

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Birch Solar 1,)
LLC for a Certificate of Environmental)
Compatibility and Public Need to Construct a Solar-) Case No: 20-1605-EL-BGN
Powered Electric Generation Facility in Allen and)
Auglaize Counties, Ohio.)

**BIRCH SOLAR’S
MEMORANDUM CONTRA
TO HOLD AN ADDITIONAL IN-PERSON PUBLIC INFORMATIONAL MEETING
AND TO HOLD THE STAFF’S DETERMINATION OF
COMPLETENESS IN ABEYANCE BY
AGAINST BIRCH SOLAR LLC AND RESIDENTS IN
ALLEN AND AUGLAIZE COUNTIES**

I. INTRODUCTION

On February 12, 2021, as supplemented, Birch Solar 1, LLC (“Applicant”) filed an application with the Ohio Power Siting Board (“Board”) for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Allen and Auglaize Counties, Ohio (“Application”).

At this time, pursuant to Ohio Administrative Code (“O.A.C.”) Rule 4906-2-27(B)(1), the Applicant submits this memorandum contra to the June 9, 2021 Motion to Hold an In Person Informational Meeting in the Area in which the Project is Located and to Hold the Staff’s Determination of the Application’s Completeness in Abeyance (“Motion to Hold”) filed on behalf of Against Birch Solar and various residents in Allen and Auglaize Counties, Ohio (“Petitioners”),

Petitioners move for an order directing Applicant to hold an in-person public informational meeting (“PIM”) “in the area in which the project is located.” In addition, Petitioners further move that the Administrative Law Judge (“ALJ”) direct the Staff to delay its determination of the

Application's completeness under O.A.C. 4906-3-03(A)¹ until such time as the in-person informational meeting has been held and the Application has been amended to "summarize in its certificate application how many and what types of comments were received" during the in-person public informational meeting as required by O.A.C. 4906-3-03(B)(4).

The Applicant believes in public participation and has worked to inform the community of the Project and answer all questions about the Project from its very inception. However, even given the Applicant's strong commitment to public involvement, upon review of the Petitioners' Motion to Hold, it is not possible for the Applicant to support the motion requesting an additional in-person PIM. As further set forth herein, the Applicant opposes the Motion to Hold for good reason.

Initially, the Applicant notes that the PIM is not a requirement under the statute, but a requirement under the Board rules in O.A.C. Rule 4906-3-03(B), which requires that the PIM be conducted "prior to [the applicant] submitting a standard certificate application to the [B]oard." In compliance with the rules and directives of the Board, the Applicant held two PIMs prior to submitting the Application on February 12, 2021,² and, as shown below, went above and beyond the rule requirements by implementing a robust public information program that consisted of several elements including, but not limited to, two presentation and question and answer ("Q&A") sessions with options for attendees to join either by web or telephone ("Virtual PIMs"). An additional in-person PIM is not warranted or required as the Applicant's alternative public information program met and exceeded the purpose of O.A.C. Rule 4906-3-03. The Applicant

¹ The Applicant notes that, while the Petitioners cite to O.A.C. Rule 4906-3-03(A) for the completeness determination, it is actually O.A.C. 4906-3-06(A) that sets forth the completeness review process after an application is filed in the OPSB docket. Therefore, hereafter, the Applicant will cite to O.A.C. 4906-3-06(A) with regard to the completeness determination.

² As detailed below, two PIMs were held on November 20 and 23, 2020, during the height of the pandemic, and combined the PIMs lasted for almost 8 hours. The Applicant notes that a typical PIM is a one-time event for a two-hour duration.

crafted and executed a robust alternative public information campaign to educate and inform the community about the Project during the COVID-19 pandemic. This consisted of community engagement opportunities in-person, virtually, through the mail, and through its website. Petitioners characterize the Applicant's dynamic program as though it only consisted of virtual components such that, if individual community users experienced technical limitations in terms of participating in virtual PIMs, there were no options for them to engage regarding the Application. That is simply not true. Petitioner's assertion that the Applicant's virtual presentations experienced logistical problems is unfounded and the Applicant met and exceeded its obligation to satisfy the objectives of a PIM contained in O.A.C. Rule 4906-3-03. In addition, the Applicant already summarized in its Application how many and what types of comments were received at the PIMs as required by O.A.C. 4906-3-03(B)(4); thus, there is no reason to delay issuing Applicant its completeness letter. Finally, Petitioner's desired remedy is not supported by the Board precedent they cite and improperly suggests that all applicants not having received their completeness letter when the emergency was lifted must have additional PIMs in person. The Applicant's consistent commitment to providing information regarding the Project to the community and the Board demonstrates that the Applicant has met all necessary requirements and should receive the Board's determination of completeness on or before June 14, 2021, pursuant to O.A.C. Rule 4906-3-06. Further delay is unwarranted and would call to question the real reason underlying any delay.

II. ARGUMENT

A. Birch Solar's Public Information Program Met and Exceeded Purpose of and an Additional Public Information Meeting is Not Warranted

1. Board Granted Applicant's Motion Permitting Alternative Public Information Program During State of Emergency

In recognition of the COVID-19 pandemic and state of emergency in Ohio, the Applicant held Virtual PIMs and conducted an alternative public information program with the Board's express approval.³ Due to the fact that, at the time of the PIMs, the state of Ohio, as well as the nation and world, were living through a serious pandemic and state of emergency, the Applicant requested a waiver from the requirement in O.A.C. Rule 4906-3-03 that the PIM be held in the area in which the Project is located, in lieu of the normal in-person PIM in the Project Area as set forth in O.A.C. Rule 4906-3-03(B). The Board authorized the Applicant to hold a Virtual PIM and implement an alternative public information program.⁴ The Applicant held two PIMs on November 20, and 23, 2021 and implemented a robust alternative public information program in accordance with processes and requirements expressly contemplated by Ohio law and administrative code during the COVID-19 pandemic under emergency orders issued by the Governor and the Ohio Department of Health Director.

The Applicant's request for waiver and the Board's ultimate granting of the waiver was consistent with the General Assembly's legislation enabling public bodies to convene virtual public meetings and hearings.⁵ It is important to recognize that, at the same time the Applicant sought its waiver, the Board, properly relying on Am. Sub. H.B. 197, authorized the scheduling of Virtual PIMs for numerous other projects that are currently pending before the Board.⁶ In addition, during the COVID-19 pandemic and state of emergency in the state, the Board scheduled and held numerous local public hearings and adjudicatory hearings in a cases using remote access

³ *In re Application of Birch Solar, LLC*, Case No. 20-1605-EL-BGN, Entry (Oct. 26, 2020).

⁴ *Id.*

⁵ Am. Sub. H.B. 197

⁶ A few of the many projects that were granted authority to hold Virtual PIMs include: *In re Application of Fox Squirrel Solar, LLC*, Case No. 20-931-EL-BGN (June 30, 2020); *In re Application of Yellowbud Solar, LLC*, Case No. 20-972-EL-BGN, Entry (May 26, 2020); and *In re Application of Powell Creek Solar, LLC*, Case No. 20-1084-EL-BGN, Entry (June 15, 2020).

technology that facilitated participation by telephone and/or live video on the internet.⁷ It is unclear whether the Petitioners are now expecting the Board to go back and hold in-person PIMs and hearing for all projects that are before the Board and followed the rules and statute for their PIMs and hearing.

2. Virtual PIMs and Public Information Program were Conducted in Accordance with Ohio Administrative Code and Ohio Law During State of Emergency

The Applicant's PIMs and alternative public information program met and exceeded the purpose of O.AC. 4906-3-3, ensuring that the community could both obtain information about the Birch project and provide comments and feedback for the purpose of informing the Applicant of concerns prior to the Applicant filing the Application.

While there is no statutory requirement that a PIM be held, the Board has established rules requiring that, **prior to filing a standard certificate application**, the applicant must hold at least one PIM. The purpose of the PIM being held prior to the filing of an application is to provide the community an opportunity to learn more about the project and for the applicant to ascertain any issues or concerns the community might have. The applicant then takes the input gained from the PIM back and evaluates the project layout and proposal to best address any concerns or issues that were brought up by the community.

In accordance with the rule, prior to the COVID-19 pandemic and the special dispensation under the statute for virtual meeting and hearings, PIMs were typically held on a weekday, for a two-hour period, at a venue located in the project area that can accommodate large groups of

⁷ A few of the many projects where local and evidentiary hearings were held virtually include: *In re Application of The Ohio State University*, Case No. 19-1641-EL-BGN, Entry (May 22, 2020); *In re Application of Fox Squirrel Solar, LLC*, Case No. 20-931-EL-BGN (Jan. 22, 2021); *In re Application of Yellowbud Solar, LLC*, Case No. 20-072-EL-BGN, Entry (Oct. 7, 2020); *In re Application of Powell Creek Solar, LLC*, Case No. 20-1084-EL-BGN, Entry (Jan. 25, 2021).

individuals. At the PIM, the applicant usually provided materials explaining the project and subject matter experts were made available so the public could ask questions and obtain answers to questions they may have about different aspects of the project, including ecological, sociological, engineering etc. Maps showing the proposed facility were also made available.

While there is no question that the Virtual PIMs held by Applicant during the lengthy time of the COVID-19 pandemic that shutdown the state and nation for over a year, provided for a different venue than an in-person setting, the information provided and the feedback obtained were invaluable. For the Virtual PIMs, the Applicant provided extensive information to the public both prior to the PIMs, via the Applicant's website and hard copy upon request, and during the PIMs in the form of a power point presentation and the availability of the subject matter experts. Both PIMs were well attended by the public. Combined, both PIMs lasted for almost 8 hours and, during the PIMs, the Applicant's subject matter experts responded to hundreds of questions from the public.

There is no question that the purpose of the PIM envisioned by the Board was met and exceeded. The public and community received almost 8 hours of detailed information and the Applicant received important information that the Applicant then took back and took in to consideration in finalizing its Application before filing it with the Board.

3. Applicant's Virtual PIMs and Public Information Program Ensured Community Obtained Project Information during Pandemic

With the express approval of the Board, the Applicant delivered two extremely well attended Virtual PIMs and a robust public information program to ensure the community obtained information about the Project. Prior to filing the Application, the Applicant's information program consisted of many opportunities for informational gatherings both by the public and the Applicant,

including, but not limited to: holding in-person community open houses where local residents and stakeholders obtained Project information, while respecting safety guidelines as to wearing masks and social distancing; and maintaining a Project website that contains important information on the Project⁸; making a power point presentation with Project information available on its website from the subject matter experts; providing a pre-recorded presentation to provide Project information on its website; sending Project information mailers to adjoining landowners and area stakeholders; hosting two live, web-based and teleconference Q&A PIMs; and hosting small group meetings with community members, either in-person or via phone. This program not only substantially complied with the Board's rules, but also enhanced the public information program required by O.A.C. Rule 4906-3-03. In addition, the notification efforts the Applicant used complied with and enhanced the notice provisions required under the rules for PIMs.

In October of 2020, the Applicant began significant community engagement activities to discuss and help shape its plans for the Project and to obtain feedback directly from community members themselves prior to submittal of the Application. The Applicant joined the Lima Allen County Chamber of Commerce, reached out to the local media, and hosted four community information meetings – two in-person and two virtual, connecting directly with 500 or more residents.

The Applicant hosted an in-person Community Open House on October 27, 2020, where invitations were mailed to approximately 200 local residents near the proposed Project Area, as well as key local stakeholders. The open house was held in a 'drop in' format from 3-8 p.m. to be able to keep groups spread out and small in order to facilitate safe social distancing, with masks required. The event was covered by local media.⁹

⁸ <https://www.lightsourcebp.com/us/projects/birch-solar-project/>

⁹ <https://www.limaohio.com/news/433761/solar-farm-heading-to-auglaize-county>

The Applicant also held a local Community Outreach Meeting at the Apollo Career Center in Lima on November 18, 2020. The meeting was open to the public, advertised in the local papers, both print and online,¹⁰ and invitations were emailed to members of the Lima Chamber of Commerce members. The entire event was broadcast live on local Lima television on WTLW TV 44.¹¹ This in-person meeting duration was 3 hours 20 minutes. The presentation was about 45 minutes, with over 2 hours of Q&A with the community following.

The two Virtual PIMS approved by the Board were held on November 20, 2020 and November 23, 2020¹² and allowed the community to participate either by phone or web, and interactively ask questions. Each Virtual PIM consisted of a presentation about the Project followed by a Q&A session with options for attendees to join either by web or telephone. Notice was posted on the Project's website, published in the *Lima News* and the *Wapakoneta Daily News*, emailed to 800 members of the Lima Chamber of Commerce, and mailed to local government officials, libraries, local schools, local first responders, landowners, and adjacent landowners. In addition, a pre-recorded presentation about the Project and the permitting process was also made available on the project website, along with answers to commonly asked questions by the community.

The November 20, 2020 Virtual PIM lasted for 4 hours and 30 minutes. The presentation lasted for 1 hour and 25 minutes; it was followed by 3 hours of Q&A with the community, both through the chat function and live via phone. The meeting had 161 online participants and 110 phone participants. The November 23, 2021 Virtual PIM lasted for 3 hours and 15 minutes. The

¹⁰ <https://www.limaohio.com/news/436596/birch-solar-plans-community-outreach-meeting>;
<https://www.newsbreak.com/news/2103512411297/birch-solar-plans-community-outreach-meeting>

¹¹ The video is accessible here: <https://m.youtube.com/watch?feature=youtu.be&v=P7KNRK88RpU>. The video is unlisted in accordance with YouTube's policies.

¹² Petitioners incorrectly state that the second Virtual PIM occurred on November 24, 2020.

presentation was for 1 hour and 15 minutes, followed by 2 hours of Q&A with the community, both through the chat function and live via phone. The meeting had 73 participants by phone and 153 online.

For the Virtual PIMs, the Applicant used a well-established hosted streaming service, Broadnet. The Applicant selected this service to ensure the meeting was not dependent on any of the presenter's own internet connections or software. Contrary to Petitioner's representations, Broadnet has confirmed that it did not experience any downtime and the meeting streamed during the entirety of both PIMs. As a backup, participants were able to participate by phone only.

For those not able to attend, a pre-recorded presentation about the Project and the permitting process was also made available on the Project website, along with a mechanism to submit further questions, and answers to commonly asked questions by the community.

4. Birch Solar Has Met and Exceeded its Obligations to Hold a Public Information Meeting

The Applicant's virtual PIMs and public information program, described above, met and exceeded the purpose of O.A.C. 4906-3-3, ensuring that the community could both obtain information about the Birch project and provide comments. The purpose of a PIM, which is held prior to the Applicant filing its application with the Board, is to inform the community about the Applicant's intent to file an application. In addition, the PIM provides an opportunity for the Applicant to answer questions from interested persons and gather information regarding any concerns the community might have so that the Applicant can consider the questions and concerns in its application. The public information program held by the Applicant, accomplishes these goals.

Understanding the purpose of the PIM and the need to provide the community with information on the Project, as well as the Applicant's need to receive constructive feedback on the plans for the Project, the virtual PIMs and the public information program conducted by the Applicant, satisfies the intent of the requirements in O.A.C. Rule 4906-3-03. In fact, the proposed program exceeded the requirements in the Board's rules and ensured that a larger range of individuals not only received notice of the Project and the PIMs, but were provided an opportunity to have their questions answered in an effective and timely manner.

It is important to note that even after the PIMs are conducted, that there are still meaningful mechanisms that allow for community participation in Project. The Board provides stakeholders an opportunity to file comments in the docket, intervene in the proceeding and become involved in the evidentiary hearing, or to testify at a public hearing.

B. Unreasonable Relief Sought is Not Supported by OPSB Precedent Referenced

As stated above, Applicant's public information program meets and exceeds the purpose and requirements of O.A.C Rule 4906-3-03. None of the cases that Petitioners rely on establish the need for applicants to have both virtual hearings and then later have an in-person PIM due to unsubstantiated issues with the virtual meeting components of a public information program. Similarly, none of the cases referenced by the Petitioners establish that failure to include a summary of comments from a PIM requires the Board to delay completeness or have an additional hearing.

Petitioners request the ALJ to issue an order directing the Applicant to conduct an in-person meeting after the Applicant has already conducted an extensive public information program and after obtaining an appropriate waiver from the Board. Petitioners argue that such an order would be consistent with the Board's rulings granting waivers of in person informational meetings in

other pending cases prior to the June 2, 2021 expiration of the Ohio Department of Health Director's COVID-19 order restricting mass gatherings. In making this argument, Petitioners cite recent ALJ entries in Board cases that were issued in April of 2021, to suggest that virtual meetings are inherently insufficient when compared to in-person meetings. Contrary to the Petitioners assertions, these cases do not require applicants to first have virtual hearings and then later additional in-person meetings prior to obtaining a letter of completeness under O.A.C. Rule 4906-3-06. Importantly, these cases cited by Petitioners do not address the sufficiency of the virtual method but reflect the evolved context regarding the pandemic and the inevitable expectancy that Ohio would emerge from the COVID-19 pandemic—and that opportunities for in-person interaction would increase as things began to normalize. Petitioner's analysis is divorced from the inherent context reflecting that the COVID-19 pandemic has been ever-changing and that there has been a positive trend in Ohio's management of the pandemic. Simply because in-person meetings are happening now does not mean that because a meeting was held virtually that it is no longer valid. It does not mean that all pending cases that have had public hearings but which await their completeness determination under O.A.C. 4906-3-06, must now have additional in-person meetings.

In *In re the Application of Palomino Solar*, Case No. 21-41-EL-BGN, (Entry of Apr. 21, 2021), the ALJ denied the applicant's request for a waiver from O.A.C Rule 4906-3-03(B)(2) after the applicant determined it had inadvertently omitted providing notice of its virtual public information meeting to abutting landowners. Because 49 abutting property owners did not receive notice of the PIM, the ALJ ordered the applicant to hold another hearing for specific landowners. Contrary to the Petitioners' inference, this entry did not require an additional hearing because of purported issues associated with a virtual hearing, only the partial failure to notice the appropriate

landowners. The entry did not address the sufficiency of the past virtual meetings and programs in general but merely noted the potentiality, if the applicant was able to hold an in-person public informational meeting, and if the statewide health orders prohibiting mass gatherings are lifted, or eliminated, the applicant should evaluate and file an update in that docket regarding the possibility of providing an opportunity for an in-person meeting.

In *In re the Application of Border Basin I*, Case No. 21-277-EL-BGN, (Entry of Apr. 20, 2021), *In re the Application of Nottingham Solar*, Case No. 21-270-EL-BGN, (Entry of Apr. 9, 2021), *In re the Application of Cepheus Energy*, Case No. 21-293-EL-BGN, (Entry of Apr. 9, 2021), ALJs granted waivers to allow projects to hold virtual public information programs in lieu of in-person programs. Petitioners rightly point out that these entries all contain language directing the respective applicants to do that in the event that statewide health orders prohibiting mass gatherings are lifted or otherwise eliminated, and the applicant is able to hold an in-person public information meeting, the applicant should evaluate and file an update on the record regarding the possibility of providing an opportunity of an in-person meeting for those who wish to do so. However, this language does not require applicants to first have virtual hearings and then later additional in-person meetings prior to obtaining a letter of completeness under O.A.C. Rule 4906-3-06.

At the time the Applicant was granted its PIM waiver, the pandemic was at a very pronounced stage. As such, the language referred to by petitioners in recent orders was not included in the entry granting the waiver to the Applicant. By filing this motion, Petitioners seek to insert this language in all orders not yet deemed complete regardless of timing. This would result in an inequity for the Applicant. Most importantly, it would not redress any harm as the Applicant has already exceeded its requirements. It would also not account for the substantial efforts that the

Applicant has made in terms of its interactions with the community and its efforts to provide information to the Board in order to obtain a completeness letter. To this end, in addition to providing a thorough and exhaustive application, the Applicant has timely provided responses to eight data requests to Board staff and related supplements to those responses. The Applicant's commitment to providing information regarding the Project, both to Board and the community, is impeccable.

As a result of Applicant's effective community engagement, questions or concerns were documented and incorporated into the Project as much as possible. As part of the Project design considerations, and with the consideration of the significant input received in the community outreach, the Applicant is implementing several substantial changes to its Project plan.

III. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Hold should be denied.

Respectfully Submitted,

/s/ Christine M.T. Pirik

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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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 11th day of June, 2021.

/s/ Christine M.T. Pirik

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Summary: Memorandum Contra Motion for Additional Public Information Meeting and for Completeness to be Held in Abeyance electronically filed by Christine M.T. Pirik on behalf of Birch Solar 1, LLC