BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of Hecate Energy Highland 4, LLC for a Certificate of Environmental Compatibility and Public Need.	))))	Case No. 20-1288-EL-BGN

APPLICATION FOR REHEARING ON EXPEDITED BASIS

Pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Rule 4906-2-32, Hecate Energy Highland 4, LLC ("Highland 4") respectfully submits this Application for Rehearing of the March 18, 2021 Opinion, Order and Certificate ("Order") issued by the Ohio Power Siting Board ("Board") in this proceeding.

This case involves a 100 MW utility-scale solar project with a 65 MW phase and a 35 MW phase that both share a common transformer before connecting to the grid. The September 2, 2020 application requested that the Board view these phases as two separate facilities, but the December 1, 2020 application supplement clarified that one certificate for the entire 100 MW project was being requested for Highland 4 that would then be bifurcated and assigned in part to Highland 4's affiliate (Hecate Energy Highland 2, LLC).

The December 1, 2020 supplement was ultimately reflected in the stipulations and recommendations entered into by the parties and offered and accepted into evidence at the evidentiary hearing. As a result, the Board was presented with the issue of whether to: (1) issue a certificate for the entire 100 MW facility and then bifurcate and assign the 35 MW portion to Hecate Energy Highland 2, LLC or (2) issue a certificate for the 65 MW portion of the project and find that the 35 MW phase was non-jurisdictional.

Highland 4 believes that the procedural history of the application and some of the language that it used in this proceeding may have been confusing, because the Board's Order did not state the findings necessary to resolve the jurisdictional question. The Board's March 18, 2021 Order resulted in issuance of a certificate to Highland 4 to construct and operate the 65 MW phase and not the entire 100 MW project. The Board neither adopted all of the provisions of the January 22, 2021 Joint Stipulation and Recommendation ("Joint Stipulation") or the January 25, 2021 Supplemental Joint Stipulation and Recommendation ("Supplemental Joint Stipulation") relative to the 35 MW phase, nor did it expressly confirm that the 35 MW phase is non-jurisdictional.

This Application for Rehearing is intended to more clearly frame the fundamental jurisdictional issue presented and clarify the basis for the Board's Order. Highland 4 therefore sets forth the following specific grounds for rehearing:

1. The Board's decision in the Order to not adopt the Joint Stipulation and Supplemental Joint Stipulation without modification and not (a) grant a certificate to Highland 4 for the construction, operation, and maintenance of a 100 MW solar-powered electric generation facility; (b) immediately bifurcate that certificate between the 65 MW and 35 MW phases of the facility; and (c) assign the 35 MW phase of the certificate to Hecate Energy Highland 2, LLC ("Highland 2"), is unlawful and unreasonable because the Board has jurisdiction over the entire 100 MW facility when both phases of the project share the same transformer used to connect the project to the electrical grid. (*See* Order, ¶¶ 109–110)

2. The Board's failure to expressly state in the Order that the 35 MW phase is non-jurisdictional and provide its reasoning in the Order is unlawful and unreasonable. (*See* Order.)

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support. Given important and critical commercial and construction

deadlines, including upcoming financing transactions, Highland 4 asks that this Application for Rehearing be considered on an expedited basis and be addressed at the Board's May 20, 2021 meeting. Please note that counsel for Highland 4 has been authorized by counsel for the Ohio Farm Bureau Federation to represent to the Board that the OFBF does not oppose this Application for Rehearing.

Respectfully submitted,

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I. INTRODUCTION

This Application for Rehearing submitted by Hecate Energy Highland 4, LLC ("Highland 4") presents two grounds for rehearing, each equally important to provide certainty to all involved in the development of a 100 MW utility-scale solar facility to be located in Highland County, Ohio. The 100 MW project will be constructed and operated in two phases: a 65 MW phase called New Market Solar I to be constructed and operated by Highland 4 and a 35 MW phase called New Market Solar II to be constructed and operated by an affiliate of Highland 4 (Hecate Energy Highland 2, LLC). Highland 4 and Hecate Energy Highland 2, LLC ("Highland 2") are under common ownership.

Both grounds for rehearing ask the Board to confirm a fundamental issue regarding its jurisdiction: does the Board have jurisdiction over the entirety of the 100 MW project when the separately metered 35 MW and 65 MW phases share a single transformer connecting the 100 MW project to the grid? Or, because the two phases of the 100 MW project will be constructed and operated by separate corporate entities with separate panel arrays and separate collection systems to generate power that will be separately metered and separately sold under different power purchase agreements, does the Board only have jurisdiction over the 65 MW phase, such that the 65 MW phase requires a certificate and the 35 MW phase is a non-jurisdictional facility? The Board's Order did not expressly make this determination.

- **The first ground for rehearing requests that the Board find that it has jurisdiction over the entire 100 MW facility as recommended by its Staff, and that a certificate for 100 MW be issued and bifurcated between the two phases**. That is the approach requested in Highland 4's December 1, 2020 supplement to its application and the January 22, 2021 Joint

Stipulation and Recommendation ("Joint Stipulation") and the January 25, 2021 Supplemental Joint Stipulation and Recommendation ("Supplemental Joint Stipulation") submitted by Highland 4, Board Staff, and the Ohio Farm Bureau Federation. Further, Board Staff has already evaluated the 100 MW project as a whole and determined in the Staff Report that it satisfies all statutory requirements. The approach recommended in the Joint Stipulation and the Supplemental Joint Stipulation (i.e., the bifurcation and assignment of the 100 MW certificate into phases) is consistent with statute and Board precedent.

- **Indeed, the Board issued a decision in the Hardin Solar II docket on the same day that it issued the Highland 4 decision, bifurcating Hardin Solar II's 170 MW certificate into a 150 MW phase that was subject to a power purchase agreement and a 20 MW phase which the Board assigned to a separate project company (Hardin Solar III LLC), and the Board retained jurisdiction over both phases**. *See* Entry, *In the Matter of the Application of Hardin Solar Energy II LLC*, Case No. 18-1360-EL-BGN and *In the Matter of the Application of Hardin Solar Energy III LLC*, Case No. 20-1678-EL BGN (March 18, 2021). The entire 170 MW project in that case, like Highland 4, involved a common transformer for the two phases. (*See* Application in Case No. 18-1360-EL-BGN, p. 15 (Oct. 12, 2018) (describing how collection lines will all connect to a single project substation and main power transformer to connect to the grid).)

- **The supplemented application requested – and the Staff Report, the Joint Stipulation and the Supplemental Joint Stipulation all recommended – a certificate for a 100 MW project**. Highland 4 recognizes that its original application requested that the Board view these phases as two separate facilities, but it corrected its request to make clear in the December 1, 2020 supplement to its application that it was asking for a 100 MW certificate which would then be bifurcated into two phases, with each phase owned by a separate project company. And, while the

phases were at various times referred to as separate and distinct (which they are in certain aspects), this application is intended to make sure the Board understands that the two phases share a single transformer used to connect the facility to the electrical grid.

- **Alternatively, Highland 4 requests that the Board expressly confirm that the 35 MW phase is non-jurisdictional and does not require a certificate, and provide its reasoning in the rehearing decision**. The Order did not explain why the Board did not address the 35 MW facility even though R.C. 4903.09 requires the Board to expressly make findings rather than imply them. Absent rehearing and based on the current decision as written, the 35 MW facility will continue to be treated as a non-jurisdictional project.

- **The record is complete and the Board can grant rehearing either by approving the Joint Stipulation and Supplemental Joint Stipulation to apply the certificate conditions to both the 65 MW and 35 MW phases, or leave the 65 MW certificate in place and expressly confirm that the 35 MW facility is non-jurisdictional**. With a complete record and with the facts fully presented to the Board (i.e., the single transformer), there is nothing further for the Board to do but rule on the grounds for rehearing. Given the facts in the record and the overall design of the 100 MW facility (common transformer), Highland 4 respectfully requests that the Board grant rehearing, approve the Joint Stipulation and Supplemental Joint Stipulation without modification, and (a) issue a certificate to Highland 4 for the entirety of the 100 MW Project; (b) bifurcate the certificate into two parts; the first for the 65 MW phase to be constructed and operated by Highland 4; and the second the 35 MW phase to be constructed and operated by Highland 2; and (c) assign the 35 MW portion of the certificate to Highland 2. In the alternative, the Board should clarify that it did not grant a 100 MW certificate because it determined that the 35 MW phase was a non-jurisdictional facility.

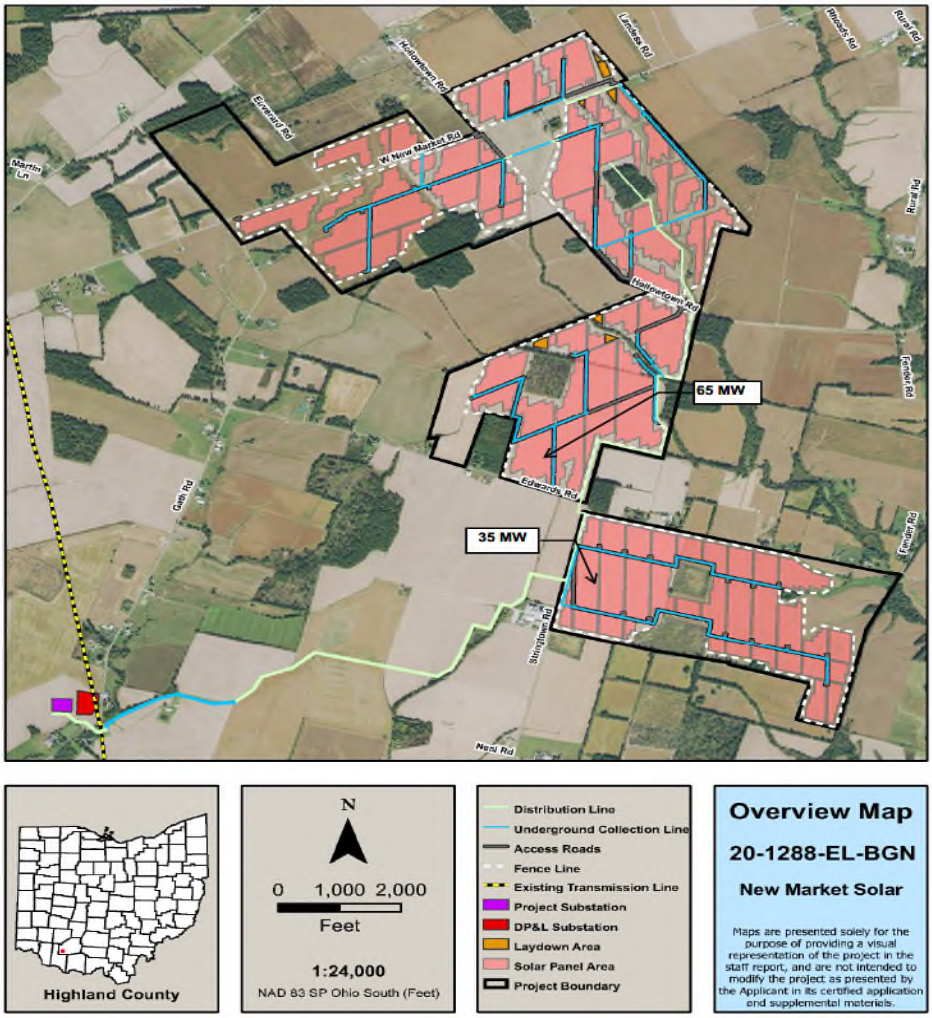
II. KEY FACTS RELEVANT TO REHEARING

To help simplify matters on rehearing, there are a handful of key facts relevant to this Application for Rehearing:

- The overall project described in the application, as supplemented, **is a 100 MW facility consisting of two parts to be sold through separate power purchase agreements**. Highland 4 will construct and operate New Market Solar I, the 65 MW portion of the overall 100 MW facility. Highland 2 will construct and operate New Market Solar II, the 35 MW portion of the overall facility. (*See* Supplement to Application, p. 1 (Dec. 1, 2020).)
- **The two phases share a common collection substation**. Although the two phases will be separately metered at the substation, **they will share the same transformer connecting the overall facility to the electrical grid**. (*See* Application, p. 4 (Sept. 2, 2020); Supplement to Application, p. 1 (Dec. 1, 2020); *see also* Order, p. 29, Condition 14 (referencing the single "substation transformer chosen for the project").) This is a key fact that the Board can rely on to grant rehearing, because it was clearly stated in the Application. (*See* Application, pp. 4, 10 and 17.) For example, following is an excerpt from a table on page 4 of the September 2, 2020 application:

TERM	DEFINITION
Project Area	The 1,114 acres to be occupied by both New Market Solar I and New Market Solar II
Project	New Market Solar I and New Market II collectively
Projects	New Market Solar I and New Market Solar II
New Market Solar	New Market Solar I and New Market Solar II collectively
New Market Solar I	The 65 MWAC solar-powered electric generating facility proposed to be constructed and operated in Clay and Whiteoak Township, Highland County, Ohio
New Market Solar II	The 35 MWAC solar-powered electric generating facility proposed to be constructed and operated in Whiteoak Township, Highland County, Ohio
New Market Solar I Project Footprint	The currently anticipated 602-acre extent of the area to be occupied by New Market I
New Market Solar II Project Footprint	The currently anticipated 222-acre extent of the area to be occupied by New Market II
New Market Solar I Project Area	The 822-acre lateral extent of New Market I
New Market Solar II Project Area	The 292-acre lateral extent of New Market II
Project Substation	The substation to serve both New Market I and New Market II prior to conveyance to the Clay Substation. The facilities will share the same transformer, but will be metered separately.
Clay Substation	The substation to be constructed, owned and operated by Dayton Power & Light to which the two meters at the Project Substation will deliver power. The Clay Substation will tap the Stuart-Clinton 345 kV transmission line, also owned and operated by Dayton Power & Light and ultimately the PJM network.

- Output from New Market Solar I (the 65 MW phase) will be sold under a power purchase agreement (PPA) and output from New Market Solar II (the 35 MW phase) will be sold under a separate PPA (thus the need for separate metering and separate project companies). (*See* Direct Testimony of Patti Shorr, p. 12 (Jan. 22, 2021).)
- The **two phases are both within the 1,114 acre "Project Area"** (as defined in the above chart from the September 2, 2020 application) **for the 100 MW facility** as shown in the following map from page 8 of the January 4, 2021 Staff Report and Recommendation ("Staff Report"), with the 35 MW phase being the southern area of arrays as indicated by the comment box and the 65 MW phase being all arrays to the north, as indicated by the comment box (comment boxes were added to the map for purposes of this brief).



- The entities conducting both phases (Highland 4 and Highland 2) are **<u>under common ownership</u>**. (*See* Supplemental Joint Stipulation, p. 2 and letter attachment.) The two parts of the 100 MW facility (the 65 MW and 35 MW portions) are not being constructed in a staggered manner.
- In a supplement to its application, Highland 4 asked the Board to issue a certificate for the entire 100 MW project, bifurcate the certificate into the 65 MW and 35 MW phases, and then assign the 35 MW portion of the certificate to Highland 2. (Supplement to Application, p. 1 (Dec. 1, 2020).) **<u>Highland 2 agreed to abide by all terms and conditions of the bifurcated certificate in that correspondence</u>**. (*Id.*)

- The publications and public notices required under the Board's rules **have identified this project to the public as a 100 MW facility**. (*See* Proof of Initial Public Notice and Publication (Dec. 14, 2020); Proof of Second Public Notice and Publication (Jan. 13, 2021).)
- At the January 19, 2021 public hearing in this matter, the Administrative Law Judge began the hearing by explaining that **"[t]he project will generate 100 megawatts."** (*See* Transcript for Hearing Held on January 19, 2021, 9:3–4 (Feb. 2, 2021) (emphasis added).)
- The **Board Staff Report recognized that the project would be "a 100 MW solar-powered generating facility."** (Staff Report and Recommendation, p. 6 (Jan. 4, 2021) (emphasis added).) Board Staff then evaluated the "facility" under the R.C. 4906.10(A) factors and found that the "facility" satisfied the statutory requirements. (*See, e.g.*, *id.* at 20.)
- On January 22, 2021, **Highland 4, Board Staff, and the Ohio Farm Bureau Federation executed a Joint Stipulation and Recommendation** recommending the Board grant, bifurcate, and assign the certificate as requested in Highland 4's supplement to its application. (*See* Joint Stipulation (Jan. 22, 2021).) A Supplemental Joint Stipulation and Recommendation was filed on January 25, 2021 to provide additional detail regarding the bifurcation. (*See* Supplemental Joint Stipulation (Jan. 25, 2021).)
- Through questions by the Administrative Law Judge at the evidentiary hearing, Highland 4 witness Shorr confirmed that the proposed bifurcation **would not change the footprint of the overall project area.** She also confirmed that the bifurcation **would not change the commitments** of either Highland 4 or Highland 2 to the certificate conditions. (*See* Transcript for Hearing Held on January 25, 2021, 16:6–19 (Feb. 2, 2021).)

III. ARGUMENT

A. First Ground for Rehearing: The Board's decision in the Order to not adopt the Joint Stipulation and Supplemental Joint Stipulation without modification and not (a) grant a certificate to Highland 4 for the construction, operation, and maintenance of a 100 MW solar-powered electric generation facility; (b) immediately bifurcate that certificate between the 65 MW and 35 MW phases of the facility; and (c) assign the 35 MW phase of the certificate to Highland 2, is unlawful and unreasonable because the Board has jurisdiction over the entire 100 MW facility when both phases of the project share the same transformer used to connect to the electrical grid. (*See* Order, ¶¶ 109–110.)

In its Order, the Board issued a certificate to Highland 4 for the construction, operation, and maintenance of a 65 MW solar-powered electric generation facility, rather than issuing a certificate for a 100 MW facility, bifurcating the certificate and then assigning the 35 MW portion to Highland 2 as requested in Highland 4's supplement to its application, the Joint Stipulation and the Supplemental Joint Stipulation. (*See* Order, ¶¶ 109–110.) Highland 4 respectfully submits that the decision was unlawful and unreasonable.

Although the Board did not expressly provide the reasoning for its decision (an error addressed in greater detail in the second basis for rehearing), the Board appears to have reasoned – especially given the procedural history of the application – that the two phases were separate facilities and that the 65 MW phase of the project was under its jurisdiction and the 35 MW phase was not. There are specific facts, however, that support treating the entire 100 MW facility as a jurisdictional facility – as recommended in the Joint Stipulation and Supplemental Joint Stipulation.

1. A major utility facility includes not only the electric generating plant, but also associated facilities such as substations and other equipment used for the generation of electricity.

The Board has jurisdiction to grant certificates for major utility facilities, which include "[e]lectric generating plant and associated facilities designed for, or capable of, operation at a

capacity of fifty megawatts or more." R.C. 4906.01(B)(1)(a); 4906.04. The phrase "associated facilities" is not defined by statute but is defined in the Board's rules as consisting of "… rights-of-way, land, permanent access roads, structures, tanks, distribution lines and substations necessary to interconnect the facility to the electric grid, water lines, pollution control equipment, and other equipment used for the generation of electricity." Ohio Adm.Code 4906-1-01(F)(3). When appropriately viewed as a whole and accounting for the common transformer used for both the 65 MW and 35 MW portions of the 100 MW project, the entire 100 MW facility meets the definition of a major utility facility and falls within the Board's jurisdiction.

2. The 65 MW and 35 MW phases should be viewed together as a single 100 MW facility because they share a common transformer before connecting to the grid.

While this project will be divided into two parts or phases, the Board should view the entire project as a single 100 MW facility because the two phases feed through a single transformer to connect to the electrical grid. Unlike coal generation facilities, which typically have one building housing the generation turbines and a single owner/operator holds the certificate alone, solar facilities have panels placed across hundreds of acres and it is very likely that portions of the facility may be used to support different power purchase agreements. In those cases, the overall facility is broken into phases and the certificate for the facility must be bifurcated between the affiliates and phases. The Board, however, retains jurisdiction over the entire facility.

3. In previous cases, the Board has granted a certificate for an entire facility and then has bifurcated the certificate between the various phases, even when a phase is less than 50 MW.

The Board previously has bifurcated certificates and assigned the certificate between the phases – even if one of the phases is less than 50 MW. For example, on the same day that the Board issued its decision in this proceeding, the Board bifurcated the Hardin Solar II Certificate

and assigned 20 MW to an affiliate of Hardin Solar II. In the *Hardin Solar Energy* cases, Hardin Solar II held a certificate to operate a 170 MW solar farm facility. Upon application, the Board issued an order bifurcating the certificate into a 150 MW phase retained by Hardin Solar II and a 20 MW phase assigned to Hardin Solar III. *See* Entry, *In the Matter of the Application of Hardin Solar Energy II LLC*, Case No. 18-1360-EL-BGN and *In the Matter of the Application of Hardin Solar Energy III LLC*, Case No. 20-1678-EL BGN (March 18, 2021).

The Board, through its order, retained jurisdiction of the 20 MW phase and expressly required Hardin Solar III to abide by all conditions in the certificate. It did not condition the bifurcation of the 20 MW from Hardin Solar II to Hardin Solar III on the approval of Hardin Solar III's pending application for a solar-powered electric generation facility of up to 300 MW that would include the acreage for the assigned 20 MW. *See In the Matter of the Application of Hardin Solar Energy III LLC*, Case No. 20-1678-EL BGN. Importantly, just like Highland 4, the Hardin Solar II and Hardin Solar III phases of the 170 MW project share a common transformer within the project substation. (*See* Application in Case No. 18-1360-EL-BGN, p. 15 (Oct. 12, 2018).)

Another example of the Board approving a bifurcation and assignment was in the *Paulding Wind Farm II* case, where the Board had issued a certificate to Paulding Wind II to operate a 150.4 MW wind-powered electric generation facility comprised of up to 98 wind turbines. Later, the Board issued an order bifurcating the certificate into a 58-turbine phase retained by Paulding Wind II and a 37-turbine phase transferred to Paulding Wind III. *See* Entry, *In the Matter of the Application of Paulding Wind Farm II, LLC*, Case No. 10-369-EL-BGN (Feb. 28, 2011). In both of these cases, the Board recognized that the different phases of the project all comprised a single facility governed by a single bifurcated certificate. The Board should reach the same result on rehearing in this matter.

4. **If the Board does not assume jurisdiction over projects consisting of multiple phases that share a common transformer, developers will be able to construct and operate significant generation facilities without Board oversight**.

The decision on whether to treat phased projects with a single point of interconnection to the electrical grid as a single facility operating under a single bifurcated certificate has important ramifications for the Board's ongoing jurisdiction. If the Board does not assert jurisdiction over a project consisting of multiple phases and a shared transformer, developers will be able to operate significant generation facilities without Board oversight. For example, hypothetically, a developer can take a greater than 50 MW solar farm facility and split it into separately metered subparts that are each less than 50 MW to avoid Board oversight. In other words, but for the separate metering of each phase, the phases together would constitute one major utility facility. The following figures of a hypothetical 120 MW facility with three 40 MW phases illustrate this issue.

Figure 1: Below is a 120 MW metered facility with three 40 MW panel array areas side by side. This is a Board jurisdictional facility, including the transformer and meter, as the total MW exceeds 50 MWs.

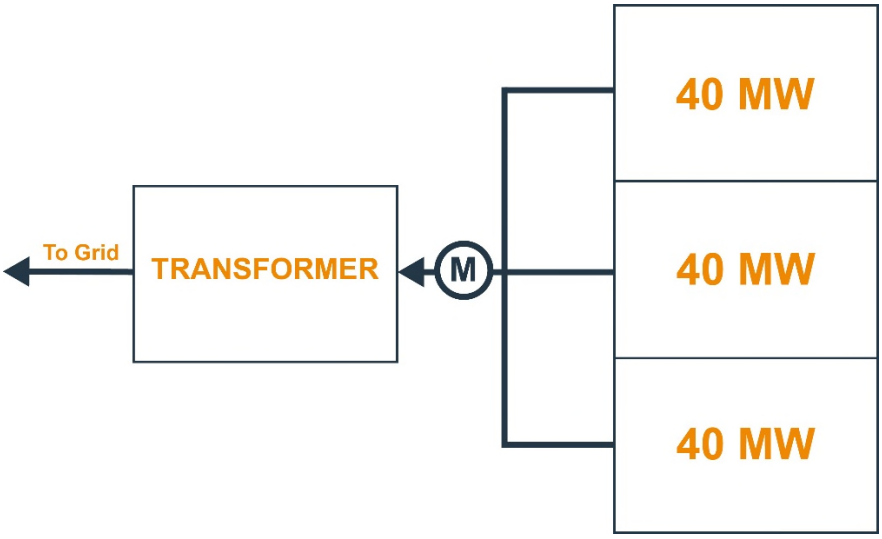
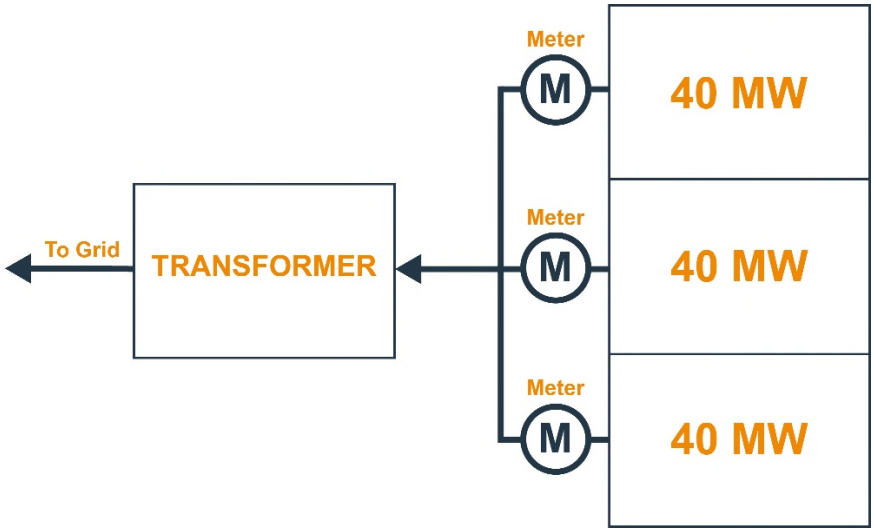


Figure 2: Below is a 120 MW facility with three 40 MW panel array areas side by side with the addition of meters to measure output from each 40 MW panel area.



The only physical difference between Figure 1 and Figure 2 is the addition of meters to Figure 2 to measure output from the 3 panel areas. Note that the addition of meters to phases of an overall project is a common practice (e.g. Hardin Solar I, II and III) because it allows for the phases to be operated by separate project companies when the power from the phases is sold under separate power purchase agreements.

Applying the Board's March 18, 2021 Order in this case and assuming the Board intended for the 35 MW portion of the project to be treated as non-jurisdictional, the three arrays in Figure 1 would be treated as one project subject to Board jurisdiction while the three arrays in Figure 2 would not be subject to the Board's jurisdiction based solely on separate metering, separate project companies for each 40 MW phase and separate PPAs for each phase. This result, however, may not have been anticipated by the Board when it issued the decision, and may suggest that the Board was not aware of the common transformer that will be used to connect both the 65 MW portion and 35 MW portion of the overall 100 MW project to the grid (a fact that is in the case record).

5. **Board Staff has already reviewed the entire 100 MW facility and determined that it satisfies the required statutory factors. Board Staff and the Ohio Farm Bureau have already stipulated to a 100 MW certificate that would be bifurcated between the two phases**.

Here, Board Staff has already reviewed the entire 100 MW facility and determined that the entire 100 MW facility satisfies the statutory requirements under R.C. 4906.10. (*See* Staff Report and Recommendation (Jan. 4, 2021).) Highland 4, Board Staff and the Ohio Farm Bureau have stipulated to a 100 MW certificate to be bifurcated between the two phases. (Joint Stipulation and Recommendation (Jan. 22, 2021); Supplemental Joint Stipulation and Recommendation (Jan. 25, 2021).) The Board also did not make any findings that the 35 MW phase failed any of the required factors for approval in R.C. 4906.10 or that the conditions in the Joint Stipulation were for some reason insufficient or improper for the 35 MW phase. Thus, with the benefit of the clarifications contained in this Application for Rehearing, the Board can simply issue a 100 MW certificate with the same conditions that it has already found to be appropriate for the project, and then bifurcate the certificate between the two phases just like it did for Hardin Solar II and Hardin Solar III. No additional evaluation of the 35 MW facility nor further Board effort would be required. And, moving forward, the Board would have the benefit of oversight over the entire 100 MW facility.

For these reasons, the Board should grant rehearing, adopt the Joint Stipulation and the Supplemental Joint Stipulation without modification and (a) issue a certificate to Highland 4 for the entirety of the 100 MW Project; (b) bifurcate the certificate into two parts; the first for the 65 MW phase to be constructed and operated by Highland 4; and the second the 35 MW phase to be constructed and operated by Highland 2; and (c) assign the 35 MW portion of the certificate to Highland 2.

B. Second Ground for Rehearing: The Board's failure to expressly state in the Order that the 35 MW phase is non-jurisdictional and provide its reasoning in the Order is unlawful and unreasonable. (*See* Order.)

1. The Board may have determined the 35 MW phase was non-jurisdictional based on the facts of this case.

Given the Board's decision to not include the 35 MW phase in the issued certificate, the Board may have considered the above and still concluded that the 35 MW phase was non-jurisdictional. For example, the Board may have relied on the fact that the 35 MW phase, based on nameplate capacity alone, does not meet the 50 MW threshold set forth in R.C. 4906.01(B)(1). And, there are some distinctions between the two phases that might have led the Board to decide not to consider the 35 MW and the 65 MW phases as two parts of a whole facility:

- Each phase will be constructed and operated by separate – albeit affiliated – corporate entities.
- Although the two phases will share a transformer before connecting to the grid, each will have separate panel arrays and separate collection line systems that route to the common transformer.
- The power generated by each phase will be separately metered prior to the transformer and will be sold under different power purchase agreements.

As set forth below, however, if the Board made the determination based on these facts that the 35 MW phase was non-jurisdictional, it was required to expressly say so and explain its reasoning.

2. If the Board determined that the 35 MW phase was non-jurisdictional, it was required under R.C. 4903.09 to expressly state that determination and explain its reasoning.

If the Board concluded that the 35 MW phase was non-jurisdictional, it is required to say so. Rather than make an express finding, the Board stated that "the Board declines to adopt the parties' recommendations from the Supplemental Stipulation" and that "[t]he Applicant's request

for certification of 35 MW for New Market Solar II will not be addressed." (Order, pp. 32, 34 n. 2.) The Board did not explain how it viewed the 35 MW phase at all, although the Board's modification of the Joint Stipulation and refusal to adopt the Supplemental Joint Stipulation imply that the 35 MW phase is non-jurisdictional. The Board's lack of any explanation or reasoning in the Order on the 35 MW phase provides no legal direction to all involved with the 100 MW project, including the Board's Staff which must consider how to treat future utility scale solar projects in Ohio that will be constructed and operated through multiple phases.

As a matter of law, in deciding this matter, the Board was required to file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." R.C. 4903.09; R.C. 4906.12 (applying R.C. 4903.09 to Board proceedings); *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, ¶ 38 (finding PUCO failed to comply with R.C. 4903.09 when it failed to "offer a reasoned explanation for its findings"). It is true that "strict compliance with [R.C. 4903.09] is not required." *See Payphone Ass'n v. PUC*, 109 Ohio St. 3d 453, 461 (2006). However, the Board is still required "to set forth '***some*** factual basis and reasoning based thereon in reaching its conclusion.'" *Id*. (emphasis added) (internal citations omitted). Moreover, where any "order fails to state the reasons upon which the conclusions in the . . . opinion and order were based, such order fails to comply with the requirements of this section and is, therefore, unlawful." *Ideal Transp. Co. v. Public Utilities Com.*, 42 Ohio St. 2d 195, 71 (1975), *citing Motor Service Co. v. Public Utilities Com.*, 39 Ohio St. 2d 5 (1974). The Board's failure to explain its handling of the 35 MW phase of the application violates this statutory requirement.

3. In previous cases, the Board has made express findings when it found it lacked jurisdiction over an issue.

In the past, when the Board has found that it lacked jurisdiction over a pending issue, it has expressly said so. *See, e.g., In the Matter of the Application of Icebreaker Windpower, Inc.*, Case No. 16-1871-EL-BGN, 2020 OHIO PUC LEXIS 1633, *36 (October 8, 2020) (noting that the "determination of whether the project violates the Public Trust Doctrine is one of a judicial nature and, ***consequently, outside the Board's jurisdiction***.") (emphasis added); *In the Matter of the Application of PG&E Dispersed Generating Company, LLC,* Case No. 00-922-EL-BGN, 2001 Ohio PUC LEXIS 1102, *5 (Feb. 12, 2001) (finding that "two installed turbines have a combined net generating capacity of 45 MWs and were, ***therefore, not subject to the Board's jurisdiction (i.e., less than or equal to 50 MWs***) (emphasis added); *see also In the Matter of the Application of North Coast Gas Transmission, LLC,* Case No. 14-1754-GA-BLN, 2015 Ohio PUC LEXIS 315, *13 (April 6, 2015) (finding the Board "is ***without jurisdiction to consider the supplement to [an] application for rehearing***" because it was filed more than 30 days from the date of the Board's approval of a project's letter of notification application) (emphasis added); *In the Matter of Application of the Cleveland Electric Illuminating Company,* Case No. 95-600-EL-BTX, 1997 Ohio PUC LEXIS 386, *6 (May 19, 1997) (again finding the Board lacked jurisdiction over an untimely application for rehearing). Unlike these previous cases, the Board failed to explain whether it had jurisdiction over the 35 MW phase of this project and it must provide that explanation in its rehearing order.

As it currently stands, the Board's decision implies that the 35 MW phase is non-jurisdictional. Thus, if on rehearing the Board declines to grant the 100 MW bifurcated certificate as requested in Highland 4's supplement to its application and as recommended in the Joint

Stipulation and Supplemental Joint Stipulation, it should expressly state that the 35 MW phase is non-jurisdictional.

IV. CONCLUSION

Highland 4 presents two grounds for rehearing to the Board for its consideration. The first ground for rehearing seeks a grant of rehearing to approve both the Joint Stipulation and the Supplemental Joint Stipulation as recommended by Highland 4, the Board's Staff and the Ohio Farm Bureau Federation. As stated in the Application for Rehearing, the procedural history of the application and language used in this proceeding may have been confusing, but all of the key facts are in the record to allow the Board to approve the Joint Stipulation and Supplemental Joint Stipulation as presented without modification. Doing so would ensure both phases of the project are subject to the same certificate conditions and oversight by the Board, a finding properly justified by the fact that both phases feed into a common transformer. Alternatively and as sought in the second ground for rehearing, the Board should explicitly confirm that the 35 MW phase is non-jurisdictional to provide certainty to all involved in the 100 MW solar project and its two phases. Highland 4 appreciates the Board's consideration of the grounds for rehearing and

respectfully requests an expedited decision on the Application for Rehearing given the 100 MW project's commercial and construction schedule, including upcoming financing transactions.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will automatically serve notice of the filing of this *Application for Rehearing on Expedited Basis* to those individuals referenced on 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 *Application for Rehearing on Expedited Basis* has been emailed to the following on this 19th day of April 2021:

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