

**BEFORE  
THE OHIO POWER SITING BOARD**

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

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**REPLY 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**

**January 5, 2023**

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**INTRODUCTION**

This case concerns whether (1) Hecate Energy Highland, LLC (“Hecate” or “Company”) constructed its solar generation facility consistent with the certificate of environmental compatibility and public need (“Certificate”) the Ohio Power Siting Board (“OPSB” or “Board”) approved, (2) whether Board Staff (“Staff”) has authority to override conditions the Board imposed in a certificate, and (3) if Staff has such authority, whether it used it. Staff maintains that Hecate failed to construct the facility consistent with the Board’s Certificate, that Staff lacks authority to override Board certificate limitations, and that Staff did not do so in this case.

Hecate’s Application to construct the Facility and supplemental filings describe a 100-foot setback requirement.<sup>1</sup> The Board’s Opinion and Order<sup>2</sup> adopting the Stipulation

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<sup>1</sup> Application (September 2, 2020) at 22.

<sup>2</sup> Opinion and Order (March 18, 2021).

and issuing Hecate's Certificate mandates 100-foot setbacks. But in constructing the facility, Hecate did not incorporate setbacks at least 100 feet from all public road rights of way in at least 38 locations. Hecate self-reported 39 setback violations on September 12, 2022.<sup>3</sup> Ohio Power Siting Board Staff ("Staff") performed a site inspection of the 39 self-reported violations and confirmed 38 setbacks shorter than the required 100 feet.

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. Hecate argues its self-report of violation is also a valid layout change submission. Finally, Hecate argues mitigating circumstances, including Staff's conduct, justify a remedy other than strict compliance with its Board-approved certificate.

Hecate is wrong. Staff did not approve lesser setbacks. Hecate's engineering drawings did not denote that the 45-foot setbacks depicted were a deviation from its Certificate, so Staff properly did not review the drawings for substance. Further, Staff does not have authority to unilaterally modify a Board-approved certificate. Hecate's self-report of violation is not a valid request to adjust its Certificate. This would violate Joint Stipulation Condition 8's requirement that Staff approve *prior* to construction any modification proposed after the Company submitted engineering drawings. It would also

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<sup>3</sup> Compliance Inquiry Report (October 18, 2022) at 1.

violate R.C. 4906.98(B)'s requirement that facilities be constructed in compliance with the certificate. Finally, Staff's conduct does not mitigate Hecate's setback violation. Absent a facility denoting changes to a project on its engineering drawings, Staff reviews engineering drawings only to ensure they were prepared by a professional engineering firm and are docketed in an accessible format. Staff properly executed this review.

The Board should find that Hecate constructed New Market Solar out of compliance with its certificate, violating R.C. 4906.98(B). As such, Hecate is responsible for remedying all construction setback violations and adhering to the Board's approved 100-foot construction setbacks.

## **ARGUMENT**

**A. Hecate did not “specifically denote” 45-foot setbacks, as Condition 8 of the Joint Stipulation requires to modify a Board-approved Certificate, by merely submitting to Staff engineering drawings that depicted 45-foot setbacks.**

Hecate argues that it properly applied post-certificate, as O.A.C. 4906-3-13(D) allows, to adjust New Market Solar's setback length. Per Hecate, the fact that “every final engineering drawing submission made to Board Staff denoted 45-foot setbacks” establishes a valid application to adjust setback length.<sup>4</sup> While Hecate's drawings did show 45-foot setbacks, that alone is insufficient to request to modify a Board-approved Certificate.

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<sup>4</sup> Initial Post Hearing Brief of New Market Solar ProjectCo 1, LLC and New Market Solar ProjectCo 2, LLC (“Hecate Brief”) at 23.

Hecate did not comply with Condition 8 of the Joint Stipulation,<sup>5</sup> which governs modifying its Certificate through engineering drawings. Condition 8 required Hecate's drawings to "specifically denote any **adjustments made from the siting detailed in the application.**" (Emphasis added). **Hecate admits** that "the drawings **did not expressly state that the Project setback was changed to 45 feet** from road right-of-ways, as compared to the Application." (Emphasis added).<sup>6</sup> Though Hecate's drawings show 45-foot setbacks, they do not denote that these setbacks are an *adjustment* from the conditions the Board approved in Hecate's Certificate.

To modify a Certificate through engineering drawings, Condition 8 requires that it be clear from viewing the engineering drawings alone that the setbacks depicted are not those the Board approved. In this case, Staff could only discover the 45-foot setbacks shown in Hecate's drawings are "an adjustment made from...the application" by comparing the drawings to the application's terms. This means the engineering drawings do not themselves "specifically denote" that the 45-foot setbacks depicted are "adjustments made from...the application," as Condition 8 requires. So, under Condition 8, Hecate's drawings are not a valid post-certificate request to modify the setback lengths the Board approved in its Certificate.

Hecate also argues its engineering drawings are sufficient to modify its Certificate because they gave Staff notice that New Market Solar was constructing 45-foot setbacks. Per Hecate, "a simple, quick review of the documents submitted (and the corresponding

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<sup>5</sup> Joint Stipulation and Recommendation (January 25, 2021) ("Joint Stipulation").

<sup>6</sup> Hecate Brief at 10.

shapefiles) would have alerted Staff that the final engineering drawings denoted 45-foot setbacks throughout the Project area.”<sup>7</sup> But, submitting engineering drawings that depict 45-foot setbacks does not alone give Staff sufficient notice that Hecate sought to modify its Certificate. 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’s protocol is reasonable because a certificate holder is obligated to specifically identify and seek Staff review of construction setback changes. Hecate’s claim that Staff approved setback modifications is without merit.

Staff witness Robert Holderbaum testified reviewing engineering drawings for accuracy would be “duplicative” because the conditions of construction are already “set forth in the certificate.”<sup>8</sup> Engineering drawings memorialize these already-established conditions. Further, reviewing engineering drawings for accuracy would require costly expert consultant services.<sup>9</sup> 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. As established above, Hecate’s engineering drawings did not themselves alert Staff that the 45-foot setbacks depicted were an adjustment from the Board-approved Certificate. So, Hecate’s engineering drawings did not give Staff notice that it sought to incorporate shorter setbacks.

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<sup>7</sup> *Id.* at 25.

<sup>8</sup> Testimony of Robert Holderbaum (November 9, 2023) (“Holderbaum Testimony”) at 4.

<sup>9</sup> *Id.* At 4

Hecate next argues that Staff approved 45-foot setbacks through its “review and acceptance” of the Company’s engineering drawings. Per Hecate, Staff’s review and acceptance occurred through “Mr. Holderbaum’s verbal approval to the Project to proceed with construction” and at “the April 2021 preconstruction conference,” during which “Staff provided a green light for construction to go ahead.”<sup>10</sup> However, as Staff witness Robert Holderbaum testified, Staff’s review and acceptance of Hecate’s drawings only included verifying they were professionally drawn and publicly accessible. Holderbaum stated that “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.”<sup>11</sup> This ensured Staff had professional, accessible engineering drawings to use as a resource if doing so later became necessary. 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...”<sup>12</sup> Staff does not review engineering drawings for accuracy absent express denotation of changes from the application, which – as established above – was absent from Hecate’s engineering drawings. Therefore, Staff’s “review and acceptance” of Hecate’s drawings did not modify Hecate’s obligation to incorporate 100-foot setbacks, as described in its Board-approved Certificate.

Further, Staff’s review and acceptance of engineering drawings cannot modify the Board-approved conditions in the March 18, 2021 Opinion and Order. Staff does not

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<sup>10</sup> Hecate Initial Brief at 25.

<sup>11</sup> Holderbaum Testimony at 4.

<sup>12</sup> Tr. at 33.



have the 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.”<sup>13</sup> 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 delegated.”<sup>14</sup> This means only the Board, not Staff, could adjust setback requirements in Hecate’s certificate. The Board never modified its March 18, 2021 Opinion and Order to permit Hecate to install 45-foot setbacks, and Staff does not have the power to authorize such adjustments without Board approval.

**B. Hecate’s self-report of violation is not a valid application to adjust setback length under Condition 8 of the Joint Stipulation and R.C. 4906.98(B).**

Hecate argues its “September 2022 self-report of violation could also be viewed as a Condition 8 layout change submission.”<sup>15</sup> But, Condition 8 of the Joint Stipulation makes clear the signatory parties did not intend for self-reporting a construction violation to be a valid method of requesting to adjust a Board-approved Certificate. Condition 8 states that if Hecate seeks to modify its Certificate “after the submission of final engineering drawings,” “Staff has to review these changes to ensure compliance with all conditions of the issued certificate **prior to construction** in those areas.”<sup>16</sup> (Emphasis added). A self-report of violation does not occur until *after* construction. So, alerting

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<sup>13</sup> R.C. 4906.03(D).

<sup>14</sup> *In re Buckeye Wind, L.L.C.*, 131 Ohio St. 3d 449, 451.

<sup>15</sup> Hecate Initial Brief at 25.

<sup>16</sup> Joint Stipulation, Condition 8.

Staff of proposed adjustments through a self-reported construction violation would prevent Staff from reviewing new conditions “prior to construction,” as Condition 8 of the Joint Stipulation requires. Hecate asks the Board to find that signatory parties intended for Condition 8 to be internally inconsistent. The Board should instead reject Hecate’s proposal and find that a self-report of construction violation is not a valid method to request adjustment to a Board-approved Certificate.

Further, R.C. 4906.98(B) precludes Hecate from applying to shorten setbacks by self-reporting a construction violation. R.C. 4906.98(B) 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.” (Emphasis added.) Allowing Hecate to apply for layout changes by self-reporting construction violations would violate R.C. 4906.98(B). At the time of construction, Hecate’s facility would not be “in compliance with the certificate,” as R.C. 4906.98(B) requires. Surely, signatory parties did not intend for Hecate to modify its Certificate by violating Ohio law. The Board should find self-reporting a construction violation is not a valid application to modify a Certificate.

**C. Staff properly reviewed Hecate’s engineering drawings, so Staff’s conduct does not mitigate Hecate’s construction violation.**

Hecate argues the Board should consider “many mitigating circumstances” in fashioning a remedy for the Company’s violation. If the Board does consider mitigating circumstances, Staff’s conduct should not be among them. Hecate argues that “Staff had an obligation to review engineering drawings and did not, thereby compounding this

issue.”<sup>17</sup> Not true. Again, Staff did review the engineering drawings. Staff reviewed and accepted Hecate’s engineering drawings by making sure they were professionally drawn and publicly accessible. Staff did not review the engineering drawings for accuracy because Hecate did not denote that the 45-foot setbacks depicted were an adjustment from the Board-approved Certificate. That Staff did not review the substance of the drawings is the fault of Hecate and, therefore, does not mitigate the Company’s construction violation.

Hecate’s Certificate to construct New Market Solar required 100-foot setbacks. Hecate’s arguments that Staff modified this requirement are without merit. Hecate failed to incorporate 100-foot setbacks.<sup>18</sup> On September 12, 2022, Hecate self-reported construction violations, identifying 39 locations where equipment was installed less than 100 feet from public road rights of way. Staff conducted a site inspection on September 30, 2022, finding valid 38 of the 39 self-reported setback violations. By failing to install 100-foot setbacks, Hecate constructed New Market Solar out of compliance with its Certificate, violating R.C. 4906.98(B). As such, Hecate is responsible for remedying all construction setback violations and adhering to the Board’s approved 100-foot construction setbacks.

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<sup>17</sup> Hecate Initial Brief at 41.

<sup>18</sup> Testimony of Christopher Douglass at 3.

## 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 responsible for remedying all construction setback violations and adhering to the Board's approved 100-foot construction setbacks.

Respectfully submitted,

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**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**, on behalf of the Staff of the Ohio Power Siting Board, has been served upon the below-named counsel via electronic mail, this 5<sup>th</sup> day of January 2023.

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