BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of Angelina Solar I, LLC for a Certificate of Environmental Compatibility and Public Need	**)** **)** **)** **)**	**Case No. 18-1579-EL-BGN**

REPLY BRIEF OF ANGELINA SOLAR I, LLC

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TABLE OF CONTENTS

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I. INTRODUCTION

The Board should grant a certificate to the Angelina Solar I, LLC ("Angelina") Solar Project (the "Project") because Angelina has provided the Board with sufficient evidence to find and determine that the Project meets every applicable requirement of R.C. 4906.10(A). Nothing in the Post-Hearing Brief ("CCPC Brief") of Concerned Citizens of Preble County, LLC and its intervening members (collectively, "CCPC"), supports a different conclusion.

Rather than evaluate whether the statutory criteria for a certificate issuance have been satisfied, CCPC advances views on the contents of certificate applications, including the submittal of various studies and plans that CCPC believes should have been included in Angelina's application ("Application"). That viewpoint is at odds with the Board's rules and the Board's prior decisions, as well as decisions from the Supreme Court of Ohio. CCPC's viewpoint is also at odds with the fact that the Project (as is every project the Board reviews) is a proposed project and final engineering and design is not yet complete. *See e.g. In re Application of Nestlewood Solar I LLC*, Opinion, Order and Certificate dated April 16, 2020, ¶¶ 72, 96 (requiring submittal of engineering drawings at least 30 days prior to preconstruction conference and agreeing to submittal of final engineering drawings not economically feasible pre-certificate issuance).

CCPC's viewpoint is also nonsensical. CCPC would have the Board only issue certificates for projects for which all final engineering and design studies are complete, every planting in vegetative screening identified, scripts for emergency service training meetings drafted, and every inch of drain tile located, among other highly detailed and specific construction, design, and engineering requirements. This is unworkable, not required by law and as Mr. Herling testified, would "drive investment for any type of power generation plants away from the State because of the delay and cost that a final engineering/construction design requirement would impose on any project." (Company Ex. 22, 6).

Nevertheless, CCPC strives at length to characterize the Application as flawed, but to do so it necessarily resorts to numerous misrepresentations. One of the more egregious examples is CCPC's oft-repeated claim that Angelina improperly attached numerous "studies" to its hearing testimony as if it was attempting to fill in information missing from the Application. This characterization is patently false. The exhibits were not "studies" (*e.g.*, an executed road use maintenance agreement) and most importantly, CCPC did not file any motions to strike the exhibits or object to the admission of the exhibits during the October 29, 2020 hearing.

Further, CCPC's challenge to the February 1, 2019 completeness determination is not only misplaced, but it is also untimely given that CCPC never objected to that determination, made no appearance at the public hearing to submit that objection and has never submitted a formal challenge to the completeness decision. Even if the completeness determination can be challenged almost two-years after it was made—which it cannot—a review of the Application and the requirements of O.A.C. 4906-4 reveal that the Application fully complied with every single requirement. CCPC's repeated conclusory assertion that the Application has "information gaps" is simply inaccurate.

CCPC's argument that certain criteria were not addressed is simply a diversion from CCPC's failure to provide any evidence supporting its arguments over the last two years. Unlike CCPC, Angelina has entered voluminous evidence into the record to support the issuance of a certificate. Angelina hired multiple engineering and other professional firms to assist in studying and analyzing this project and its potential impacts. Multiple expert witnesses provided testimony to the Board for its consideration to support both the Application and the Amended Joint Stipulation. CCPC had the opportunity to cross-examine all witnesses and did not object to the admission of that testimony into the record.

CCPC also does not speak for the public. The Preble County Commissioners, the Preble County Engineer, the Preble Soil & Water Conservation District, the Board of Trustees of Dixon Township and the Preble County Planning Commission, **all signed the Amended Joint Stipulation and all recommend that the Board adopt the proposed conditions in the Amended Joint Stipulation under Section 4906.10(A) of the Revised Code**. While CCPC with its alleged 67 members may imply that it speaks for the public, the signatures of the elected officials of Preble County and other local agencies on the Amended Joint Stipulation are a far better indication of the public's view of the Project.

In sum, and as set forth more fully below, none of the arguments made by CCPC justify the denial of a certificate to Angelina or the modification of any of the conditions of the Amended Joint Stipulation. The robust and voluminous record in this proceeding fully supports issuance of a certificate, and the Board should adopt the Amended Joint Stipulation in its entirety without modification.

II. ARGUMENT

A. CCPC's claim that Angelina is Attempting to Supplement the Application with Additional "Studies" is a Misrepresentation to the Board and Should be Rejected by the Board

CCPC blatantly misrepresents to the Board that the various plans and documents referenced in the Amended Joint Stipulation and attached to Angelina witness testimony are "studies." Specifically, CCPC argues that Angelina improperly submitted numerous "studies" into the record at the October 29, 2020 hearing. (*See, e.g.*, CCPC Brief at 6 ("None of the studies attached to these supplemental testimonies have been incorporated into the Application."); *see also id.* at 5, 6, 8, 83, and 85). CCPC also claims that the conditions of the Amended Joint Stipulation call for "12 major studies" post-certificate approval. (*Id.* at 84; *see also id.* at 2, 4, 5, 8, 83, and 90). CCPC's deliberate use of the term "study" in both contexts throughout its brief is highly misleading and improper. A simple review of the alleged "studies" show that they are typical plans supporting the Project's construction and operation and not "studies."

First, the documents that Angelina provided at the October 29, 2020 hearing are clearly not "studies" as CCPC claims but plans and other documents representing Angelina's ongoing work to prepare for the construction and operation of the Project. For example:

- The preliminary site plan (Company Ex. 22 at Attachment DH2) that reflects ongoing engineering work and incorporates the negotiated setbacks in the Amended Joint Stipulation is not a study;
- The correspondence from the Ohio Historic Preservation Office ("OHPO") (*Id.* at Attachment DH3) about the Project's future survey plans is not a study;
- The draft complaint resolution plan (*Id.* at Attachment DH4) to be used during construction and operation is not a study;

- The Preble County Commission Resolution approving Angelina's PILOT program application for the Project and putting in place the $9,000/MW/year payment is not a study (*Id.* at Attachment DH6);

- The preliminary landscape management plan (Company Ex. 24 at Attachment 1) that will be finalized and utilized for the Project during construction and operation is not a study;

- The Road Use and Maintenance Agreement ("RUMA") (Company Ex. 27 at Attachment 1) executed with the County and townships is not a study;

- The preliminary vegetation management plan (*Id.* at Attachment 2) to be used during construction and operation is not a study; and

- The preliminary decommissioning plan (*Id*. at Attachment 3) to be used during operation and at the end of the Project's life is not a study.

With the possible exception of David Hessler's sound modeling of the preliminary layout, none of these documents are "studies." Mr. Hessler performed the modeling to support the Amended Joint Stipulation and its 500 foot inverter setback condition.[1] He presented a sound contour map that resulted from that modeling with his testimony and used that to explain why the 500 foot inverter setback would ensure no noise issues. Importantly, CCPC did not object to Mr. Hessler's testimony and the sound contour map being admitted into evidence.

Second, the Amended Joint Stipulation's recommended post-certificate submittals are not "studies." To the contrary, the submittals all relate to the construction and operation of the Project, as shown below:

- Detailed final engineering drawings are not a study;

- Drawings showing changes to the Project's layout after final engineering drawings are submitted is not a study;

- A public information program is not a study;

[1] Notably, Mr. Hessler's modeling was made possible because of two circumstances occurring post-application: first, the signatories to the Amended Joint Stipulation agreed to stipulate to an expansive minimum setback of 500 feet from any inverter and a non-participating residence, (Joint Ex. 2 at 6 Condition 3); and, second, Mr. Hessler's discovery in "late 2019" of an excellent study of inverter sound that provided "the honey deal [sic "ideal"] information that's needed for noise modeling." (TR 588 and 592).

- A plan for avoiding cultural resources is not a study;
- A landscape and lighting plan is not a study;
- A storm water pollution prevention plan is not a study;
- A vegetation management plan is not a study;
- A construction access plan is not a study;
- A final traffic plan is not a study;
- A transportation management plan is not a study;
- A decommissioning plan is not a study; and
- Pre- and post-construction stormwater calculations are not a study – they are required to be completed after final engineering and are part of the pre-construction process.

Under the proposed Amended Joint Stipulation, Staff will confirm that the plans listed above comply with the Amended Joint Stipulation's conditions. (*See* Joint Ex. 2 at Conditions 9, 11, 13, 18, 22, 25, and 29 (requiring mitigation, landscape and lighting, complaint resolution, vegetation management, construction access, traffic, and decommissioning plans to implement the conditions' respective requirements and obligations to be submitted to Staff for review and confirmation that they comply with the respective conditions)). Far from constituting "studies" required to be in the Application, the plans required to be submitted to Staff prior to construction of the Project and the preliminary plans submitted at the October 29, 2020 hearing (with no objection from CCPC) demonstrate Angelina's continued work on the Project, its ongoing engagement with the local authorities, and the natural development process of a major utility facility including the development of construction and operation plans.

CCPC's claim after the hearing that the Angelina witness testimony exhibits are improper stands in stark contrast to its near silence concerning those exhibits during the October 29, 2020 hearing. Indeed, CCPC failed to make a single objection to any of these documents being

included in the record, and offered extremely limited, if any, cross-examination of these documents, despite having ample opportunity to do so. For example, CCPC's counsel had **no objections or questions** whatsoever regarding the RUMA, decommissioning plan, and vegetation management plan. (TR 638-639 (admitting the RUMA, decommissioning plan, and vegetation management plan into the record without a single question or objection). Likewise, CCPC had **no objections or questions** concerning the OHPO communication, complaint resolution plan, or PILOT approval. (*See generally* TR. Vol. V). Similarly, CCPC had **no objections** and only very limited questions regarding the preliminary site plan, landscape plan, and the sound contour map. (TR at 560-562, 566-568, 590-591, and 611-613).

CCPC also had ample opportunity to engage in discovery and take depositions before the October 29, 2020 hearing, but did not serve any discovery on Angelina. The only request from CCPC was to informally ask for two documents referenced in Mr. Hessler's testimony on the Amended Joint Stipulation (an ISO noise standard and an manufacturer inverter sound power report – both of which were provided). CCPC subsequently marked the inverter sound report for use at the hearing and that document was admitted into the record (CCPC Ex. 7). CCPC also never objected either by motion or orally to the scheduling of the public hearing and any part of the evidentiary hearing even though it now claims that both hearings should not have been held. (CCPC Brief at 8).

The Board should reject CCPC's efforts to misconstrue the nature of the information that was entered into the record at hearing without objection as well as the post-certificate submittals required under the Amended Joint Stipulation. The Board should also reject CCPC's post-hearing claim that the Board should not have held the April 30, 2019 public hearing.

B. The Board Can Appropriately Delegate its Authority to Staff for the Post-Certificate Issuance Approval of Certain Plans

Setting aside CCPC's gross mischaracterization of the post-certificate approvals, it is well-established in Ohio law that the Board can delegate to Staff the responsibility to flesh out certain certificate conditions. Yet CCPC devotes approximately two pages in its brief to recite the **dissenting opinion** from a Supreme Court of Ohio case, in order to claim that the Board should not approve the Amended Joint Stipulation, because it allows "12 major studies" to be submitted to Staff following the issuance of the certificate. (CCPC Brief at 82-83, citing dissenting opinion *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878).[2] In so doing, CCPC repeats arguments made and rejected by the Board and the Supreme Court of Ohio in previous renewable generation cases.

As the Court concluded in *Buckeye Wind*, "**the board did not improperly delegate its responsibility to grant or deny a provisional certificate when it allowed for further fleshing out of certain conditions of the certificate.**" *Buckeye Wind* at ¶ 18 (emphasis added). Specifically, the *Buckeye Wind* certificate required the applicant to submit to the Board's Staff at various times after the issuance of the certificate:

- A final equipment delivery route and transportation routing plan
- One set of detailed drawings for the proposed project so that the Staff can confirm that the final project design is in compliance with the terms of the certificate
- A stream crossing plan
- A detailed frac-out contingency plan
- A final electric collection system plan

[2] The specific section of the dissent that the CCPC quotes was addressing one specific concern: that the applicant in that case did not provide the calculations necessary to demonstrate that the provided setbacks were sufficient to protect neighbors from blade shear (i.e. the distance a broken windmill blade could travel) and does not provide any comment regarding approval of post-certificate plans generally, which are commonly utilized. *See Buckeye Wind* at ¶¶ 48-53.

- A tree clearing plan
- A final access plan
- A fire protection and medical emergency plan
- An avian and bat mortality survey plan
- A Phase I cultural resources survey program
- An architectural survey work program
- A screening plan for one specific property
- A determination of the probable hydrologic consequences of the decommissioning and reclamation operations
- A study identifying any Prime Farmlands
- Engineering techniques proposed to be used in decommissioning and reclamation and a description of the major equipment

In re Buckeye Wind, Case No. 08-0666-EL-BGN, Opinion, Order and Certificate, March 22, 2010, at 82-96. These post-certificate plans and information to be submitted go well beyond the mere "white or gray screws" decisions that CCPC implies the *Buckeye Wind* decision was limited to. (CCPC Brief at 81).

On appeal, the Court affirmed the Board's certificate conditions requiring post-certificate submittals of various plans including a transportation routing plan, electrical system collection plan, tree-clearing plan, fire-protection and medical emergency plan, noise complaint resolution procedure, and other post-certificate submittals. *See Buckeye Wind*, 2012-Ohio-878 at ¶ 28 (citing conditions 8, 33, 40, 45, 46, and 49). The Board has followed that decision in numerous decisions since, adding conditions to certificates that require the submission of project specific plans and information after the issuance of the certificate. The table on the following page shows some of those certificate examples.

Post-Certificate[3] Plan or Submission[4]	Angelina Solar I, LLC (Amended Joint Stipulation)	Willowbrook Solar I, LLC, Case No. 18-1024-EL-BGN	Hecate Energy Highland, LLC, Case No. 18-1334-EL-BGN	Hardin Solar Energy LLC and Hardin Solar Energy II LLC, Case Nos. 17-0773-EL-BGN and 18-1360-EL-BGN	Hillcrest Solar I, LLC, Case No. 17-1152-EL-BGN	Vinton Solar Energy LLC, Case No. 17-0774-EL-BGN
Engineering Drawings of Final Project Design	X (Condition 3)	X	X	X	X	X
Public Information Program	X (Condition 12)	X	X	X	X	X
Complaint Resolution Process	X (Condition 13)	X	X	X	X	X
Phase I Cultural Resources Survey Program	X (Condition 9)	X	X	X	X	X
Landscape and Lighting Plan	X (Condition 11)	X	X	X	X	X
Vegetation Management Plan	X (Condition 18)	X	X	X	X	X
Construction Access Plan	X (Condition 22)	X	X		X	
Traffic Management Plan	X (Conditions 25 and 26)	X	X	X	X	X
Decommissioning Plan	X (Condition 29)					

The plans to be submitted by Angelina following the issuance of the certificate are very similar to those upheld in *Buckeye Wind*. Many of the conditions in the Amended Joint Stipulation, (*see, e.g.*, 9, 11, 12, 13, 18, 25, and 29) expressly require Staff to either "review and approv[e]" or to "confirm[] that [the plan] complies" with the relevant condition. (Joint Ex. 2 at

[3] Certificates issued to other solar projects: *In re Willowbrook Solar I*, LLC, Case No. 18-1024-EL-BGN, Opinion, Order and Certificate, April 4, 2019. *In re Hecate Energy Highland, LLC*, Case No. 18-1334-EL-BGN, Opinion, Order and Certificate, May 16, 2019. *In re Hardin Solar Energy LLC*, Case No. 17-0773-EL-BGN, Opinion, Order and Certificate, February 15, 2018. *In re Hardin Solar Energy II LLC*, Case No. 18-1360-EL-BGN, Opinion, Order and Certificate, May 16, 2019. *In re Hillcrest Solar I, LLC*, Case No. 17-1152-EL-BGN, Opinion, Order and Certificate, February 15, 2018. *In re Vinton Solar Energy LLC*, Case No. 17-0774-EL-BGN, Opinion, Order and Certificate, September 20, 2018.

[4] An 'X' denotes that the certificate allows a submission is to be made post-certificate issuance.

6-12). Notably only three conditions require a Staff review and approval (condition 9 - approval of any mitigation plans agreed to with the Ohio Historic Preservation Office to avoid cultural resource finds, condition 20 mapping of sensitive resource areas, and condition 29 - decommissioning plan). Regardless of the language used in the conditions, all proposed delegations to Staff relate to condition compliance and are not a delegation of the Board's responsibilities under R.C. 4906.10.

CCPC has no basis for arguing against the appropriateness of post-certificate submittals given that the plans that are proposed to be submitted to Staff post-certificate issuance in this case are no different from plans allowed to be submitted post-certificate issuance in other Board decisions, and as affirmed by the Supreme Court of Ohio.

C. The Actual, Pertinent Issue Before the Board is Whether the Record, as a Whole, Provides Sufficient Evidence to Find and Determine Each Applicable Element of R.C. 4906.10

The Ohio Supreme Court has clearly held that "[i]n granting a certificate for the construction, operation, and maintenance of a major utility facility, the board must determine [the] eight specific points" set forth in R.C. 4906.10(A)(1)-(8). *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, at ¶ 27 (citing R.C. 4906.10(A)). **Whether, the application complied with O.A.C. Chapter 4906-4, as argued by CCPC, is not one of the eight criteria**.

The determination that an application complies with the O.A.C. is merely a preliminary step to initiate the process of holding a public hearing and creating the record. *See* R.C. 4906.07; O.A.C. 4906-3-06(A); R.C. 4906.08 (testimony and evidence to be taken at public hearing); R.C. 4906.09 (mandating that "a record shall be made of the hearing and of all testimony taken"). Following the creation of the record, the Board is not to grant a certificate unless it finds and

determines the eight specific points set forth in R.C. 4906.10(A). The substantive decision to issue a certificate is unrelated to the early approval of an application's procedural compliance, except insofar as that approval sets the record-making process into action. *See* O.A.C. 4906-3-06(A) ("Upon receipt of a standard certificate application…the chairman shall examine the certificate application to determine compliance with Chapters 4906-1 to 4906-7 of the Administrative Code"). Application approval means a decision has been made to "[a]ccept the…application as complete and complying with the content requirements" of O.A.C. 4906-1 to 4906-7. *Id.* It is not, nor could it be, an in-depth analysis of the sufficiency of the evidence and studies submitted as part of an application.

It is only after approval that the Board is called upon to investigate an application. *See* O.A.C. 4906-3-06(C) ("Staff shall conduct an investigation of each **accepted, complete application** and submit a written report as provided by division (C) of section 4906.07 of the Revised Code."); *see also* R.C. 4906.07(C) (requiring an investigation of approved applications, which "shall contain recommended findings with respect to division (A) of section 4906.10").[5] In other words, an application is first reviewed for procedural compliance—a check to confirm it addresses the informational topics set forth in the O.A.C; and, it is only after that initial compliance check that there is a substantive investigation into that application by Staff.

Notably, the purpose of Staff's subsequent investigation is not to evaluate the evidence in relation to the O.A.C., but to make "recommended findings **with regard to division (A) of section 4906.10 or the Revised Code**," which sets forth the relevant criteria of the issuance of a

[5] CCPC mischaracterizes the nature of Staff's statutorily-required investigation when it claims that Staff's investigation must offer "recommendations on whether the application complies with the criteria of R.C. 4906.10(A) **and the Board's rules**." (CCPC Brief at 7 citing O.A.C. 4906-3-06(C) (emphasis added)). In actual fact, the cited regulation requires Staff to issue a report in accordance with R.C. 4906.07(C) which, in turn, requires "recommended findings with respect to division (A) of section 4906.10," saying nothing about the "Board's rules." Indeed, the Staff Report methodically walks through each of the considerations set forth by R.C. 4906.10(A), ultimately recommending the issuance of a certificate in this matter. (*See* Staff Report, filed April 15, 2019 at 11-31).

certificate. *See* R.C. 4906.07(C) (emphasis added). Here, as set forth in the following chart, a review of the O.A.C. sections complained of by CCPC and Angelina's Application reveals that the Application provided the information required by the O.A.C. for certificate applications:

ILLUSTRATION OF THE APPLICATION'S COMPLIANCE WITH THE O.A.C.		
Ohio Administrative Code Sections	**Page Number(s) of CCPC Brief's Citation to the O.A.C. Section**	**Page and Exhibit Reference to Angelina Solar's Application Addressing the O.A.C. Sections**
4906-4-08(D)(4)	10, 16, 18, 22	85-89 (Exhibit I – Visual Resources Report)
4906-4-08(A)(3)	25, 34, 35, 36, 38	55-59 (Exhibit E – Noise Report)
4906-4-08(E)(2)	38	90-92 (Figure 20 – Table of Agricultural Resources)
4906-4-08(A)(1)(a), (b), (d), and (e)	43, 49	53-55
4906-4-08(A)(4)	47	59-61 (Exhibit F – Geotechnical-Hydrogeology Report; Figure 8 – Map of Drinking Water Resources)
4906-4-08(E)(2)[6]	52-54	89-92 (Figure 19 – Map of Agricultural Resources; Figure 20 – Table of Agricultural Resources); issue of noxious weeds addressed on page 75
4906-4-08(B)(1)	34, 54, 56, 57	68-71 (Exhibit G – Ecology Report; Figure 10 – Map of Ecological Resources; Figure 11 – Map of Delineated Resources)
4906-4-08(B)(3)	57-59	74-76 (Exhibit G – Ecology Report)
4906-4-07(C)	59, 63, 70-73	44-48
4906-4-07(D)	76, 77	48-50
4906-4-06(F)(4)	77	36-37 (Exhibit D – Transportation Report)

[6] CCPC inadvertently cites to 4906-4-08(E)(1) on page 52 and 54 of its brief, but the language at issue is from (E)(2).

D. The Application was Deemed Complete Long Ago and Admitted into Evidence with No Objection from CCPC

Angelina's Application was found to be compliant nearly two years ago on February 1, 2019. (*See* Letter of Compliance, filed February 1, 2019). CCPC made no attempt to timely challenge the determination that the Application complied with the Board's rules. (*See id.* (The Application "has been found to comply with Chapters 4906-01, et seq., of the Ohio Administrative Code")). CCPC permitted this procedural determination to proceed to hearing without challenge prior to or during hearing. **In fact, CCPC made no objection to attempt to prevent Angelina from moving the Application into the record.** (*See* TR at 135).[7]

Now, almost two years from the February 1, 2019 completeness determination, CCPC argues that the Application is incomplete. Not only is CCPC's argument factually wrong, the Board should reject it as untimely. *See In re in re Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, ¶ 19 ("A party's failure to challenge an alleged error constitutes a forfeiture of the objection because it deprives the board of an opportunity to cure any error when it reasonably could have."); *see also City of Parma v. PUC*, 86 Ohio St.3d 144, 148, 1999-Ohio-141, 712 N.E.2d 724 ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred. Wherefore, we do not accept Parma's objections.").

CCPC's 72 pages of arguments attacking the Application's completeness are without merit. The Application was complete and the approval properly issued with no objection from CCPC until after the evidentiary hearing.

[7] The only objection raised by CCPC in relation to Company Exhibit 1 (the Application) was to object and move to strike Exhibit C to the Application—a study demonstrating the positive economic impact of the Project—on the grounds that no witness was testifying as to its contents. (TR at 18-19). This objection and the motion were overruled, and CCPC admitted it had no objection to the Application's completeness or any other objection to the Application. (TR at 135).

E. Angelina has Complied with all Statutory and Regulatory Requirements for the Issuance of a Certificate

In its Initial Brief, Angelina presented to the Board the record evidence supporting the issuance of a certificate for the Project pursuant to R.C. 4906.10(A). In contrast, and as detailed above, the vast majority of CCPC's Brief attacks the procedural sufficiency of the Application and its initial approval. (CCPC Brief at 9-81). CCPC only makes a conclusory claim the record does not satisfy the statutory requirements of R.C. 4906.10(A) for certificate issuance. (*Id.* at 89). CCPC's claim is devoid of any citation whatsoever—CCPC instead makes the bald statement that its 72 pages of argument regarding the decision to approve the Application supports the conclusion that the record evidence does not satisfy the statutory requirements. (CCPC Brief 87-89). Accordingly, while Angelina necessarily responds to CCPC's 72 pages of ill-timed arguments regarding the Application's compliance below, it does so with the purpose of further showing why the record establishes that the statutory requirements of R.C. 4906.10(A) have been met and why the Board should adopt and approve the Amended Joint Stipulation without modification.

1. The Board has Adequate Evidence to Find and Determine that the Project's Impacts on Visual Resources and Motorist Visibility will be Minimal (CCPC Brief Section III.A Section III.I)

a. The Project will have a Minimal Impact on Visual Resources

In attacking the Application's approval, CCPC claims, without citation, that the Project would "impose a serious blight on the scenic views in Preble County." (CCPC Brief at 10). CCPC offers no evidence to support this conclusory assertion except for reciting the Project's general visibility. While there is no dispute that the Project will be visible from certain locations, all CCPC offers is speculative "concern," with no evidentiary value, that the "panels … will spoil the visual and aesthetic enjoyment…." (CCPC Ex. 2 at 4). Speculation—especially value-

based, subjective speculation—is not evidence, and cannot be relied on by the Board. *See In re Complaint of Buckeye Energy Brokers, Inc.*, Case No. 10-0693-GE-CSS, Entry on Rehearing, February 23, 2012 at ¶40 ("The Commission must rely squarely on the evidence presented in this case and not on speculation or [conjecture].")

Contrary to CCPC, Angelina has thoroughly investigated and considered the visual impacts of the Project. As a part of its evaluation, Angelina commissioned a visual resources assessment ("VRA"). (Company Ex. 12 at 2). The VRA determined the Project will not be visible from areas located more than 2.5 miles away with field reviews indicating minimal project visibility beyond 0.5 miles from the proposed Project panels. (Company Ex. 12 at 4). The viewshed analysis was conservatively based on a panel height of 15 feet and provides a "preliminary idea of where the Project potentially may be visible from." (TR at 181, 182). Potentially visible does not mean the entire project is visible from a particular area, but means that "a portion of the Project could potentially be visible." (TR at 185). Visibility alone of low-lying solar panels (and certainly not before any mitigation has been put into place) does not constitute a "scenic blight."

CCPC attempts to undermine the validity of Angelina's VRA by pointing to the fact that the visual simulations in the VRA show a panel height of 8 feet. (CCPC Brief at 13). In so doing, CCPC makes trumped-up claims regarding the "seriousness of its deception" and alleged admissions made by Angelina and its visual expert, Matthew Robinson. (CCPC Brief at 14). To the contrary, nothing was concealed. The VRA clearly states that the simulations are based on 8 foot panels. (*See* Company Ex. 1 at Exhibit I at Figure 2). CCPC had the opportunity to cross Mr. Robinson on that exact issue, and he explained that the 8 foot panels were utilized because it is the most likely height of the panels to be used. (TR at 181-182).

Importantly, as Mr. Robinson testified (and the CCPC Brief largely ignores), if the visual simulations depicted a panel height of 15 feet, his ultimate conclusions in the VRA **would not change**. (TR at 205). Mr. Robinson concluded that "[w]here visible, the Project will introduce a new contrasting use to the landscape. However, as noted in my testimony above, the existing perimeter vegetation along with the Applicant's use of setbacks and plantings will soften the visual effect of the Project." (Company Ex. 12 at 7-8).

CCPC also asserts without any evidence that the setbacks provided between the Project fence and neighbors property lines of 25 feet, and 150 feet between solar equipment and non-participating residences are "ridiculously short." (CCPC Brief at 14). CCPC's unsupported hyperbole is directly contradicted by Mr. Robinson who stated that, "the increased setbacks [in the Amended Joint Stipulation] operate to decrease the Project's perceived scale to viewers on the non-participating parcel[s]" and that this greater distance allows for greater screening options. (Company Ex. 24 at 2-3). In contrast, CCPC can offer no explanation or basis for comparison for its judgment that such setbacks are "ridiculously short."

CCPC additionally claims that Angelina did not provide necessary information because the O.A.C. "requires simulations from the perspective of **every** 'viewer group' exposed to Facility views." (CCPC Brief at 15) (emphasis added). CCPC's argument fails because it is premised on another mischaracterization of the regulations which, in reality, require a "range of…view groups"—not every possible viewer group—along with an explanation of the applicant's "selection of vantage points." O.A.C. 4906-4-08(D)(4)(e). This is exactly what Angelina's Application provides. (*See* Company Ex. 1 at Exhibit I at 21 ("An analysis of the visibility of the Project was undertaken to identify those locations within the visual study area where there is potential for the major Project components to be seen from ground-level vantage

points"). The VRA explains in detail that the visual resource professional "drove public roads and visited public vantage points within the study area to document points from which the Project would be visible, partially screened or fully screened…Photographs were taken from 34 representative viewpoints within the study area as shown on Figure 8…Viewpoints photographed during field review **generally represented the most open, unobstructed available views toward the Project Area**." (Company Ex. 1 at Exhibit I at 25) (emphasis added).

b. Angelina Has Adequately Described and Provided for Visual Mitigation Measures

Despite CCPC's protestations, Angelina has committed in the Amended Joint Stipulation to provide screening for all non-participating parcels containing a residence with a direct line of sight to the Project Area for the entire lifetime of the Project; has provided clear and effective options that will be used to accomplish this visual mitigation; has provided for the possibility of good neighbor agreements with non-participating participants to develop alternative arrangements; and is obligated to provide a final landscape plan to Staff for confirmation that it satisfies these commitments. (Joint Ex. 2 at 7-8 Condition 11). The Board should find this approach to be reasonable, effective to mitigate the visual impact of the Project, and that it satisfies the statutory requirements for certificate approval. (Company Ex. 1 at Ex. I at 39; Joint Ex. 2 at 9).

Angelina is committed and obligated to provide visual mitigation for the Project. The VRA in the Application specifically provides:

- Specific to mitigation through screening, "[a] landscape plan showing potential mitigation areas and design will be part of the final Project.
- The Applicant is considering including as a component of the landscape plan, pollinator-friendly grasses and wildflowers along selected roadsides

and other fence lines to soften the appearance of the Project and better integrate the Project into the landscape (see example simulations included in Figure 13). The Applicant anticipates using a mix of native pollinator wildflowers and grasses that will be selected based on their aesthetic and environmental properties, and their ability to grow in the conditions of the Project Area. Examples of the types of seed mixes that are being considered include the Eastern Great Lakes Native Pollinator Mix and the Wet Soil Native Seed Mixes, or similar. These plantings will be installed in the setback space between the Project perimeter fence and the edge of roadside rights-of-way. These plantings would grow to an average height of 4-6 feet (in the summer). As shown in Figure 13, the introduction of the pollinator species would soften the horizontal lines created by the security fence and reduce the visual contrast resulting from the Project.

- The Applicant is considering as part of the landscape plan the installation of native shrubs and trees in selected sensitive areas, such as along fence lines adjacent to residences. Use of native shrubs and trees will not necessarily result in plantings that completely screen views of the Project, but instead would serve to soften the overall visual effect of the Project and help to better integrate the Project into the surrounding landscape. Plantings would be selected based on aesthetic properties, to match or complement the existing vegetation at a given location.

(Company Ex. 1 at Exhibit I at 40-41). Angelina summarized those plans in the Application. (Company Ex. 1 at 88-89).

All of the above concepts are included in proposed conditions in the Amended Joint Stipulation. Angelina must provide a final landscape plan to be included as part of the final design of the Project, and as Condition 11 states, Angelina must:

> prepare a landscape and lighting plan **in consultation with a landscape architect licensed by the Ohio Landscape Architects Board** that addresses the aesthetic and lighting impacts of the facility with an emphasis on any locations where an adjacent non-participating parcel contains a residence with a direct line of sight to the project area and also include a plan describing the methods to be used for fence repair. **The plan shall include measures such as fencing, vegetative screening or good neighbor agreements**. Unless alternative mitigation is agreed upon with the owner of any such adjacent, non-participating parcel containing a residence with a direct line of sight to the fence of the facility, **the plan shall provide for the planting of vegetative screening** designed by the landscape architect to enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area. **The Application shall maintain vegetative screening for the life of the facility and the Applicant shall replace**

> **any failed plantings so that, after five years, at least 90 percent of the vegetation has survived**

(Joint Ex. 2 at 7-8, Condition 11) (emphasis added)

Likewise, Condition 18 of the Amended Joint Stipulation requires a vegetation management plan that must address the:

> implementation and maintenance of vegetative ground cover for the solar fields and any vegetative screening, including any pollinator-friendly plantings and describe any planned herbicide use. The plan shall also describe the steps to be taken to **prevent establishment and/or further propagation of noxious weed identified in OAC 901:5-37** during implementation of pollinator-friendly plantings. The Applicant shall consult with the Ohio Seed Improvement Association prior to purchase of seed stock regarding the names of reputable vendors of seed stock and shall purchase seed stock used on this project from such recommended sources to the extent practicable and to the extent seed stock is available from such vendor(s).

(Joint Ex. 2 at 9-10, Condition 18).

Despite these obligations and detailed descriptions of potential mitigation methods, CCPC takes issue with the flexibility of the approach for landscaping screening to claim that the Application is deficient because it did not specifically commit to a precise method by which visual mitigation will be implemented. (CCPC Brief at 16). In other words, it appears as though CCPC would prefer Angelina to commit to a single mitigation method at the outset of the Project because it suggests that by providing the numerous potential options that it did, "Angelina [can] do whatever it wants." (CCPC Brief at 19).

The Board should reject CCPC's mischaracterization that Angelina can do "whatever it wants" in regards to landscape screening. To the contrary, Angelina is obligated to screen the non-participating parcels for the entire life of the Project, has provided numerous, effective options for doing so, and is required to provide a final landscape plan that must be reviewed by Staff to ensure the Condition 11 screening obligations are met. (Joint Ex. 2 at 7-8, Condition 11). As noted above, Condition 11 requires a landscape plan with vegetative screening designed

by an Ohio licensed landscape architect. That plan must "…enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area." (*Id.*) Screening must be maintained for the life of the facility, which ensures that landscaping modules are maintained so that the screening will remain effective (*i.e.*, there will be no "huge gaps" in a screening module as CCPC claims). (CCPC Brief at 19).

CCPC also argues that the visual mitigation plans fail to "accommodate the reasonable expectation of…nonparticipating neighbors who **may** want the solar equipment to be completely screened from their homes by vegetation." (CCPC Brief at 19-20) (emphasis added). The Board should dismiss this speculative concern as it is unsupported by any evidence. CCPC was unable to provide a single witness or any other evidence to support its contention that complete screening is something any of its members "may want." This unsupported claim is also belied by Mr. Robinson's experienced testimony:

> The use of an opaque "green wall" approach is generally not desirable or effective, **because it tends to contrast with the existing visual character of the surrounding area and actually draws viewer attention because it looks out of place.** Instead, the goal is to soften the appearance of the project so that it blends more effectively into the background.

(Company Ex. 16 at 2) (emphasis added).

Remarkably, CCPC also takes issue with the Amended Joint Stipulation's requirement that vegetative screening must be properly established by ensuring that at least 90% of any plantings that make up the visual screening will survive in the first five years of the planting. (CCPC Brief at 21). CCPC seems to believe that every plant that dies must be replaced and that there should be at least two rows of plants so that a dead plant does not "open a view to the Facility." (CCPC Brief at 20). CCPC does not provide any evidence or expert testimony to support this unfounded claim (thus an argument of counsel) and in doing so, it ignores the operation of Condition 11.

Specifically, as Mr. Robinson (Master's Degree in Landscape Architecture) made clear, Condition 11 has two prongs. First, at least 90% of the plantings must survive after five years of planting. (TR 614-615). This measurement is taken on a facility wide basis (*i.e.*, not on a specific module basis). (*Id.*) The second prong of Condition 11 is the requirement that screening must be maintained for the life of the Project. (TR 616). In other words, each module planted to screen an adjoining property must be maintained to ensure the goal of the screening is achieved. (TR 616 and see Staff witness Conway, TR 621, lines 8-19). Thus, Condition11 will ensure that plantings are properly established, and further commits Angelina to maintain the vegetative screening for the entire lifetime of the Project. (Joint Ex. 2 at 8).

Based on the results of the VRA and Mr. Robinson's testimony, as well as the mitigation required by the Application and the Amended Joint Stipulation, the Board has adequate evidence to find and determine that the Project will have a minimal visual impact.

c. <u>The Project will have a Minimal Impact on Lighting</u>

CCPC also takes issue with the alleged lack of detail regarding lighting in the Application. (CCPC Brief at 22-25). CCPC makes no argument that lighting from the Project somehow does not meet an applicable statutory standard in R.C. 4906.10. Instead, CCPC relies solely on an alleged deficiency in not describing measures to limit impact due to lighting. (CCPC Brief at 25, citing O.A.C. 4906-4-08(D)(4)(f), (claiming that the Application is missing information to "describe measures that will be taken to minimize any adverse visual impacts")).

In order to make this claim CCPC necessarily ignores portions of the VRA, which was included as an attachment to the Application. Specifically, the VRA states that:

- "Other than the substation, and a few other select locations, no facilities within the Project will require night lighting, which will minimize light pollution/nighttime visual impacts.

- The proposed substation will incorporate motion sensors for the security lighting, which will minimize the amount of time that the lights are on and avoid significant off-site lighting impacts.

- All security and work-related lights will be shielded, downward facing fixtures design to minimize light pollution and/or off-site lighting impacts."

(Company Ex. 1 at Exhibit I at 40).

Further, Condition 11 of the Amended Joint Stipulation obligates Angelina to include lights that are "… motion-activated and designed to narrowly focus light inward toward the facility, such as being downward-facing and/or fitted with side shields." (Joint Ex. 2 at 8). CCPC dismisses this condition claiming, without support, that "Angelina was required to place it" in the Application. (CCPC Brief 24). In making this claim, CCPC ignores the fact that the Board may approve certificates "upon such…conditions…as the board considers appropriate." R.C. 4906.10(A). Here, Angelina and the other signatory parties to the Amended Joint Stipulation have proposed Condition 11 for Board approval. The process of conditioning certificate issuance on certain conditions is in keeping with the established method for approving certificates, and CCPC has presented no authority to the contrary. *See id.*

Angelina's commitments with respect to lighting clearly meet the relevant regulatory requirements to describe and evaluate lighting impact, and provide the Board with sufficient evidence to find that the Project will have a minimal impact on lighting in the area surrounding the Project Area.

d. <u>The Project's Impact on Motorists' Visibility is Minimal</u>

CCPC claims, without a scintilla of actual evidence, that the Project's "obstruction of motorists' views of cross-traffic at road intersections could be a problem at any intersection at which **solar panels or fences are so close to the intersections that they obstruct motorists' views**." (CCPC Brief at 51) (Emphasis added). There is no evidence that solar panels or fences

will obstruct views. The perimeter fence of the Project will be set back at least 25 feet from the edge of a public road right-of-way. (Company Ex. 1 at 54; Joint Ex. 2 at 6, Condition 3). Any above-ground equipment associated with the Project (other than the perimeter fence) will be set back at least 40 feet from the edge of a public road right-of-way. (Company Ex. 1 at 54). In addition, as specifically stated by Mr. Robinson in uncontroverted testimony, "**the setback distances in the Application … would provide adequate distance for motorist visibility at road intersections at the edges of the Project Area**, [and] additional setback distance [as provided in Amended Joint Stipulation Condition 3] will serve to further improve motorist visibility at those intersections, while maintaining effective screening." (Company Ex. 16 at 3) (emphasis added).

Thus, the Board has sufficient evidence to find and determine that the Project's impact on motorists' visibility is minimal.

2. The Board has Adequate Evidence to Find and Determine that the Project's Noise Impacts will be Minimal (CCPC Brief Section III.C and Section III.D)

a. Operational Noise will not be an Issue for the Project and Sufficient Evidence has been Provided to the Board for it to Find and Determine that Operational Noise will be Minimal

As it does throughout its brief, CCPC does not claim that operational noise will not represent the minimal adverse environmental impact (as required by R.C. 4906.10(A)), but rather focuses on perceived regulatory deficiencies with the Application. Regardless of CCPC's misdirection, the record is clear: operational sound of inverters at both the property line of non-participating parcels as well as the residences of non-participants will be so low and for all practical purposes, inaudible. CCPC's lengthy effort—spending approximately ten pages of its brief—to obfuscate and confuse this issue should be recognized by the Board for what it is, an attempt to manufacture an otherwise nonexistent problem, and be rejected accordingly.

The Board should also note that while the original stipulation did not require an inverter setback, the Amended Joint Stipulation now requires a setback of 500 feet from any central inverter and a non-participating residence. (Joint Ex. 2 at 6 Condition 3).[8] This setback is consistent with Angelina's Application, which requires that "[t]he Project will be designed to site the inverters within the solar fields **to ensure they do not cause material, adverse impacts**." (Company Ex. 1 at 58). As Mr. Hessler noted in the original hearing, the Application requires "the inverters [] be sited inside the Project so that they do not cause [adverse] impacts." (TR at 310). With respect to the 500 foot setback, Mr. Hessler testified that with this "setback of 500 feet[,] the precise location of the central inverters **is immaterial from a noise impact perspective**." (Company Ex. 23 at 5) (emphasis added).

To support this conclusion, Mr. Hessler modeled the sound from inverters using the preliminary layout which incorporated the 500 foot setback distance for inverters (the preliminary layout actually has the nearest non-participating residence 720 feet from an inverter) and found that all non-participating residences were either close to or, in the vast majority of cases, outside of a 35 dBA sound contour. (Company Ex. 23 at 4). Mr. Hessler testified that "[t]o be clear, 35dBA "**is so low in absolute terms that it is generally considered inconsequential even in rural environments where the background sound level is essentially negligible**." (Company Ex. 23 at 3 (emphasis added); *id*. at Attachment DMH-S1; *id.* at 3 (sound level of 38 dBA is "negligible, if not totally inaudible). In other words, 35 dBA is, for practical purposes, inaudible.

For comparison sake, a noise level of 40 dBA is equivalent to an empty theater or library. (CCPC Ex. 1 at A-3). In addition, Mr. Hessler (with over 30 years of acoustics experience)

[8] CCPC attempts to argue that including a setback in the stipulation is an improper "retrofit," (CCPC Brief at 34), this is clearly incorrect as the Revised Code expressly allows for certificates to be issued subject to any condition the Board finds to be appropriate. R.C. 4609.10(A).

testified that "**40 dBA … is the minimum absolute threshold any project would ever need to be designed to because that sound level is so low that complaints are extremely rare even when there is no significant background masking noise present in the environment**." (Company Ex. 20 at 5-6) (emphasis added).

CCPC attempts to argue that Mr. Hessler's testimony at the supplemental hearing is at odds with his earlier testimony in this matter. (CPPC Brief at 30). This effort to attack Mr. Hessler's credibility is demonstrably false and is indicative of the CCPC's lack of any actual substantive evidence. Mr. Hessler's testimony at all times has been entirely consistent with his conclusion in his original study that was included in the Application: "inverter sound is rarely audible at the perimeter fence of typical solar fields so an adverse noise impact at the nearest residences beyond the project boundary appears to be highly unlikely." (Company Ex. 1 at Exhibit E at 15).

For example, Mr. Hessler noted that the study completed by the Massachusetts Clean Energy Center ("Massachusetts Study") concluded that at 150 feet any sound from the inverters faded into background from the inverter and that no sound from the inverters could be detected. (TR at 254, 256.)[9] While the background levels at 150 feet for that study were higher than the ambient background levels in the Project Area, Mr. Hessler also testified the inverter sound emanating from the inverters in the Massachusetts Study were the equivalent of a domestic air conditioner unit. (TR at 500 and see Company Ex. 20 at 2-3). He also noted that he had taken measurements at another solar facility in New York State "where people lived across the street

[9] CCPC attempts to undermine Mr. Hessler's credibility by claiming that Mr. Hessler "assured the Board" that a distance of 50 feet would be adequate to avoid adverse noise impacts during the original hearing. (CCPC at 30). This claim is without citation, and in reviewing the original hearing transcripts, it does not appear that Mr. Hessler made any such representation during the hearing; CCPC appears to be misconstruing the record in its attempt to manufacture this noise issue.

from the fence [of the project] and I'm not aware of any problems there." (TR 270). Mr. Hessler also repeatedly pointed out that inverters would be located hundreds of feet away from the Project boundary and that the area was large enough to accommodate large buffer distances. (TR 501-502). That testimony was confirmed by the fact that the preliminary layout readily accommodates a 500-foot inverter setback from residences.

With a 500 foot setback now recommended through the Amended Joint Stipulation, CCPC's only recourse is to claim (with no expert testimony) that the inverters will increase "the community's noise levels by as much as 18 dBA at 500 feet." (CCPC Brief at 31). But, to make this claim, CCPC took the lowest registered L90 background level of 20 dBA in Mr. Hessler's background noise study,[10] which, as can be seen in Mr. Hessler's noise report, is the quietest one minute (out of ten minute increments) that was recorded **at night** and compared it to the inverter noise level of 38 dBA at 500 feet. However, at night the inverters will be completely inert and silent, emitting no noise whatsoever. (*See* Company Ex. 1 at Exhibit E at 5 (nighttime L90 at 20 dBA); *see also* TR at 259 (Mr. Hessler testifying that the "low [sound] levels, the 20s[,] happened at night"); *see also* Company Ex. 20 at 3 (Mr. Hessler testifying that inverters "are only active during the daytime and are completely inert and silent at night when sensitivity to noise is much greater.")).

"[T]he range of background sounds during the daytime" are, in fact, "35 during the day, or up to the high 40s, or over 50 if there's any kind of wind" meaning the inverters—that only operate during the day—will not increase the "community's noise levels" at all. (TR at 260). And, as noted above, Mr. Hessler (with over 30 years of acoustics experience) testified that "40

[10] L90 is a measure that provides the average of the quietest recorded minute in subsequent 10 minute intervals. In other words, it is an extremely conservative measure of background sound. Average background sound is referred to as the Leq.

dBA … is the minimum absolute threshold any project would ever need to be designed to because that sound level is so low that complaints are extremely rare **even when there is no significant background masking noise present in the environment**." (Company Ex. 20 at 5-6) (emphasis added).

CCPC further claims that the central inverters will raise sound levels to "40 dBA or 45 dBA on neighboring land." (CCPC Brief at 31). CCPC fails to provide any record citation for this claim or that it would actually create noise impacts—considering that a noise level of 40 dBA is equivalent to an empty theater or library, (CCPC Ex. 1 at Appendix A, A-3), and that normal conversations are about 65 dBA, (TR 604). Regardless, these alleged concerns about sound at a property boundary would occur during daytime hours, which is much different than nighttime where "sensitivity to noise is much greater." (Company Ex. 20 at 2). Moreover, as noted above, the average (Leq) daytime background sound level for the Project is 39 dBA Leq and can easily range into the 50 dBA range if there is any wind. (Company Ex. 20 at 5; TR at 260). Lastly, a simple review of the sound contour map attached to Mr. Hessler's testimony (Company Ex. 23) shows how low sound levels will be at the boundary of leased properties, including a level of less than 35 dBA at the nearest non-participating residence property line (approximately 620 feet from the nearest inverter on the preliminary layout). (Company Ex. 23, Exhbiit DMH-S1 and TR at 598-599).

When considering CCPC's unfounded complaints about operational noise, the Board may also take note of its own rule and prior decisions on operational sound from other types of projects. *See* 4906-4-09(F)(2) (establishing minimum daytime operational sound for wind farms as ambient Leq plus 5 dBA as measured at any sensitive receptor (i.e. a non-participating occupied building)); *see also In re Champaign Wind*, Case No. 12-0160-EL-BGN, Opinion,

Order and Certificate, May 28, 2013 at page 88 (allowing a sound level of 5 dBA over Leq of 44 dBA); *In re Blue Creek*, Case No. 11-3644-EL-BGA, Order on Certificate Amendment, November 28, 2011 at page 5 (allowing a sound level of 5 dBA over Leq of 43.6 dBA)).

Importantly, mitigation can also be easily implemented if somehow an operational noise issue develops. For example, Mr. Hessler, in his Noise Report attached as Exhibit E to the Application noted that "… if [an inverter] were to unexpectedly generate complaints, options, such as cabinet damping and ventilation silencers, would be available to retroactively mitigate noise from these devices and resolve any issue." (Company Ex. 1 at Ex. E at 13). He provided a thorough explanation on how mitigation could be accomplished in his rebuttal testimony (see Company Ex. 20, 2-3), and repeated that conclusion at the October 29, 2020 hearing. (Company Ex. 23 at 4). The requirement to mitigate inverters if a noise issue develops is now a recommended condition in the Amended Joint Stipulation. (Joint Ex. 2 at 6).

CCPC also expends significant energy in an effort to make a problem out of the potential use of "string inverters" in the Project. (CCPC Brief at 30-31). In reality, this is a non-issue. String inverters are much smaller than central inverters, are attached to solar panel racking (*i.e.* do not have their own footprint), handle significantly less current than central inverters, and are "very quiet." (TR at 592-563, 569 and 609-10). Although the Project's design calls for central inverters, and string inverters have not yet been fully ruled out, the uncontroverted testimony establishes that string inverters are far more quiet than central inverters:

Specifically, Mr. Hessler testified as to how the Amended Joint Stipulation's setback of 150 feet from a residence to the fenceline, and the setback of 25 feet for equipment to the fenceline (a total setback of 175 feet) would apply to string inverters.

> Question: Given that setback and based on your experience, if the Project utilized string inverters, would you expect the sound from the inverters to create any noise issue?
>
> Answer: No, not at all. Even if the string inverter were put on the very end of the row on the outside edge of the Project, at 150 or 175 feet, the level would be done in the very low 30s based on the SMA test report for that particular 150-kilowatt string inverter that I've seen.

(TR at 602-603).[11] Accordingly, given the evidence in the record, the Board has more than adequate basis to find and determine that noise from the Project's inverters will have a minimal impact even if the Project utilizes a string inverter rather than the planned central inverter.

b. Construction Noise will not be an Issue for the Project and Sufficient Evidence has been Provided to the Board for it to Find and Determine that Construction Noise will be Minimal

CCPC argues that Angelina should be required to "devise more effective mitigation measures to address … noise." (CCPC Brief at 38). Angelina is already committed to adequate mitigation measures that will result in the Project having a minimal impact on noise during construction. Angelina will mitigate construction noise by employing best management practices, including limiting the hours of construction, maintaining vehicles in proper working condition, and working with the local community to advise residents of those periods when sustained construction activity is expected to take place in relatively close proximity to their homes. (Company Ex. 1 at 59). In addition to the mitigation of construction noise described above, the Amended Joint Stipulation requires that:

> General construction activities shall be limited to the hours of 7:00 a.m. to 7:00 p.m., or until dusk when sunset occurs after 7:00 p.m. **Impact pile driving shall be limited to the hours between 9:00 a.m. and 7:00 p.m. Monday through Friday**; hoe ram and blasting operations, if required, shall be limited to the hours between 10:00 a.m. and 4:00 p.m., Monday through Friday. Construction activities that do not involve noise increases above ambient levels at

[11] The string inverter Mr. Hessler was referring to in his answer was manufactured by SMA, which also manufactured the central inverter used in Mr. Hessler's modeling of the preliminary layout. (TR at 596). He testified that he utilized an "excellent" sound power report by SMA to model string inverters for another project. (TR at 596).

> sensitive receptors are permitted outside of daylight hours when necessary. The Applicant shall notify property owners or affected tenants within the meaning of Ohio Adm. Code 4906-3-03(B)(2) of upcoming construction activities including potential for nighttime construction.

(Joint Ex. 2 at 7, Condition 10) (emphasis added).

This condition is common for other projects that have been recently granted certificates by the Board, both for renewable and fossil fuel-fired generation facilities. *See e.g. In re Hecate Energy Highland, LLC*, Case No. 18-1334-EL-BGN, Opinion, Order and Certificate, May 16, 2019 at 18 (solar); *In re Harrison Power LLC*, Case No. 17-1189-EL-BGN, Opinion, Order and Certificate, June 21, 2018 at 33 (fossil fuel-fired).

CCPC also argues that the Noise Report produced by Mr. Hessler wrongly claims that the installation of posts will be "fairly short-lived in any particular location." (CCPC Brief at 37, citing Company Ex. 1 at Exhibit E at 2). Despite CCPC's arguments to the contrary, construction or pile driving **in any particular area** will in fact be brief in duration.

In his testimony, Mr. Herling estimated that installation of posts throughout the **entirety** of the Project Area, not in any single location, would take 3-4 months. (TR at 63). Mr. Herling further estimated that a single crew of post installers would be able to install approximately 100 to 200 posts every day, and that the actual installation of a single post would take under a minute. (*Id.* at 67, 130). **The majority of the time in post installation is spent relocating machinery between post locations.** (*Id.* at 130).

CCPC focuses on Mr. Herling's estimate that 8,000 posts will be installed in a 120-acre area, claiming that he "could not say how long post installation would occur." (CCPC Brief at 21). CCPC is wrong. Not only did Mr. Herling testify that his 8,000-post estimate was a "maximum. … very, very conservative number in terms of the high end," he went on to estimate that, if only one crew were used to install posts, installation would take 40 to 80 days. (TR at

68). In reality, multiple crews would be working on post installation in a given area (and throughout the Project Area) at the same time. As Mr. Herling further testified, in his experience with the construction of solar projects, multiple crews work in the same field. (Id. at 69). In addition, construction in the 120-acre area (or any other part of the Project Area) will be limited to daylight hours by Amended Joint Stipulation Condition 10.

Given the short duration of construction in any given area and the limitations in Condition 10 of the Stipulation on the hours of construction activities (including pile driving), the Board has adequate evidence to find that the Project's construction noise will have a minimal impact.

3. The Board has Adequate Evidence to Find and Determine that the Project's Impacts on Drain Tile, Surface Water Drainage, and Water Quality will be Minimal (CCPC Brief Section III.E, Section III.M, and Section III.N)

a. <u>The Board has Adequate Evidence to Find and Determine that Required Drain Tile Repairs will be made Promptly</u>

CCPC also attempts to manufacture an issue regarding drain tile when attacking the Application's completeness, alleging that because the Application uses the phrase "commercially reasonable," that the Application and the Project are deficient because Angelina may not be obligated to repair drain tile in some circumstances. (CCPC Brief at 40). Again, CCPC is incorrect.

As described in Mr. Herling's testimony, the use of the term "commercially reasonable" is "not talking about repairing never or at all. It's talking about repairing promptly. So I think that's different than the question you're asking unless we're talking purely in hypotheticals. We don't say the words 'commercially reasonable efforts to repair.' It's 'promptly repair.'" (TR at 87-88). Mr. Herling went on to note that "commercially reasonable" relates to "how promptly we'll fix it depending on the purpose, the function, and the location of the tile in this situation."

(*Id.* at 88). In other words, the phrase "commercially reasonable" refers to how quickly a repair may be performed, while complying with the Amended Joint Stipulation obligation that a repair be performed "promptly." In addition, the Amended Joint Stipulation's condition concerning repair of drain tile does not include the "commercially reasonable" qualifier, making this a non-issue: "[d]amaged field tile systems shall be promptly repaired no later than 30 days after such damage is discovered, and be returned to at least original conditions or their modern equivalent at the Applicant's expense." (Joint Ex. 2 at 9, Condition 16).

CCPC also takes issue with the timing of repairs to drain tile, despite the fact that the Amended Joint Stipulation requires that repairs be done promptly, and in no event can take longer than thirty days. (CCPC Brief at 40). In her written testimony, CCPC's witness, Rachael Vonderhaar, speculated that Joint Stipulation Condition 16 "would allow up to 30 days of flooding to occur." (CCPC Ex. 3 at 3). At hearing, however, Ms. Vonderhaar admitted that "promptly repaired" is synonymous with "as soon as the opportunity exists" and further admitted that she considered the outside deadline of 30 days established in Condition 16 in the Joint Stipulation to be reasonable. (TR at 380). Thus, based on Ms. Vonderhaar's admissions, no changes to the Amended Joint Stipulation are necessary to ensure that repairs are made promptly.

CCPC also claims that the procedures for "replacement activities **will necessitate the temporary removal of solar panels** to provide room for the equipment used to replace the tiles." (CCPC Brief at 41). CCPC's assertion is contradicted by its own witness who readily acknowledged that mini-excavators and even hand shovels are sufficient to repair tile. (TR at 375). Further, it is worth noting that Mr. Waterhouse, Angelina's expert witness on issues of drainage and drain tile, testified that in his experience gained from working on over 50 solar

projects, **he has not encountered a single issue of tile breakage or drainage resulting from construction at a solar farm**. (TR at 154-156).

Given the commitments in the Application as well as the Amended Joint Stipulation, the Board has adequate evidence to find and determine that the overall impact to drain tile will be minimal.

b. The Board has Adequate Evidence to Find and Determine that Drain Tile in the Project Area will be Identified and Avoided to the Extent Practicable

As described in Mr. Waterhouse's expert testimony, Angelina is engaged in a process to identify all drain tile in the Project Area. (TR at 139). Mr. Waterhouse testified regarding the progress of this process. Specifically, efforts undertaken to date include: 1) working with the Preble County Engineer and the Preble Soil & Water Conservation District to obtain maps of any drain tile in the Project Area; 2) discussions with landowners in the Project Area to identify drain tile locations; and 3) conducting an on-site review to identify drain tile indicators visually. Prior to construction, additional analysis of data gathered will be reviewed and an action plan determined for each property in the Project Area. (Company Ex. 8 at 6). And Angelina has continued that process, mailing letters to landowners adjacent to or near the Project Area requesting drain tile information on their properties. (*See* Company Ex. 27 at 9; *see e.g.* Company Ex. 28).

CCPC claims that these efforts are insufficient, and would also impose on Angelina a **never-ending and far-reaching obligation** to consult with "**all potentially affected upstream and downstream landowners (both adjacent and non-adjacent to the Project Area)**." (CCPC Brief at 42) (emphasis added). CCPC's mandate is simply unnecessary and potentially unworkable. As Mr. Waterhouse testified,

> "It should be possible to identify drain tile in the Project Area using the methods described [above]. If advance identification is not possible, it should be possible, during construction, to identify damaged drain tile and repair it at that time. Damaged drain tile generally can be identified by the presence of water flowing out of the ground in an unexpected location. Excavating the area and following the source of the flowing water will lead to any broken pipe. The construction period for the Project should be long enough for an ample number of rain events to reveal any locations in which tile was damaged but not immediately discovered and repaired."

(Company Ex. 8 at 3-4).

In addition, in the course of Mr. Waterhouse's assessment with respect to consultation with upstream adjacent landowners "additional investigation will be dependent upon the further steps that we intend to take based on what the information is that we've gathered so far." (TR at 140). As an example, Mr. Waterhouse testified that, in the case of a drain tile originating on an adjacent property that flows into the Project Area: "we would want to know as much information as possible about the location of those tiles and we would intend to consult with those landowners to find out what information they can give us." (*Id.*) With respect to downgradient properties, Mr. Waterhouse testified that "I can't say that we absolutely wouldn't [consult with the downgradient property owner]. It would depend on what the site-specific conditions are and what we find from the rest of our Drain Tile Assessment." (*Id.* at 140-141).

A mandate to <u>consult</u> landowners, however, is not workable and may actually slow the process of tile identification or repairs if a neighboring landowner is unwilling or unavailable for consultation on the issue or repair. For example, Angelina sent two letters to CCPC-member Campbell Brandly Farms, LLC asking for drainage and tile mapping in early 2020 and did not receive a response as of the October 29, 2019 hearing. (TR at 552-553). In addition, an open-ended obligation to consult with landowners not adjacent to the Project Area is impractical and makes no sense. Tile networks could conceivably be connected for miles in any direction, and

an obligation to consult with **all landowners** upstream or downstream could result in Angelina being forced to consult with landowners far from the Project Area.

The better solution (ignored by CCPC) is what is required under Condition 16 of the Amended Joint Stipulation. That condition requires Angelina to make "efforts to contact the owners of all parcels adjacent to the project area to request drainage system information on those parcels." (Joint Ex. 2, at Condition 16). And importantly, Angelina has started that process by not only doing a general mailing but separately following up with CCPC counsel to provide copies of those letters after responses from many CCPC members were not received. (TR at 553; Company Ex. 28). Condition 16 also requires many other steps in regards to drain tile systems and importantly, is supported by the County Engineer who is a signatory to the Amended Joint Stipulation. The Board has adequate evidence to find and determine that the overall impact to drain tile will be minimal.

c. <u>The Board has Adequate Evidence to Find and Determine that the Project's Impacts on Surface Water will be Minimal</u>

Continuing its misguided attack on the Application, CCPC insists that the Application does not adequately provide the information set forth in O.A.C. 4906-4-07(C)(2), which seeks "information regarding water quality during construction." (CCPB Brief at 60). As an initial matter, while irrelevant to the Board's decision to issue a certificate, the Application clearly provides the information requested. (Company Ex. 1 at 44-48). For example, with respect to the construction phase, the Application states there will be little grading or excavation and that, as a result there will be no water monitoring or gauging stations, no aquatic discharges, no anticipated changes in flow patterns and erosion, and no equipment to control discharge of effluents, because the Project will not discharge any effluents. (*Id.*). CCPC also argues that the O.A.C. requires Angelina to "quantify the amount of water that will flow off the Project Area"

by means of a hydrology study. (CCPC Brief at 59-60 and 63). In reality, this is not a requirement and CCPC misrepresents the rule.[12]

CCPC then blatantly mischaracterizes Angelina's straight-forward position that the Project will have little to no impact on current stormwater flows to mean that it is Angelina's position that there will be no stormwater flows whatsoever, as if Angelina somehow believed that rain would stop falling on the Project Area. (CCPC Brief at 61 ("the Application betrays Angelina's position as false by admitting that stormwater flow will occur")). CCPC attempts to support its position by citing to the Amended Joint Stipulation's requirement that Angelina obtain a General Permit Authorization for Stormwater Runoff, and Mr. Marquis' unsurprising testimony that a solar panel will interrupt rainfall's trajectory to the ground. (CCPC Brief at 60-62). None of these arguments counter the clear record evidence that the Project will have no negative impact on surface water drainage.

First, CCPC ignores the Groundwater Hydrogeological and Geotechnical Desktop Document Review Summary Report ("Hydrogeological Report") conclusion that "**it does not appear that the construction of the proposed solar array will have a significant impact on the local geology and/or hydrogeology of the Project Area**." (Company Ex. 1 at Exhibit F at 7) (emphasis added). Further, Mr. Waterhouse testified:

> In my experience, the construction and operation of similar projects to the Project has not led to drainage issues, or an increase in runoff. **In fact, when compared to a fallow field, I would expect the Project to have superior drainage and runoff characteristics**, due to the year-round vegetation maintained in and around the Project Area.

(Company Ex. 8 at 4) (emphasis added).

[12] O.A.C. 4906-4-07(C)(2) and (3) calls for the Application to "[p]rovide an estimate of the quality and quantity of aquatic discharges," (none); "[d]escribe plans to mitigate" the same (none); "[d]escribe any changes in flow pattern" (none), "[d]escribe the equipment proposed for control of effluents" (not applicable); "[d]escribe water pollution control equipment" (not applicable); "[d]escribe the schedule for receipt of the [NPDES] permit" (not applicable); "[p]rovide a quantitative flow diagram or description of water-borne wastes through the proposed facility" (not applicable); "[d]escribe…water conservation practices" (not applicable).

At hearing Mr. Waterhouse reiterated this conclusion testifying that: "**we know that a typical project of this nature will ultimately see a reduction of runoff, not an increase, based on that change in land use**." (TR at 150) (emphasis added). Furthermore, Mr. Marquis, another licensed professional engineer with experience in hydrology and hydraulics, confirmed Mr. Waterhouse's testimony: "[b]ased on my experience in watershed models, doing hydrologic studies of watersheds that range in size from 1 acre to 60 square miles, and after reviewing the Application, **the proposed changes to land use in this project in my experience, in my opinion, do not - would not result in an increase in runoff**." (TR at 525) (emphasis added).

CCPC also points to the type of equipment listed in Angelina's Route Evaluation Study that may be delivered to the site to claim that significant grading will occur (and therefore, affect groundwater). (CCPC Brief at 63-64, citing Company Ex. 1 at Exhibit D at 2). This is yet another example of CCPC's willingness to mischaracterize the record. The Route Evaluation Study notes only the type of equipment to be used and does not address how much it will be used and for what purpose. In fact, the Route Evaluation Study has nothing to do with grading. It presents an evaluation of the impact of possible construction traffic on roads and bridges. Mr. Herling's testimony and the Application make clear that almost no grading will occur, a p. (TR at 52; *see also* Company Ex. 1 at 6, 12, 42, 46, 63). CCPC's out-of-context citation to the Route Evaluation Study does not justify the opposite conclusion.

CCPC also relies extensively on the anecdotal testimony of Walter Mast who resides approximately 1.5 miles from the Project Area in an attempt to describe the potential water-related consequences of the construction of the Project in florid detail. (CCPC Brief at 46-50; TR at 456). Importantly, Mr. Mast has not reviewed the Application filed by Angelina. (TR at 457-458). Mr. Mast has never designed a utility-scale solar farm, nor has he even been near one.

(TR at 450-451). In fact, Mr. Mast is not familiar with any solar farms. (TR at 451). Mr. Mast does not know if vegetation will be planted within the Project Area. (TR at 456). And Mr. Mast has not conducted any drainage calculations or studies regarding the impact of the Project on flooding. (TR at 467-468).

Mr. Mast testified that, to develop his testimony regarding flooding "I use – Einstein [presumably Albert] used thought experiments on – rather than actual experiments, so I use thought experiments. You see, you can measure that, so I use thought experiments." (TR at 475). Mr. Mast's testimony with respect to the impact of the Project on runoff is not credible or reliable.

Yet CCPC relies on Mr. Mast's testimony to postulate a "disagreement between Mr. Mast and Mr. Marquis" which is allegedly illustrative of the ways that the Application fails to comply with rule requirements. (CCPC Brief at 66-67). As an initial matter, there is a meaningful distinction between Mr. Marquis's substantial and relevant experience and Mr. Mast's lack of experience. Mr. Marquis has a master's degree in civil engineering. (Company Ex. 21 at 2). Mr. Marquis's experience includes a wide range of hydrologic and hydraulic analyses, surface water management and erosion and sediment control design, and his employer, Hull & Associates, has experience working on solar projects. (*Id.*; TR at 513). Mr. Marquis also reviewed the Application. (TR at 525). Mr. Mast has none of that experience and did not even review the Application. (TR at 457-458). Contrary to Mr. Mast's testimony, Mr. Marquis' testimony establishes that "**the proposed changes to land use in this project in my experience, in my opinion, do not - would not result in an increase in runoff**." (TR at 525)

Given the unrebutted evidence supplied by Mr. Waterhouse in his written direct testimony as well as at hearing, combined with the information in the Application and as

supported by Mr. Marquis, the Board has sufficient evidence to find and determine the Project will have a minimal effect on surface water.

d. The Board has Adequate Evidence to Find and Determine that the Project's Impacts on Water Quality will be Minimal

Contrary to CCPC's unsupported claims, given the limited nature of the construction activities associated with the Project, and the fact that "no discharges [to water bodies and receiving streams] are expected to occur," the Board has adequate evidence to find that impacts on water quality will be minimal (if any). (Company Ex. 1 at 46). In addition, even if compliance with the rule was still at issue, CCPC misreads the rule requirements, and, in any case, the Application is fully compliant with the rules.

CCPC summarily states that the Application failed to describe any changes in flow patterns and erosion. (CCPC Brief at 72). The Application did so. "There are no anticipated changes in flow patterns and erosion because the Project Area already is level and very little, if any, grading will be needed." (Company Ex. 1 at 46). Without support or citation, CCPC argues that because certain construction activities will occur that, therefore, Angelina's Application was misleading on this point. (CPPC Brief at 72-73). CCPC makes this assertion without citation to any testimony or other evidence. Instead, it relies on a statement by Cardno in its ecological report (Exhibit G to the Application) that "[t]emporary soil erosion and sedimentation control measures will be installed… **as applicable**, in accordance with approved Preble Soil & Water Conservation District's soil erosion and sediment control (SESC) Plans." (Company Ex. 1 at Exhibit G at 1-4 to 1-5) (Emphasis added). Cardno's statement in its report does not mean that erosion will occur (and note the "as applicable" emphasized above) and is simply another example of CCPC misinterpreting and misapplying the record.

The fact remains: "[t]here are no anticipated changes in flow patterns and erosion …." (Company Ex. 1 at 46), and as testified to by Mr. Waterhouse, "[b]ased on my experience in watershed models, doing hydrologic studies of watersheds that range in size from 1 acre to 60 square miles, and after reviewing the Application, **the proposed changes to land use in this project in my experience, in my opinion, do not - would not result in an increase in runoff**." (TR at 525) (emphasis added). CCPC's attempt to manufacture issues related to stormwater should be rejected.

Next, CCPC argues that the Application fails to provide information on water quality under O.A.C. 4906-4-07(C)(1) and (2). (CCPC Brief at 73-76). As noted in the Application, however, information on water discharges is not required because "there will be no impacts to water quality due to construction and operation," "[the Project] will not cause any aquatic discharges," and "[n]o equipment is proposed to control effluents discharged to water bodies and receiving streams because no such discharges are expected to occur." (Company Ex. 1 at 45, 46). In addition, Angelina explained in the Application that there will be no changes in flow patterns and erosion. (Company Ex. 1 at 46). Likewise, the Application made clear that there would be no direct aquatic discharges to streams as a result of Project construction. (Company Ex. 1 at 46).

Nevertheless, as committed in the Application, "the Project will implement an approved [stormwater pollution prevention plan, or] SWPPP for erosion control and the management of storm-water", and as Mr. Waterhouse's extensive testimony describes, Angelina will implement a SWPPP as part of an Ohio EPA construction stormwater permit. (Company Ex. 1 at 45; TR at 147-148). The Amended Joint Stipulation also requires a SWPPP. (Joint Ex. 2 at 9, Condition 16). The SWPPP will include "a combination of narrative, design plans, and exhibits, with the

general purpose of describing and detailing how the contractor is going to avoid releasing sedimentation, sediment, and erosion control from the Project site … It would have details on all best management practices used to prevent that sedimentation." (TR at 148). Importantly, the Board recently adopted the same language that is in Condition 16 of the Amended Joint Stipulation when issuing a certificate for another solar project in Ohio. *See, e.g., In re Application of Nestlewood Solar I, LLC*, Opinion, Order and Certificate dated April 16, 2020, ¶¶ 79, 97.

Angelina committed to developing and implementing a SWPPP as part of the permitting for the Project. This commitment does not as CCPC suggests, contradict Angelina's Application and expert witness testimony that the Project will have no adverse impact on water quality. Rather it is simply an example of Angelina's due diligence in this process and its compliance with permitting requirements. Accordingly, the Board has sufficient evidence to find and determine that there will be minimal impact to water quality given the permitting that will occur as part of this project and the requirements of Condition 16 regarding stormwater including the incorporation of guidance from the Ohio EPA October 2019 Guidance on Post-Construction Storm Water Controls for Solar Panel Arrays.

4. The Board has Adequate Evidence to Find and Determine the Project's Impacts on Crime and Emergency Services will be Minimal (CCPC Brief Section III.F and Section III.I)

When attacking the Application's completeness regarding crime and public safety issues, CCPC resorts to inaccurate, speculative, and inflammatory statements. As examples, CCPC claims that "the Application contains little provision for security to prevent criminals from stealing wire and other recyclable components at the Facility. This makes the Facility an easy target that could attract criminals to the community where they might also harm the Citizens." (CCPC Brief at 43). CCPC later in its brief reiterates the unsupported and uncited claim that

"the Application fails to provide for protection against criminals who will be attracted to steal the Facility's recyclable materials." (*Id.* at 49).

To the contrary, there is simply no evidence in the record that criminals will be attracted to the community by the Project, much less that "they" might harm CCPC's members. There is also no evidence that criminals will be "stealing wire and other recyclable components" or that the Project is an "easy target." CCPC's argument is inappropriate because it is based purely on conjecture and speculation. *In re Complaint of Buckeye Energy Brokers, Inc.*, Case No. 10-0693-GE-CSS, Entry on Rehearing, February 23, 2012 at ¶ 40 ("The Commission must rely squarely on the evidence presented in this case and not on speculation or [conjecture].") Notably, CCPC presented no evidence that existing solar installations in Ohio (or any other location) have been the victims of "stealing wire and other recyclable components."

Indeed, the Board has adequate evidence in the record to determine that the Project will **not** have a negative impact on emergency services in the local area and **no impact** on crime, and thus will serve the public interest. While not the criteria to determine issuance of a certificate, the Application describes the safety measures to be taken by the Project pursuant to O.A.C. 4906-4-08(A). The Project will implement security measures including:

- The solar panel arrays would be grouped in large clusters that would be fenced for public safety and equipment security, with locked gates at all entrances. (Company Ex. 1 at 7-8).
- Periodic security checks will be conducted. (TR at 93).
- All personnel working at the Project "whether it's operations or maintenance, is trained to report anything they see that's unusual; so whether it's their distinct

task to be doing security for the Project, or they're driving by and something is amiss, then they -- then that's reported." (TR at 92).

- Nighttime security checks or other methods to ensure security at night may be used. (TR at 92).

All of these measures provide the Board with sufficient evidence to find and determine that there will be no crime impact as a result of the Project, and that the Project will serve the public interest.

With respect to other emergency services, Angelina intends to develop an emergency response plan for local officials and emergency personnel. (Company Ex. 1 at 55). The Amended Joint Stipulation also commits Angelina to provide training, ongoing safety meetings, and any specialized equipment to local fire and EMS service providers. (Joint Ex. 2 at 11, Condition 28). These safety meetings will be held on an ongoing basis, negating CCPC's call that they be mandatorily held on an annual basis. (TR at 123; CCPC Brief at 51). These safety meetings will be effective in ensuring that local first responders are adequately prepared to respond to any issue at the Project.

As Mr. Herling, a former EMT and operations director for a local volunteer EMS testified:

> "from my experience … safety meetings would be adequate as the way -- in the way I've described them as kind of a refresher. Any department is going to constantly be training their members and the Director will certainly keep -- the Director of Emergency Response will certainly keep a record and add to how they respond, in their general response plans, how to respond to any incident at the Solar Project…."

(TR at 123-124).

In addition to the ongoing safety meetings, Angelina will offer, as required by the Amended Joint Stipulation, an initial training. This initial training would be "situational training

specific to solar energy facilities [and] will include in such training any emergency procedures which may be specific to the solar array model used for the project." (Joint Ex. 2 at 11, Condition 28).

The concerns CCPC raises about funding for emergency services (for both the county sheriff as well as local fire and emergency response) are overblown. CCPC offers only speculation that the Project **could** pull sheriff's deputies away from their other duties. (CCPC Ex. 2 at 12). Ms. Vonderhaar also testified, in her written direct testimony, that "the county lacks the funding necessary to hire the deputies necessary to patrol the Project Area." (CCPC Ex. 3 at 5, TR at 352). This testimony was undermined at hearing, with Ms. Vonderhaar acknowledging that funding for two additional deputies had been approved by the county. (TR at 354). One of the deputies will be a corrections officer and one will be an "additional road deputy." (Company Ex. 18 at 1). The additional road deputy will mean that an "additional unit is available to handle calls for service" and that "the number of miles each deputy is responsible for" will be reduced. (*Id.* at 2). Thus, even now, the County has been hiring to expand the Sheriff's Department. In addition, with the increased funding that will go to the County (and other local governments) as a result of the Project, the County may be able to expand staffing further. (Company Ex. 6 at 6-7; TR at 129-130) (describing Project payments to local government); *see also* Company Ex. 22 at Attachment DH6 (Resolution to Approve the Angelina Solar I LLC Qualified Energy Project Application for Certification).

CCPC also offers no evidence that fire or emergency response will require more funding or will somehow be affected by the Project, beyond the mere statement that Israel Township contracts with other nearby government entities for firefighting services. (CCPC Brief at 50).

Both the initial training as well as the ongoing safety meetings will contribute to emergency responders' preparedness to respond to any issue at the Project. There is no evidence that the Project will represent a burden on emergency services, whether police, fire, or other emergency services. The Board has sufficient evidence to find and determine that the Project will not have a negative impact on emergency services in the local area.

5. The Board has Adequate Evidence to Find and Determine the Project's Impacts on Groundwater will be Minimal (CCPC Brief Section III.G)

CCPC claims that contaminants may somehow be "released from the solar panels by natural disasters or human destruction." (CCPC Brief at 47). A close read of the CCPC Brief reveals that CCPC has no evidence to support its claims, instead relying on "concerns," which lead to "requests" for changes to the Project. (CCPC Brief at 47-49). There is no evidence in the record that the Project actually poses any danger to groundwater or soil. There is only evidence that the Project does **not** pose any danger.

The panels are composed primarily of readily recyclable materials such as glass, aluminum, and copper. (Company Ex. 6 at 16). While there are some chemicals used in the panel manufacturing process, suppliers of solar panels that will be used for the Project have demonstrated that their products pass U.S. EPA' s "Toxicity Characteristic Leaching Procedure" qualifying them as routine "solid" waste. (Id.; TR at 16). CCPC's concerns that Angelina may somehow acquire solar panels that do not pass the TCLP test is overblown and misleading. (CCPC Brief at 47). Mr. Herling made clear that the panels to be used for the Project will be required to pass the TLCP test, (Company Ex. 6 at 16), and that "Panels that are sold in the United States would be -- **would be doing this test as kind of a benchmark**." (TR at 100). Accordingly, CCPC's statement that "Mr. Herling acknowledged that some solar panels on the market are not TCLP tested" is hardly relevant. (TR at 99-100).

CCPC also complains that the Amended Joint Stipulation does not adequately protect soil and water from contamination. Mr. Herling addressed this concern, stating that:

> "even if damaged by breakage or fire, solar panels are manufactured and constructed to be exceedingly unlikely to release any material to the environment necessitating soil or water remediation. Solar panels contain no liquids that can spill, and the semi-conducting material is full[y] encapsulated in tempered glass. Additionally, given the low profile of the Project, its components are not generally susceptible to high winds. While tornado-force winds may cause damage to the panels, that damage should not result in the release of anything to the environment which could cause negative impacts."

(Company Ex. 6 at 16).

Based on the benign nature of the panels, the Board has adequate evidence to find that the Project will have a minimal impact on soil and water. Despite the clear evidence of the benign nature of the panels, CCPC requests that the Board condition the certificate on (1) testing adjacent well water prior to construction and then annually until the project is decommissioned and the land returned to productive farm use (over forty years later); and (2) conducting a "complete risk assessment" related to "chemicals, weather, fire, theft, etc." (CCPC Brief at 48-49). CCPC has not put forward any evidence to substantiate or justify either request. The Board should reject this unscientific, unsupported suggestion by CCPC and in doing so, may note the many utility scale solar projects it has approved in Ohio.[13]

6. The Board has Adequate Evidence to Find and Determine the Project will not Contribute to Noxious Weeds (CCPC Brief Section III.J)

CCPC continues to attack Angelina's Application by arguing that it did not contain mitigation procedures to prevent damage to agricultural land. (CCPC Brief at 53). In so doing,

[13] Certificates issued to other solar projects: *In re Willowbrook Solar I,* LLC, Case No. 18-1024-EL-BGN, Opinion, Order and Certificate, April 4, 2019. *In re Hecate Energy Highland, LLC*, Case No. 18-1334-EL-BGN, Opinion, Order and Certificate, May 16, 2019. *In re Hardin Solar Energy LLC*, Case No. 17-0773-EL-BGN, Opinion, Order and Certificate, February 15, 2018. *In re Hardin Solar Energy II LLC*, Case No. 18-1360-EL-BGN, Opinion, Order and Certificate, May 16, 2019. *In re Hillcrest Solar I, LLC*, Case No. 17-1152-EL-BGN, Opinion, Order and Certificate, February 15, 2018. *In re Vinton Solar Energy LLC*, Case No. 17-0774-EL-BGN, Opinion, Order and Certificate, September 20, 2018.

CCPC attempts to shoehorn noxious weed control requirements into a general regulatory obligation to provide a "description of mitigation procedures to be utilized … to reduce impacts to agricultural land." (*Id.*, citing OAC 4906-4-08(E)(1)(c)). Angelina has in fact provided that description, and, in so doing, has provided the Board with adequate evidence to find and determine that the Project will not contribute to noxious weeds.

Angelina is committed to the control of noxious weeds, primarily through mechanical means (as opposed to the widespread use of commercially-available herbicides). (Company Ex. 6 at 8; Company Ex. 1 at 75; TR at 106). In addition, Angelina, like others near the Project Area, will be bound by Ohio law requiring the removal or destruction of noxious weeds upon notice. R.C. 5579.05.

In addition, the Amended Joint Stipulation requires that

> The [vegetation management plan] shall also describe the steps to be taken to prevent establishment and/or further propagation of noxious weed identified in OAC 901:5- 37 during implementation of pollinator-friendly plantings. The Applicant shall consult with the Ohio Seed Improvement Association prior to purchase of seed stock regarding the names of reputable vendors of seed stock and shall purchase seed stock used on this project from such recommended sources to the extent practicable and to the extent seed stock is available from such vendor(s).

(Joint Ex. 2 at 9-10, Condition 18).

Based on the Project's commitments regarding the control of noxious weeds, the Board has adequate evidence to find that the Project will not contribute to noxious or invasive weeds.

7. The Board has Adequate Evidence to Find and Determine the Project's Effects on Wildlife will be Minimal (CCPC Brief Section III.K)

CCPC asserts that Angelina failed to appropriately conduct literature and field surveys of species in the Project Area to properly support its Application, and that Angelina did not provide data to show that no harm to wildlife will occur. (CCPC Brief at 55-57). CCPC is incorrect. In

accordance with the Board's rules, Angelina conducted a literature survey as well as field surveys of animal species in the Project Area. (Company Ex. 1 at Exhibit G at 4-5 to 4-7). The Ecological Assessment conducted by Cardno includes information regarding rare, threatened, and endangered species. (CCPC Brief at 40). Despite CCPC's claims to the contrary, the Ecological Assessment also includes a discussion of other species:

> Common game species in southwestern Ohio include cottontail rabbit, northern bobwhite (quail), Canadian geese, gray and fox squirrels, mallard and other ducks, mourning doves, ringnecked pheasants, ruffed grouse, white-tailed deer, and wild turkey.[14] Other than the agricultural crops and livestock in the area, no commercially valuable species are anticipated to be present in the Project Area.

(Company Ex. 1 at Exhibit G at 4-5) (footnote in original).

CCPC misleadingly argues that a literature survey must include "**all** plant and animal life within at least one-fourth mile of the Project Area …." (CCPC Brief at 55) (Emphasis added). CCPC misstates the regulation requirement. The word 'all' does not appear in the regulation cited by CCPC, which requires an applicant to: "Provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary. The literature survey shall include aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species designated as endangered or threatened." Ohio Adm.Code 4906-4-08(B)(1)(c). Reading this regulation as CCPC does (requiring a literature survey to identify **all** plant and animal life) would render the second sentence superfluous. Language in a regulation "must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative."

[14] www.dnr.state.oh.us/home/wild_resourcessubhomepage/researchandsurveys/wildlifepopulationstatuslanding

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26, 773 N.E.2d 536.

CCPC also makes the spurious allegation that "Angelina also failed to conduct the required field survey for animal species in accordance with OAC 4906-4-08(B)(1)(d)" and that "[t]he Angelina representations on Pages 69 and 71 of the Application that it conducted these field surveys are false." (CCPC Brief at 56). A review of the Ecological Assessment belies the inaccuracy of CCPC's claims.

The field studies conducted by Cardno included "[h]abitat observations and sensitive species assessment." (Company Ex. 1 at Exhibit G at 1-1). In addition, the Ecological Assessment specifically notes that "[w]ildlife observations during the field surveys were limited to common species in agricultural areas, including white tailed deer (Odocoileus virginianus) and gray squirrels (Sciurus carolinensis)." (*Id.* at Exhibit G at 6-3). The report goes on to state that:

> "Visual reconnaissance surveys … did not observe any [rare, threatened, or endangered, or "RTE"] species. The modification of the majority of available habitat has likely degraded the quality and limited potential RTE habitat. … **During the field surveys, Cardno staff observed minimal wildlife use in the Project Area and observed no RTE species due to the Project Area being relatively low quality and highly disturbed.**"

(*Id.*) (emphasis added).

Thus, during the field surveys, Angelina was making observations of all wildlife, not just RTE species. Despite the lack of RTE species observations, as Mr. Rupprecht indicated in his testimony, "Angelina Solar has prioritized avoidance measures for sensitive habitats [and] significant impacts to these habitats are not anticipated." (Company Ex. 13 at 4). In addition, the Amended Joint Stipulation requires Angelina to:

> adhere to seasonal cutting dates of October 1 through March 31 for the removal of trees three inches or greater in diameter to avoid impacts to Indiana bats and northern long-eared bats, unless coordination with the Ohio Department of

Natural Resources (ODNR) and the U.S. Fish and Wildlife Service (USFWS) allows a different course of action.

(Joint Ex. 2 at 10, Condition 19).

Based on the literature review and field surveys described in the Application, as well as Angelina's commitments in the Amended Joint Stipulation, the Board has adequate evidence to find that the Project's impact on RTE species and other wildlife will be minimal.

8. The Board has Adequate Evidence to Find and Determine that the Project's Effects on Nearby Crops and Livestock will be Minimal (CCPC Brief Section III.L)

CCPC argues that Angelina's Application failed to evaluate the Project's impacts on wildlife and nearby crops and livestock, but in doing so totally ignores that the Project Area is comprised almost entirely of annually-disturbed farm fields, that large segments of the testimony of Angelina expert witness Ryan Rupprecht, as well as sections of the Application confirm the lack of impact on wildlife. (CCPC Brief at 57-59). Further, in contrast to CCPC's demands, post-construction monitoring of wildlife impact is not required for the Project, **because there will be a minimal impact on wildlife**.

Specifically, the Application states that:

> "**The Project would not significantly impact wildlife or wildlife habitat.** Information on the existing wildlife in the Project Area was obtained from a variety of sources, including observations during site surveys, and publicly available data from Federal and State agencies. Wildlife within the Project Area could potentially utilize the site habitat for foraging, migratory stopover, breeding, and/or shelter. Based on the current land use, species present in the Project vicinity are primarily associated with agricultural fields, pasture grasslands, isolated wooded lots, and wetland areas. Typical wildlife species observed during the field delineations included evidence of white-tailed deer and common woodland and grassland songbirds.
> Typical construction-related impacts to wildlife include incidental injury and mortality of juvenile and/or slow moving animals (e.g., salamanders, turtles, etc.) due to construction activity and vehicular movement; construction-related silt and sedimentation impacts on aquatic organisms; habitat disturbance/loss associated with clearing and earthmoving activities; and displacement of wildlife due to increased noise and human activities. However, **the Project has been sited to**

> **avoid and/or minimize such impacts. The Project has been designed locate the majority of infrastructure within active agricultural land, which only provides habitat for a limited number of wildlife species. The few birds and mammals that may forage within these fields should be able to vacate areas that are being disturbed by construction. On a landscape scale, there is abundant availability of similar agricultural fields within the Project Area and beyond.**"

(Company Ex. 1 at Exhibit G at 7-5) (emphasis added).

In addition, Mr. Rupprecht testified, both in written direct testimony and at hearing, that the Project will have minimal if any impact with respect to the exclusion of wildlife from the Project Area. CCPC evidently has no meaningful response to Mr. Rupprecht's testimony in which he describes how a Cardno team determined that deer in the area surrounding the Project Area would increase by less than 5%, or 0.01 deer per acre, as a result of construction of the Project, and assuming that all deer are excluded from the Project Area. (Company Ex. 13 at 2, 7).

Mr. Rupprecht testified that even though Cardno used deer population as the basis for its less than 5% estimate, other wildlife would likely have the same reaction as deer to the construction of the Project, and thus the conclusion could be applied to other terrestrial species. (TR at 231). Thus, because the Project Area is composed of low quality wildlife habitat, the actual increase in wildlife that is displaced into the surrounding area will be minimal, despite the fact that the Project Area is largely surrounded by similar habitat.

CCPC relies on the testimony of Marja Brandly and Rachael Vonderhaar to attempt to argue that the displacement of wildlife will be harmful to local citizens. (CCPC Brief at 57-58). Nothing in Ms. Brandly or Ms. Vonderhaar's testimony, or in the remainder of the record, actually support CCPC's arguments. As an initial matter, neither Ms. Brandly nor Ms. Vonderhaar are qualified to offer opinion on the impact of the Project on wildlife. Ms.

Vonderhaar has no training in biology, no training in environmental science, has no post-secondary degree, is not testifying as an expert, and has never worked in the solar industry. (TR at 355). Ms. Brandly's primary residence is in Dayton (TR at 424, 429) and her other property is located over ¼ mile from closest possible solar panels. (TR at 425).

Despite the lack of expertise, Ms. Vonderhaar claimed that deer will be packed closer together, thereby easing the spread of disease, including diseases that affect both deer and cattle. (CCPC Ex. 2 at 9). Ms. Vonderhaar also testified regarding a twenty-five year old incident in which coyotes killed calves at another farm. (Id. At 8). Ms. Brandly testified only that "**[w]e are concerned**" that deer in the Project Area would be pushed onto surrounding land. (CCPC Ex. 4 at 4) (emphasis added). Their speculative testimony cannot be relied on by the Board. *See In re Complaint of Buckeye Energy Brokers, Inc.*, Case No. 10-0693-GE-CSS, Entry on Rehearing, February 23, 2012 at ¶ 40 ("The Commission must rely squarely on the evidence presented in this case and not on speculation or [conjecture].")

CCPC has presented no actual evidence that coyotes' range will be meaningfully reduced, that coyotes will actually congregate near a farm, that coyotes will attack more frequently, that deer will be "packed" closer together, or that deer diseases will be more easily spread. Finally, there is no evidence, either in Ms. Vonderhaar's testimony, Ms. Brandly's testimony, or otherwise, that the increased deer density (if it were to occur) would lead to increased infection in cattle.

More credible is Mr. Rupprecht's testimony that the actual increase in wildlife that is displaced into the surrounding area will be minimal. And as Mr. Rupprecht summarized in his testimony,

> the Angelina Solar Project will have limited environmental impacts. The Project is proposed to be primarily built on land that has already been disturbed

> seasonally/annually for agriculture. The Project's most significant impact will come from the conversion of land used for agriculture to land used for the solar panel arrays. Angelina Solar has designed the Project to avoid and minimize impacts to wetlands, waterbodies, woodlots, and aquatic and terrestrial wildlife species where possible.

(Company Ex. 13 at 8).

Based on the information in the Application, as well as other evidence, including Mr. Rupprecht's testimony, the Board has sufficient evidence to find and determine that the Project's effects on crops and livestock will be minimal.

9. The Board has Adequate Evidence to Find and Determine that the Project will Comply with Ohio's Solid Waste Requirements at R.C. Chapter 3734 (CCPC Brief Section III.O)

CCPC argues that Angelina's Application failed in two respects: that it did not provide an estimate of the quantity of waste the Project will generate nor did it estimate the amount of demolition debris resulting from the removal of the old buildings within the Project area pursuant to R.C. 3714.01. First, as CCPC does not challenge, it should be remembered that this is a solar project that will not generate any waste during operation, with the possible exception of limited trash generated by personnel performing on-site duties. (Company Ex. 1 at 50). Apparently recognizing this, CCPC attempts to take issue with Angelina's estimate of construction and demolition waste. (CCPC Brief at 76-77).

With respect to waste generated during construction, Angelina complied with the application regulations describing the waste ("limited amounts of non-hazardous wastes…include[ing]…nails, boxes, containers, and packing materials…and occasional litter") and estimated that the amount of waste would be "very limited." (Company Ex. 1 at 49). Accordingly, Angelina satisfied the regulation and CCPC fails to provide any support or explanation as to why this estimate is unsatisfactory except for its bald statement that it is. (CCPC Brief at 77).

With respect to CCPC's second point that Angelina's Application was somehow faulty because it did not estimate the amount of demolition debris from two abandoned buildings within the Project Area in accordance with R.C. 3714.01, CCPC misreads the statutes and the regulations. R.C. 4906.10(A)(5) specifically requires an applicant comply with R.C. Chapter 3734, which is Ohio's solid waste statute. And, accordingly, O.A.C. 4906-4-07(D), required the Application to provide information with those solid waste regulations. CCPC, without support, claims that Angelina should also comply with R.C. 3714 regarding "demolition debris." In doing so, CCPC attempts to inject requirements not contemplated by the applicable statutes and regulations.

Demolition debris, like that resulting from the demolition of a house, is not regulated under R.C. 3734 but under a completely different chapter of the Ohio Revised Code, Chapter 3714. The applicable statute, R.C. 4906.10(A)(5), does not require Angelina to comply with R.C. Chapter 3714 for the Board to issue a certificate. In addition, as noted by Mr. Herling, any demolition debris generated by construction of the Project would be minor, limited to a few barns and a small house. (TR at 110). These structures would only be removed in consultation with those landowners who are participating in the Project Area. (Company Ex. 1 at 78).

The record in this case establishes that:

1. Solid waste generated during construction and operation will be minimal, (Company Ex. 1 at 49);
2. Any solid waste generated will be disposed of in a municipal landfill, (*Id.*); and
3. As estimate of demolition debris is not required by the Board's rules or statute, but any such debris generated by the Project will be minor. (TR at 110).

Thus, based on the record, the Board may disregard CCPC's arguments and conclude that the Project will comply with all solid waste disposal requirements.

10. The Board has Adequate Evidence to Find and Determine that the Project will have a Minimal Impact on Traffic Near the Project Area (CCPC Brief Section III.P)

CCPC claims that "the Application does not explain how the [transportation] problem will be addressed" and that the Application and Amended Joint Stipulation do not explain how Angelina will protect the farmers' access to the public roads during planting and harvesting seasons. (CCPC Brief at 78-79). CCPC's concerns are unfounded, lack any support, and contradicted by the record evidence.

Angelina is committed to work with the Preble County Engineer, the Trustees for the impacted townships, and ODOT to ensure that any impacts to road surface conditions and traffic flow are accounted for and rectified. (Company Ex. 1 at 36). Where possible, deliveries on single lane roads to the Project will be limited despite low traffic volumes in and around the Project Area. (*Id.*) Summarizing the Project's impact on traffic, Mr. Bonifas, a professional engineer, testified that:

> "[b]ased on the results of the Route Evaluation Study and my experience, I would not expect the construction or operation of the Project to have a negative effect on the travelling public. I would also not expect the construction or operation of the Project to have a negative effect on the condition of the local roadways that could not be maintained during construction or restored post-construction."

(Company Ex. 10 at 3-4).

In addition to the completed Route Evaluation Study, Angelina will implement a traffic management plan, as required by Amended Joint Stipulation Conditions 25 and 26. (Joint Ex. 2 at 10-11). Mr. Bonifas testified as to how the traffic management plan would handle movement of oversize vehicles:

> "an oversize load would need to get a permit, through ODOT, to transport that load and that permit would require there to be a route evaluated for that, a specified route. The oversize loads, depending on the size, would need to have escort vehicles and potentially other means of traffic control like flagging. **So if an oversize load, for the Project, were to encounter a piece of farm equipment at the same time, that should be avoided by the traffic plan, the escort vehicle, and the flagging.**
> * * *
> when they're moving an oversize load down the road, they're going to have a flagger go ahead and make sure the road is clear and they'll go to the next intersection and they'll hold traffic up until that vehicle gets to that point and then they'll leapfrog to the next intersection."

(TR at 167) (emphasis added).

Mr. Bonifas acknowledged that even with the traffic management plan, construction of the Project may result in delays for other traffic on the road, but indicated that "it would typically be a very short duration. It's just the time to move the truck down the road." (*Id.* at 167-168).

Traffic, to the extent it will be a "problem," will be addressed through coordination with local officials and the implementation of a traffic management plan, as described in the Application and Amended Joint Stipulation. The Board has sufficient evidence to find that the Project's impact on traffic will be minimal.

F. The Board Can Adopt the Amended Joint Stipulation's More-Expansive Setbacks (CCPC Brief Section III.Q)

CCPC argues that the Board cannot accept the setbacks set forth in Condition 3 of the Amended Joint Stipulation arguing that Angelina should have included the negotiated setback condition in the Application and that the setbacks are not in the public interest. Once again, CCPC offers no evidentiary or legal support for its argument. (CCPC Brief 79-81).

Throughout its brief, CCPC continually fails to appreciate that the Board is not constrained by the Application, but can approve it "upon such terms, conditions, or modifications…as the board considers appropriate." R.C. 4906.10(A). Importantly, CCPC fails to understand that the Amended Joint Stipulation's condition with the setbacks has been

submitted to the Board as a recommended condition. If the Board adopts that condition (which it should), then it would be using its statutory authority under R.C. 4906.10(A) to impose that condition on the Project. CCPC cannot argue against the Board's authority to impose conditions on the Project, and certainly any Board imposed conditions do not need to be anticipated in an application to the Board.

Moreover, the setbacks proposed by Condition 3 are **more expansive** than what the original Application provided for. (*Compare* Company Ex. 1 at 54 *with* Joint Ex. 2 at 6 Condition 3). Where the Application provided for a 10 foot setback from the perimeter fence and non-participant's property line, the Amended Joint Stipulation increases that to 25 feet. (*Id.*). Further, where the Application called for a 100 foot setback between above-ground equipment and a non-participating residence, the Amended Joint Stipulation increases that distance to 150 feet between the fence and a non-participating residence. (*Id.*)

These increased setbacks are in the public interest as testified by Mr. Robinson: "By enlarging the Project setback from residences on non-participating parcels, Condition 3 improves the Applicant's ability to effectively screen and mitigate the Project's visual impact." (Company Ex. 24 at 3). The setback condition with a 500 foot inverter setback also is in the public interest as it is approximately 350 feet more than what CCPC was asking for in the initial hearing. (*See* TR 77-79 (CCPC's counsel pushing Mr. Herling to commit to a 150 foot setback for inverters)). CCPC has no basis to claim that the proposed setbacks are not in the public interest.

G. CCPC's Procedural Due Process Rights Have Not Been Harmed

CCPC also makes the argument that that it has been deprived of its procedural due process rights. (CCPC Brief at 85-86). In making this argument, CCPC replicates arguments made by the citizen-intervenors, Union Neighbors United ("UNU"), in the *Buckeye Wind* case. (*Compare* CCPC Brief at 85-86 to Argument on Tenth Proposition of Law, Appellant's Merit

Brief, pp. 46-48).[15] Just as the Court in *Buckeye Wind* rejected UNU's argument, so should the Board reject CCPC's argument here.

The cases cited by CCPC (and UNU) are simply not applicable and reveal a misunderstanding of the process that the General Assembly has approved for cases before the Board. CCPC cites *Mathews v. Eldridge* (1976), 424 U.S. 319 along with other cases for the proposition that administrative proceedings must comport with due process. (CCPC Brief at 54). As an initial point, the holdings in these cases are not controlling on the matter at bar because all found no due process violation. *Mathews v. Eldrige*, supra at 349; *LTV Steel Co. v. Indus. Comm.* (2000), 140 Ohio App. 3d 680, 692-693; and *Egbert v. Ohio Department of Agriculture* (2008), 2008-Ohio-5309; ¶ 39. CCPC also cites to *Seitz v. All Creatures Animal Hosp.* (Nov. 15, 1985), Ashtabula App. No. 1192, LEXIS 9306.

However, the *Seitz* case involved the conduct of a hearing referee who considered post-hearing statements as evidence made against the applicant's interest without notice or knowledge of the appellant and without any opportunity to confront or cross-examine the witnesses who made the statements against her. (*Id.* at *2). In contrast, Angelina has provided the Board with sufficient evidence to make the required determinations under R.C. 4906.10(A) and pursuant to its statutory authority, impose terms and conditions in the certificate.

The fact that Angelina will submit information to the Board and/or its Staff as a condition of a future certificate does not rise to the level of a governmental decision warranting the protections of due-process. *Mathews v. Eldrige*, supra at 332 ("[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.")

[15] Available here: http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=676280.pdf

Moreover, unlike the circumstances in the *Seitz* case, the Board has already held an evidentiary hearing and will issue its decision on the statutory criteria under R.C. 4906.10(A). Angelina's submission of information, as required by the Amended Joint Stipulation, is intended to ensure compliance with the future certificate. This is not the equivalent of a governmental decision entitling CCPC to the right of an evidentiary hearing.

In making its due process argument, CCPC ignores the process set up by the General Assembly and certain statutory principles that the Board must follow. First, R.C. 4906.04 provides, in part, that "[n]o person shall commence to construct a major utility facility in this State without first having obtained a certificate for the facility." Because an applicant cannot construct a facility without a certificate, this means that the Board must evaluate proposed projects, not those already built. As the Board's Staff recognized in its initial brief, the Board must evaluate the criteria set forth in R.C. 4906.10 with respect to the estimated impacts of such proposed projects and may impose any terms and conditions it believes necessary. R.C. 4906.10(A).

Second, applying the three-part test in *Mathews* demonstrates the constitutional adequacy of the Board's administrative proceeding. The "private interest at stake" is considered by the Board in the evidentiary hearing at which CCPC (and other intervenors) had the opportunity to cross-examine Staff and Angelina witnesses. The post-certificate information is designed to protect that private interest by making sure that the Applicant has complied with the conditions that will be imposed. With respect to the risk of erroneous deprivation of that interest and the probable value of additional procedural safeguards, there is no risk of an erroneous deprivation.

With respect to the government's interest, requiring an evidentiary hearing on information submitted in compliance with the certificate conditions would impose significant

fiscal and administrative burdens on the Board and its Staff far outweigh any countervailing benefits. It should also be noted that CCPC is fully entitled to follow the formal complaint process already provided in R.C. 4906.97 and 4906.98 and OAC Chapter 4906-7 if any complaint is not resolved by the informal complaint process recommended in the Amended Joint Stipulation. (Joint Ex. 2 at 8, Condition 13).

Finally, CCPC has participated fully in these proceedings. It has presented its own testimony and witnesses, and has cross-examined Angelina and Staff witnesses. It has had full opportunity to raise its concerns regarding the Project's impacts. CCPC has received all of the process that it is due. CCPC has no basis for claiming that conditions calling for information submittals post issuance of a certificate rise to the level of a due process violation.

H. CCPC can submit a Complaint to Angelina and/or the Board if any Issues Arise Post-certificate Issuance

CCPC attempts to make an issue of the fact that pre-construction meetings are not open to the public, that Staff's post-certificate decision-making will be in "secrecy," and asks that the Board require Angelina to post for public notice and comment all permit applications, plans, correspondence, and requests for government action, and that the pre-construction meeting (and "other meetings") be made open to the public. (CCPC Brief at 86-87). This is unworkable and out of place. If any member of the public has a concern with any activity occurring under the Project's certificate, it will be able to use the complaint resolution process required under the Amended Joint Stipulation. (Joint Ex. 2 at 8, Condition 13). During construction Angelina committed in its Application to:

> require the general contractor hired to construct the Project to identify a person to address any complaints, concerns or comments from the public during construction. [Angelina] also will require that information be posted to provide the public with contact information to submit complaints, concerns or comments regarding construction and that prompt responses be made to any such complaints, concerns or comments (for which a response either is requested or

> clearly implied). Finally, [Angelina] will require the contractor to make commercially reasonable efforts to expeditiously resolve any complaints or concerns.

(Company Ex. 1 at 33-34).

What CCPC cannot do is assume the Board's or its Staff's role in ensuring certificate compliance, be allowed to comment on every permit, or be allowed to attend every meeting that may occur regarding the Project, as it suggests. (CPPC Brief at 86-87).[16] CCPC has no role to play in Angelina's communications with local authorities, government permitting approvals, or at pre-construction meetings. If CCPC were allowed to inject itself into all such aspects of Project development, it would only promote inefficiency and provide CCPC a platform to voice its manufactured issues in a continued effort to undermine the Project. For example, with respect to the preconstruction conference, Staff witness Andrew Conway testified: "[the preconstruction conference is] for the Applicant. The Applicant holds the conference and it's to -- for the Applicant to direct its contractors and subcontractors to make sure that they follow the -- are aware of the terms of the Certificate and abide by that Certificate." (TR at 421). CCPC's participation in the pre-construction conference is not necessary to achieve the goals of the meeting. Moreover, Staff not CCPC is obligated to continue to review the Project and many plans submitted post-certificate issuance to ensure that the Project complies with the conditions of the certificate. (Joint Ex. 2 at 7-12, Conditions 9, 11, 12, 13, 14, 18, 25, 26, and 29).

The Board should reject CCPC's effort to intertwine itself in all aspects of Project development as it suggests because it is improper and because the Project already has established complaint procedures in place to address any potential issues that may arise post-certificate.

[16] With respect to government action, the Ohio Revised Code already provides methods for members of the public to obtain public records. There is no need to reinvent that process here.

I. **The Amended Joint Stipulation is in the Public Interest and does not Violate any Important Regulatory Principle or Practice**

CCPC provides a cursory list of the alleged deficiencies with the Amended Joint Stipulation, essentially restating and summarizing its arguments regarding the alleged deficiencies in the Application. (CCPC Brief at 87-89). In so doing, CCPC ignores the obvious benefits of the Amended Joint Stipulation, and disregards statements in the Application and the record as a whole that refute each of CCPC's claims.

For example, as testified by Mr. Herling and supported by Angelina's responses to CCPC's attack on the Application, the Amended Joint Stipulation does not violate any important regulatory principle or practice. (Company Ex. 22 at 15). And all parties including CCPC had the opportunity to participate in all negotiations on the original stipulation as well as the Amended Joint Stipulation. (Company Ex. 12 at 2; Company Ex. 22 at 12). Indeed, the Amended Joint Stipulation represents a significant achievement given that Staff, the Ohio Farm Bureau Federation, Preble County Commissioners, Preble County Engineer, Preble Soil & Water Conservation District, Preble County Planning Commission, and the Board of Trustees of Dixon Township all signed and support the Amended Joint Stipulation. (Joint Ex. 2 at 20).

The Amended Joint Stipulation is also in the public interest because as discussed at length in Angelina's Initial Brief, the Project will provide substantial benefits, both during construction and during operation. These benefits include the generation of emission-free power, a new source of revenue to local governments (including Preble County, Dixon and Israel Townships, and the local school district) far in excess of the property taxes currently being paid on the parcels forming the Project Area, creation of hundreds of direct and indirect construction jobs and corresponding payrolls and approximately 19 to 22 direct and indirect jobs with

corresponding annual payroll of approximately $630,000 to $1 million for the operation phase of the Project.

Contrary to CCPC's unsupported claims, Angelina has met its burden of proof to show that the Amended Joint Stipulation is in the public interest and does not violate any important regulatory principle or practice. The Board should adopt the Amended Joint Stipulation without modification, as recommended by all of the signatory parties to the Amended Joint Stipulation.

III. CONCLUSION

CCPC makes no serious effort to argue that the Project does not meet the applicable statutory standards under R.C. 4906.10(A). Instead, CCPC devotes the vast majority of its brief to making a red herring arguments that the Application submitted by Angelina does not meet all relevant regulatory requirements for an application and that the Board cannot delegate its authority to Staff to review post certificate plan submittals. CCPC is wrong on both counts. The Application, as previously determined by the Board, meets the requirements of OAC Chapter 4906-4 and, taking the record as a whole, the Board has been provided sufficient evidence to make all of the findings required by R.C. 4906.10(A). Ohio law also clearly establishes that the Board can delegate responsibility for compliance with certificate conditions to Staff. Given the record in this proceeding, Angelina's application for a certificate should be granted subject to the recommended conditions contained in the Amended Joint Stipulation, without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 4th day of January 2021.

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Summary: Brief Reply Brief electronically filed by Mr. Michael J. Settineri on behalf of Angelina Solar I, LLC