BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 REPLY BRIEF

In reviewing the Staff of the Ohio Siting Board's ("The Staff"), Initial Brief, nearly the entirety of the subject matter of the hearing was ignored. Instead, the Staff sets up a strawman argument and attempts to refute that strawman narrative in stating the following:

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

See Staff Brief at p.2.

The clear problem with the foregoing is that this narrative is simply not accurate. What is also clear with Staff's above referenced narrative, is that there is not one bit acknowledgement of the clear testimony of Robert Holderbaum that: (1) the Certificate could be modified by supplemental filings; and (2) that Staff were required to review and confirm that the work would proceed in accordance with submissions, which Witness Holderbaum acknowledged, nobody at the Board did. These issues will be further addressed below

Staff's narrative is also wrong when it states, without citation, that "Staff could not authorize setbacks shorter than 100 feet without Board approval, which the Board never gave." *Id*. Indeed, there is no rule requiring the Board's approval other than what was delegated to Staff, which was to permit changes to the Project through subsequent filings and submissions. *See* EVS Exhibit 1, Exhibit DB-14 (Joint Stipulation).

As will be discussed, evidence at the hearing demonstrated the following:

- The Certificate did not have a setback requirement and the referenced Application also did not have a clearly articulated setback requirement. Instead, the Application references "in consultation with Highland County" and Highland County has a 45-foot setback requirement. As such the Staff's position is fundamentally flawed in that there never was a "change" in setback as the project setback has consistently been 45 feet.

- Even if there were a 100-foot setback requirement (a fact that is disputed), Staff modified that requirement by their actions in accepting and approving multiple submittals with a 45-foot setback.

- The 45-foot setback was open, obvious and consistent in all submittals and approvals. Fundamental principles of estoppel would normally apply and bind the Board to its actions in reviewing and approving all submittals with a 45-foot setback, but for the fact the Board is a state agency.

- The average setback as currently built is 177 feet, <u>with only minor corner areas infringing into the Board's alleged 100-foot setback envelope</u>. The overall impact is perceptively zero.

- Of the total 100MW capacity, 35 MW is built and in-service generating power. The other 65 MW was near completion. There are less costly alternatives to a re-configuration of the system. A reconfiguration of the system at this point constitutes economic waste.

I. THE BOARD'S LACK OF STANDARD SETBACKS, THE VAGUE AND CONTRADICTORY LANGUAGE IN THE APPLICATION, AND THE INCLUSION OF CONDITION 1 IN THE JOINT STIPULATION DO NOT ESTABLISH A 100' SETBACK

Hecate's Application contained only one reference to property setbacks:

- Property Lines: Setbacks are only to property lines at the exterior of the property. When two contiguous parcels are included in the Projects, there are no setbacks between the parcels even if under separate ownership. Property lines are based on GIS data. Setback locations will be adjusted following detailed site surveys. In consultation with Highland County, the established setbacks from property boundaries is 100 feet.

See EVS Exhibit 1, Attachment DB-10 (Application) at p.22. The Board does not have any established setback requirement for solar farms, but Highland County does have setbacks for commercial and industrial buildings. *See* Transcript at p.17, Lines 7-11.[1] We know that Highland County does not have a setback requirement greater than 50'. *See* Highland County Conveyance Standards (EVS Exhibit 1 - Attachment DB-3). Clearly, no reference is made in the Highland County Conveyance Standards as to any setback of 100', and the Board has no proscribed setback requirement. At best, the reference in the Application stating that "[i]n consultation with Highland County the established setbacks from property boundaries is 100 feet", is puzzling, contradictory, and overtly ambiguous. At worst, and the most likely explanation, is that the Application language must have been a mistake, in particular when similarly situated solar projects in the area have 50' setbacks. *See* Transcript at pp.17-18, lines 25 and 1.

[1] Mr. Holderbaum is a utility specialist, which covers all types of utilities including solar farms. *See* Transcript at p.22. He became involved with the Project "[p]retty much in the start of them filing with the State". *Id* at p.21. With regard to this Project, he was "responsible for all of it" and "basically organized the entire review for the project". *Id* at pp.26-27. Mr. Holderbaum also coordinated the Staff. Id.

II. EVEN IF THERE WERE A 100-FOOT SETBACK REQUIREMENT (A FACT THAT IS DISPUTED), THE BOARD MODIFIED THAT REQUIREMENT BY THEIR ACTIONS IN ACCEPTING AND APPROVING MULTIPLE SUBMITTALS WITH A 45-FOOT SETBACK

A. Condition 1

Staff's Initial Brief fails to consider Condition 1's language in any fashion. Indeed, Condition 1 is not referenced at all in Staff's Initial Brief. Condition 1 of the Joint Stipulation provides very clear direction as to how this Project could be modified:

> (1) 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.*

See EVS Exhibit 1, Exhibit DB-14 (Joint Stipulation). Even Mr. Holderbaum had to agree that **at a minimum, post certificate filings would and/could modify a project:**

> Q. …Mr. Douglass mentioned filing his testimony. The filing in this particular case, that comes through the OPSB website for the exchange of data, does it not?
>
> A. That's just our docket system so the Application would just file that with our docketing system.
>
> Q. And I think that's my point is there's nothing ---if someone is filing something, it has to be through the filing system as a general matter of course, right?
>
> A. I believe that's correct, yes.
>
> Q. … If the Applicant is submitting supplements to its Application, that's considering filing, right?
>
> A. That would be considered filing, correct.
>
> Q. If the Applicant is providing and submitting through the website the condition—the compliance condition letters, those are filings, right?
>
> A. Correct.

See Transcript at pp.23-24. Mr. Holderbaum also agreed that consistent with Condition 1, the Project could indeed be modified:

> Q. …As a general sense, you and I can agree that there are opportunities for … project modification that are through supplemental filings, data requests, or other stipulations, fair enough?
>
> A. Yeah, that's pretty broad, but yes."

Id at p.59.

Staff never addresses Holderbaum's admission, instead focusing on the alleged 100-foot setback requirement without even referencing Condition 1. In short, the Staff's Initial Brief completely ignored the testimony and the Joint Stipulation. By ignoring Condition 1, the Staff asserts that it does not matter anyway because "Staff does not review engineering drawings to ensure they accurately show Board-approved conditions for construction". *See* Staff Brief at p.5. Staff then relies upon Mr. Holderbaum's circular logic and writes that "such review would be "duplicative" because the conditions of construction are already "set forth in the certificate". Engineering drawings memorialize these established conditions. Further, reviewing engineering drawings for accuracy would require costly expert consultant services." *Id*. In other words, it was okay for Staff to not do what they were supposed to do.

Despite the clear and unequivocal language of Condition 1, and the specific requirements of the Application to submit compliance drawings for review and acceptance, Staff reviewed nothing of substance. Indeed, if Staff is to be believed, they ignored every condition compliance submission that might have hinted at "engineering drawings". Yet at the hearing, Mr. Holderbaum was shown the May 26, 2021 drawings (EVS Exhibit 8), and despite apparently never reviewing the drawings before, in 20 seconds identified four instances on Exhibit 8 where the drawing identified a 45' setback. *See* Transcript at p.123, Lines 15-20. Cleary, "costly expert consultant

services" were not required to identify 45' setbacks. *See* Staff Initial Brief at pp.5-6. The argument that it was too costly to review a site plan simply does not pass any factual or legal test. Instead, the far more likely options are that the Staff reviewed and saw the setbacks and did not care, or Staff simply did not care and admittedly "accepted" the drawings regardless. *See* Staff Brief at p.5 ("Staff's review and acceptance of engineering drawings")[2].

B. Condition 8

Condition 8 was also very clear, as the language comes directly from Rule 4906-3-14:

> (8) At least 30 days prior to the preconstruction conference, the Applicant shall submit to Staff, for review and acceptance, one set of detailed engineering drawings of the final project design and mapping in the form of PDF, which the Applicant shall also file on the docket of this case, and geographically referenced data (such as shapefiles or KMZ files) based on final engineering drawings to confirm that the final design is in conformance with the certificate. Mapping shall include the limits of disturbance, permanent and temporary infrastructure locations, areas of vegetation removal and vegetative restoration as applicable, and specifically denote any adjustments made from the siting detailed in the application. The detailed engineering drawings of the final project design shall account for geological features (including, but not limited to Karst topography or earthwork considerations) and include the identity of the registered professional engineer(s), structural engineer(s), or engineering firm(s), licensed to practice engineering in the state of Ohio who reviewed and approved the designs. All final geotechnical study results shall be included in the submission of this final project design to Staff. If any changes to the project layout are made after the submission of final engineering drawings, the Applicant shall provide all such changes to Staff in hard copy and as geographically referenced electronic data. All changes are subject to Staff review to ensure compliance with all conditions of the Certificate prior to construction in those areas.

See EVS Exhibit 1, Attachment DB14. Condition 8 expressly mandates that Staff be provided, for review and acceptance, a set of final engineering drawings to "confirm that the final design is in

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[2] Staff's position on not conducting any substantive review of drawings is of course an *ad hoc* approach that appears to be applicable to just this case, as no written protocol exists to only review drawings for a logo and pdf format, and Mr. Holderbaum lost his handwritten notes:

> Q. There is no written understanding that you have that says we don't review drawings meaning your office and you and your staff and Staff you coordinate do not review drawings.
>
> A. There's no written protocol that says don't do that. There's -- the way that the condition is we did as we were supposed to do.

Id at p.104, Lines 7-12. As pointed out, it took Mr. Holderbaum 20 seconds to identify four 45' setbacks on a drawing, and likely did so because they were "specifically denoted" and easily discernable on the drawings.

conformance with the certificate". Mr. Holderbaum confirmed that he reviewed and accepted the final drawings but failed to ensure that the work was in conformance or not in conformance with the Certificate.

> Q. You didn't confirm whether the design of the project or the work that was going to be happening was either going to be in conformance with the Certificate or not going to be in conformance with the Certificate.
>
> A. I would say we never confirmed that, correct.

See Transcript at p.114, Lines 17-23. Once again, the Staff utterly failed in its obligations to adhere to the language of the Joint Stipulation. Mr. Holderbaum also agreed that that New Market Solar could not review and accept their own work:

> Q. All right. So we also can agree that the review and acceptance couldn't be done by the Applicant. It had to be done by some other party because you are submitting it for review and acceptance; would that be fair?
>
> A. Yes. As I have stated before, our – the way we view reviewing and acceptance is a couple of things that I don't think the Applicant would do and that's to keep it in our public docket and have it forward facing for the public to have access to.
>
> Q. Is there anything in Condition 8 that says, hey, the Staff isn't going to do one bit of substantive review of this?
>
> A. I don't think so.

Id at p.109, Lines 9-22. In short, no one on the Staff made a single effort to confirm "that the final design is in conformance with the certificate" prior to construction beginning. *Id* at p.119, Lines 15-18.

Knowing that it had not substantively reviewed a single drawing, instead only validating the existence of an engineer's logo and whether it was in PDF format, and had utterly failed to adhere to Condition 8, Staff still gave the verbal go ahead to the Owner to begin construction in

April of 2021. *See* Transcript at pp.240-241, Lines 25-1. Incredibly, Staff's Initial Brief states that "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". *See* Staff Brief at p.6. That is not what Condition 8 requires. Indeed, the Staffs' brief disingenuously not only ignores Holderbaum's testimony, but also ignores the mandate of Condition 8 that requires Staff "to confirm that the final design is in conformance with the certificate". *See* EVS Exhibit 1, Attachment DB-14. Mr. Holderbaum told the world that no one on Staff performed this function. *See* Transcript at p.109, Lines 9-22.

III. THE AVERAGE SETBACK AS CURRENTLY BUILT IS 177 FEET, WITH ONLY MINOR CORNER AREAS INFRINGING INTO THE BOARD'S ALLEGED 100-FOOT SETBACK ENVELOPE. THE OVERALL IMPACT IS PERCEPTIVELY ZERO

Much of EVS' proofs (as well as New Market Solar's proofs), came in completely unrefuted. Indeed, Staff failed to even address over 90% of either EVS or New Market Solar's evidence. This critical point cannot be stressed enough. One of these issues was the alleged setback violations, and the other the imperceptibility of a 70' setback or 100' setback. In short, the Board must accept as true the following testimony because it is the only testimony that was proffered in the hearing.

A. The Alleged Setback Violations

The following table illustrates these alleged setback violations, as sorted from the closest to the road versus furthers from the measurement points:

New Market Solar Measurement Table September 30, 2022

Measurement	Feet from Road Center Line		
Measurement 39	100'1"	100	0
Measurement 11	97'2"	97	3
Measurement 24	96'5"	96	4
Measurement 17	94'4"	94	6
Measurement 2	91'2"	91	9
Measurement 35	89'9"	90	10
Measurement 26	89'10"	89	11
Measurement 27	88'10"	89	11
Measurement 16	86'9"	87	13
Measurement 4	86'	86	14
Measurement 6	85'9"	86	14
Measurement 7	85'7"	86	14
Measurement 31	85'9"	86	14
Measurement 32	85'7"	86	14
Measurement 3	84'7"	85	15
Measurement 23	85'	85	15
Measurement 29	85'5"	85	15
Measurement 1	84'1"	84	16
Measurement 34	83'8"	84	16
Measurement 15	83'1"	83	17
Measurement 30	82'11"	83	17
Measurement 22	82'10"	82	18
Measurement 25	82'3"	82	18
Measurement 14	81'1"	81	19
Measurement 5	78'9"	79	21
Measurement 12	77'8"	78	22
Measurement 28	77'11"	77	23
Measurement 8	75'8"	76	24
Measurement 10	76'	76	24
Measurement 18	76'1"	76	24
Measurement 19	76'5"	76	24
Measurement 36	76'	76	24
Measurement 9	75'5"	75	25
Measurement 13	75'2"	75	25
Measurement 20	73'2"	73	27
Measurement 21	71'2"	71	29
Measurement 38	71'2"	71	29
Measurement 37	68'7"	69	31
Measurement 33	67'11"	68	32

See NMS Exhibit 26. Of these alleged setback violations, 5 are less than 10 feet; 23 less than 20 feet, and 33 less than 25 feet. *See* Transcript at p.175-176 (entirety).

EVS' Property Lines and Average Setbacks analysis is even more illuminating as to these alleged setback violations, as even assuming a required setback of 100' (which is not accurate), the weighted average of setbacks for this Project is 177.2:

PROPERTY LINES & AVERAGE SETBACKS

Line No.	Length (ft.)	Area (SF)	Avg. Setback	Req Equip Setback
L1	2,082	342,019	164	100
L2	455	121,368	267	100
L3	2,178	445,435	205	100
L4	1,255	220,792	176	100
L5	1,382	311,643	226	100
L6	772	121,287	157	100
L7	667	118,834	178	100
L8	682	337,814	495	100
L9	2,240	236,649	106	100
L10	1,015	157,408	155	100
L11	3,319	549,572	166	100
L12	957	252,234	264	100
L13	617	93,828	152	100
L14	373	46,347	124	100
L15	1,562	283,499	181	100
L16	2,041	241,381	118	100
L17	2,197	288,298	131	100
L18	1,027	229,135	223	100
	Weighted Avg. Setback		177.2	

See EVS Exhibit 1, Attachment DB-15. The setbacks are simply minor corner intrusions. Stated differently, these are not huge swathes of land, but simply corners or edges of property. New Market Solar has provided an accurate depiction of these alleged setback violations in its brief.

B. The Practical Impact of the Alleged Setback Violations.

Again, the only evidence and testimony presented to the Board on the issue of the impact of the alleged setback violations came from Dan Bowar of EVS. Mr. Bowar testified that he has designed and been involved with "many, many solar projects" similar to the instant one. *See* Transcript at p.225, Lines 5-7. In questioning about the chart referenced in NMS Exhibit 26, Mr. Bowar testified as follows:

> Q. Looking at the chart, it showed the setbacks, would those setbacks as exist in your opinion as a civil engineer working on solar projects, is that going to change the experience for anybody driving by the project keeping in mind there is a fence and vegetation?

> A. With the distances we are talking about, no. The aesthetics are going to be imperceivable to those on the roadway.

See Transcript at p.221, Lines 1-9. With Mr. Bowar being the only person to testify on the issue, the Board is presented with clear testimony that the alleged setback violations are "imperceivable" from that of 100' setbacks. Stated differently, the current setbacks as built have no negative impact on any landowners or otherwise, and the Board must accept this testimony as undisputed. Staff fails to even address this issue at all at the hearing or otherwise, and of course the Staff's post hearing brief is silent as to this significant issue.

IV. OF THE TOTAL 100MW CAPACITY, 35 MW IS BUILT AND IN-SERVICE GENERATING POWER. THE OTHER 65 MW WAS NEAR COMPLETION. THERE ARE LESS COSTLY ALTERNATIVES TO A RECONFIGURATION OF THE SYSTEM. A RECONFIGURATION OF THE SYSTEM AT THIS POINT CONSTITUTES ECONOMIC WASTE.

New Market Solar and Mr. Bowar presented unrefuted testimony about the significant waste that would occur to enforce a 100'setback that is imperceptible from a worst-case scenario as built condition of 70' setback. New Market Solar has presented this issue in their brief, and EVS concurs with the same.

V. CONCLUSION

For all the foregoing reasons, EVS respectfully requests that the Board enforce the setbacks as built and permit the project to be completed. EVS respectfully urges the Board to render its decision as soon as practicable. The Project is at a critical juncture and needs to be completed in order to reach full power production that will benefit the community. At this time, work is scheduled to begin on February 6, 2024, and any delay to that start will only further impact the project's ability to provide power to the utility company.

Respectfully submitted,

/s/ Robert Dove
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on January 5, 2024.

/s/ Robert Dove
Robert Dove

Summary: Reply Brief electronically filed by Mr. Robert Dove on behalf of EVS, Inc.
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