, 2021, the Board issued an Opinion and Order that granted Hecate a certificate for construction and operation of New Market Solar, subject to conditions adopted in the modified Stipulation.

On September 12, 2022, Hecate self-reported construction violations. The self-report described 39 locations where equipment was installed less than 100 feet from all property lines. Staff conducted a site inspection on September 30, 2022, which confirmed 38 of the 39 self-reported setback violations.

On November 14, 2023, the Board conducted an adjudicatory hearing. Two Staff witnesses, one Applicant witness, and one intervenor witness provided testimony.

ARGUMENT

A. Hecate failed to comply with Condition 8 of the Joint Stipulation, making setbacks of less than 100 feet impermissible.

Hecate was required to construct New Market Solar in compliance with the Board’s approval. The Board authorized the Facility by Opinion and Order on March 18, 2021, which in part adopted of the Joint Stipulation filed on January 25, 2021. This

included a provision requiring New Market Solar to design the project in accordance with the Board's certificate authority (Condition 8, Joint Stipulation). Condition 8 required that Hecate "submit ... one set of detailed engineering drawings **to confirm that** the final design is in conformance with the certificate (emphasis added). Condition 8 further provided that Hecate was required to "**specifically denote any adjustments** made from the siting detailed in the application" (emphasis added).

Hecate violated Condition 8 by failing to denote any adjustments to the setbacks the Board authorized. Instead, Hecate filed engineering drawings that depicted noncompliant setbacks without (a) denoting the setback changes or (b) seeking Staff's review of the proposed changes to confirm that they were consistent with the Board's certificate. This violated Condition 8 of the certificate. Staff authority to approve engineering drawings does not include approving project design adjustments that have been expressly addressed by the Board through a certificate. Per R.C. 4906.03, only the Board has that power.

By failing to install 100-foot setbacks, Hecate violated R.C. 4906.98(B), which provides that "No person shall construct, operate, or maintain a major utility facility or economically significant wind farm other than in compliance with the certificate the person has obtained." Hecate's Certificate to construct New Market Solar required 100-foot setbacks from all property lines. Hecate's application describes this requirement, stating "the established setbacks from property boundaries is 100 feet."⁵ Hecate

⁵ Application at 22.

confirmed this requirement in a response to Staff data requests on December 23, 2020, which states that “equipment is set back 100’ from all property lines.”⁶ The Joint Stipulation and Recommendation filed in this proceeding, adopted by the OPSB in its March 18, 2021 Opinion and Order, did not modify these setback requirements.

Hecate’s claim that Staff approved lesser setbacks is without merit. Hecate did not comply with the terms of its certificate requiring it to seek Staff’s review of any engineering changes to the minimum setbacks that the Board authorized. Staff made clear that its review and acceptance of engineering drawings was a ministerial act that did not modify Hecate’s obligation to install 100-foot setbacks. Staff’s position is reasonable as, per Condition 8, Hecate was required to specifically denote any changes to the project to trigger Staff’s review of them. As Hecate merely submitted the drawings without denoting any proposed setback changes, Staff’s processing of the drawings is not an acceptance of modifications that dramatically impact the project’s neighboring property owners.

Absent a facility denoting changes to a project as part of its filing of engineering drawings, Staff does not review engineering drawings to ensure they accurately show Board-approved conditions for construction. Staff witness Robert Holderbaum testified such review would be “duplicative” because the conditions of construction are already “set forth in the certificate.”⁷ Engineering drawings memorialize these already-established conditions. Further, reviewing engineering drawings for accuracy would

⁶ Testimony of Robert Holderbaum (November 9, 2023) (“Holderbaum testimony”), Attachment.

⁷ Holderbaum testimony at 4.

require costly expert consultant services.⁸ For these reasons, “review and acceptance” of drawings under Condition 8 does not include review for accuracy in the absence of some express denotation of engineering changes to the certificate that the Board has issued.

Instead, Staff reviewed and accepted Hecate’s drawings by verifying they were professionally drawn and publicly accessible. As Holderbaum testified, “Staff reviewed the final engineering drawings to verify that the drawings were created by a professional engineering firm and in a format that the public could access on the case docket.”⁹ This ensured Staff had professional, accessible engineering drawings to use as a resource if necessary in the future. Per Holderbaum, Staff’s review and acceptance of drawings verifies that, “If needed in the future, if something arises with the project, we have a record of it...”¹⁰ Staff’s actions constituted “review and acceptance” under Condition 8.

Further, Staff’s review and acceptance of engineering drawings cannot modify the Board-approved conditions in the March 18, 2021 Opinion and Order. The OPSB Staff does not have authority to change the conditions for constructing a generation facility set out in a certificate of environmental compatibility and public need. R.C. 4906.03 provides “The power siting board shall” “Approve, disapprove, or modify and approve applications for certificates.”¹¹ The “board’s authority to grant certificates” “shall not be exercised by any officer, employee, or body other than the board itself” and “cannot be

⁸ *Id.* at 4

⁹ *Id.*

¹⁰ Tr. at 33.

¹¹ R.C. 4906.03(D).

delegated.”¹² This means only the Board, not OPSB Staff, could adjust setback requirements in Hecate’s certificate.

In this case, the Board did not modify the 100-foot setback requirement. The OPSB articulated the construction conditions for New Market Solar in its March 18, 2021 Opinion and Order. The Board adopted the “conditions set forth in the Stipulation,”¹³ which include “the facility” and “construction practices” “as described in the application and as modified” “in supplemental filings” and “replies to data requests.”¹⁴ Again, Hecate’s application stated that “the established setbacks from property boundaries is 100 feet.”¹⁵ And Hecate stated in a response to a Staff data request on December 23, 2020, that “equipment is set back 100’ from all property lines.”¹⁶ These are the conditions the Board approved in its March 18, 2021 Opinion and Order. Hecate did not submit its engineering drawings depicting setbacks shorter than 100 feet until after this date, on March 23, 2021.¹⁷ The Board issued no additional Opinion and Order modifying the New Market Solar certificate to approve the shorter setbacks shown in the drawings. So, Hecate was bound by the 100-foot requirement in the Opinion and Order.

Hecate failed to meet the 100-foot setback requirement.¹⁸ On September 12, 2022, Hecate self-reported construction violations. Hecate identified 39 locations where equipment was installed less than 100 feet from property lines. Staff conducted a site

¹² *In re Buckeye Wind, L.L.C.*, 131 Ohio St. 3d 449, 451.

¹³ Opinion and Order at 1.

¹⁴ Stipulation at 2.

¹⁵ Application at 22.

¹⁶ Testimony of Robert Holderbaum, Attachment.

¹⁷ Notification of Compliance with Condition No. 8 (Engineering Drawings) (March 23, 2021).

¹⁸ Testimony of Christopher Douglass at 3.

inspection on September 30, 2022, finding valid 38 of the 39 self-reported setback violations.

CONCLUSION

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Board find that Hecate constructed New Market Solar out of compliance with its certificate, violating R.C. 4906.98(B), and is liable for forfeiture.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Initial Brief**, on behalf of the Staff of the Ohio Power Siting Board, has been served upon the below-named counsel via electronic mail, this 19th day of December 2023.

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