

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.)

Reply Brief of New Market Solar ProjectCo 1, LLC and New Market Solar ProjectCo 2, LLC

New Market Solar ProjectCo 1, LLC and New Market Solar Project Co 2, LLC's (collectively, "NMS") presented their position in this proceeding in the Initial Brief submitted on December 19, 2023. NMS files this Reply Brief to reiterate that if the Board finds that the New Market Solar Project (the "Project") is noncompliant with the Project's certificate, then any remedy the Board fashions should minimize economic waste to protect the public interest. As explained in the Initial Brief, Ohio appellate courts routinely apply the economic waste doctrine in situations where the cost of remedying a construction defect outweighs the utility of the remedy. The doctrine is applicable here and should be adopted by the Board.

Following the doctrine, the Board should weigh the high cost of redesigning the Project against the fact that strict compliance would negligibly enhance the public interest. The Board must acknowledge the advanced stage of Project construction (the Project is essentially complete and is undergoing final testing) and that strict compliance with the 100-foot setback would lead to economic waste of \$7 to \$10 million (NMS Ex. 18 at 20, 50; Tr. at 250:9-17). Strict compliance would also only relocate panels just a small distance from current locations (ranging from 3 feet to 32 feet), while providing little to no benefit to the local community (NMS Ex. 18 at 19-20; Tr. at 249: 12-22). In short, strict compliance would equal \$7 to \$10 million of

economic waste and offer the least amount of benefit to the public as compared to a remedy that would improve visual impacts while avoiding economic waste.

The remedy which eliminates the possibility of any economic waste would be to allow the panels to remain as is with additional screening and fencing changes (NMS Ex. 18 at 20). The Board has flexibility under Ohio Adm.Code 4906-7-02(G) to allow the panels to remain as designed and as presently located. This can be accomplished by the Board directing NMS to update its landscaping plan, for Staff review and approval, to provide for additional screening and fencing. This additional screening would further mitigate any visual impacts of panels being left in place, as constructed. Notably, the change to agricultural fencing has already been accomplished along public roads (NMS Ex. 16; Tr. at 171:23-25; 236:3-19). If the Board utilizes this remedy, all these changes (current panel locations and screening and fencing changes) would be reflected on as-built drawings submitted to Board Staff.

If the Board finds it necessary to direct the removal of some panels, the Board should consider the remedy proposed by Mr. Yuri Otarov, which would minimize economic waste and serve the public interest. This remedy would consist of relocating panels near primary roads; enhanced landscaping in areas where panels are proposed to remain; and a change to agricultural fencing (already implemented) (NMS Ex. 18 at 19-22; Tr. at 250:17 – 251:1).

NMS also clarifies for Staff that it does not dispute that the Project is subject to a 100-foot setback from the middle of public roads and non-participating boundaries given the language in the Application and Figure 5 to the Application (App. at 32; NMS Ex. 11), a December 2020 response to a Staff data request (NMS Ex. 12), and Staff's understanding of the setback as presented to the Board in the January 4, 2021 Staff Report of Investigation (NMS Ex. 22 at 6). However, as NMS explained thoroughly in its Initial Brief, NMS defers to the Board

to determine if Condition 8 of the Joint Stipulation (allowing changes post-certificate and after the submission of final engineering drawings) and Ohio Adm.Code 4906-3-13(D) (allowing changes post-certificate) provided a mechanism for the Project layout changes that have resulted in some panels being within 100 feet of non-participating property boundaries and within 100 feet of the middle of public roads.

Finally, now that briefing is complete, NMS urges the Board to promptly issue a decision on this matter as Project construction is almost complete and the Project is partially operational (NMS Ex. 14). Fourteen months have elapsed since NMS's self-report to Board Staff during September 2022 and NMS seeks to resolve this compliance proceeding as soon as possible.

NMS appreciates the Board's consideration of NMS' position in this proceeding and would like the opportunity to improve the Project's visual appearance rather than moving panels a short distance within the Project's existing fenceline. As always, NMS is available to provide any additional information or respond to any questions to assist the Board in arriving at its decision.

Respectfully submitted,

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