

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Pleasant Prairie)
Solar Energy LLC for a Certificate of Environmental)
Compatibility and Public Need to Construct a Solar-) Case No. 20-1679-EL-BGN
Powered Electric Generation Facility in Franklin)
County, Ohio.)

**PLEASANT PRAIRIE SOLAR ENERGY LLC MEMORANDUM CONTRA
PETITION TO INTERVENE OF NO PRAIRIE SOLAR, LLC**

I. INTRODUCTION

On February 19, 2021, as supplemented on April 7 and 21, 2021, Pleasant Prairie Solar Energy LLC (“Applicant”) filed an application with the Ohio Power Siting Board (“Board” or “OPSB”) for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Franklin County, Ohio (“Application”). On June 25, 2021, No Prairie Solar, LLC (“NPS”) filed as a domestic limited liability company with the Ohio Secretary of State¹ and also sought intervention in this proceeding. Pursuant to Ohio Administrative Code (“Ohio Adm. Code”) Rule 4906-2-27(B)(1), the Applicant submits this memorandum contra to the NPS Petition to Intervene (“Petition”). The Petition articulates a generalized interest in opposing Applicant’s proposed 250-megawatt (“MW”) solar-powered electric generation facility (“Project”), but that generalized interest is unsupported by specific factual allegations sufficient to demonstrate that NPS, as a corporate entity, has the real, substantial, and unique interest required to justify intervention in this proceeding.

¹ See Exhibit A, No Prairie Solar LLC Ohio Secretary of State Certificate (effective June 25, 2021).

II. ARGUMENT

A. Legal Standard

Under both Section 4906.08(A)(3) of the Ohio Revised Code (“R.C.”), and Ohio Adm. Code Rule 4906-2-12(B), the Board or an Administrative Law Judge (“ALJ”) assigned to a case before the OPSB may grant a petition to intervene only upon a showing of “good cause.” In determining “good cause” and whether to allow intervention, the Board and ALJ may consider the following factors:

1. The nature and extent of the person’s interest.
2. The extent to which the person’s interest is represented by existing parties.
3. The person’s potential contribution to a just and expeditious resolution of the issues involved in the proceeding.
4. Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

The Ohio Supreme Court has held that “intervention ought to be liberally allowed so that positions of all persons with a real and substantial interest in the proceedings can be considered.” *Ohio Consumers’ Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St.3d 384, 2006-Ohio-5853 (emphasis added). However, merely filing a petition to intervene in an administrative proceeding does not guarantee intervention. *See, e.g., Senior Citizens Coalition v. Pub. Util. Comm. of Ohio*, 69 Ohio St.2d 625, 627 (1982) (upholding Public Utilities Commission of Ohio’s decision to limit a party’s intervention).

Given that NPS did not exist as a legal entity prior to the date of the filing of the Petition for Intervention and has no identified corporate interest relating to the Project, we assume the Petition seeks to assert associational standing on behalf of NPS’s members. To do so, NPS must meet the test for such representational standing as articulated by the Supreme Court of Ohio:

“[A]n association has standing on behalf of its members when ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088, quoting *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383; *see also Ohio Hosp. Assn. v. Community Mut. Ins. Co.* (1987), 31 Ohio St.3d 215, 218, 31 OBR 411, 509 N.E.2d 1263. We have emphasized that “to have standing, the association must establish that its members have suffered actual injury.” *Bicking*, 71 Ohio St.3d at 320. At least one of the members of the association must be actually injured. *See, e.g., Warth v. Seldin* (1975), 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343; *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health*, Franklin App. No. 07AP-490, 2007-Ohio-7147, 2007 WL 4564391, ¶ 21. “[T]he injury must be concrete and not simply abstract or suspected.” *Bicking* at 320.

State ex rel. Am. Subcontractors Ass’n, Inc. v. Ohio State University, 129 Ohio St.3d 111, 950 N.E.2d 535, 2011-Ohio- 2881, ¶ 12.

B. No Prairie Solar Has Not Met Its Burden to Demonstrate Good Cause for Intervention.

NPS’s Petition to Intervene provides the following cursory statements regarding the “nature and extent” of its members’ interest in this proceeding:

- “No Prairie Solar has more than seventy-five members who will be directly and adversely affected by the Project, which will be constructed and operated near their homes and properties. Several members of No Prairie Solar own property which is adjacent to the Project on one or more sides.” Petition at 3-4.
- “The Project will have serious adverse impacts on the members’ homes and properties.” Petition at 4.

The Petition goes on to allege that the Project as proposed in the Application would impact NPS’s members by affecting their “visual and aesthetic enjoyment” of the surrounding area, including setbacks that are “too short to protect the neighboring properties,” and providing insufficient measures “for the identification, protection, and repair of drainage tiles that are damaged by the Project’s construction.” Petition at 4-5.

These assertions do not include important predicate facts that the Board would need to possess to assess the actual nature and extent of the relevant interests at stake, including: (1) the identities of NPS's members; (2) whether any of those members would suffer particularized harm from the types of impacts alleged beyond the effects applicable to any area resident; and (3) whether other parties to the proceeding adequately represent the interests of NPS's members. Accordingly, the Board should deny the Petition to Intervene.

1. No Prairie Solar Has Failed to Allege Any Unique, Concrete Harm to Its Members.

The fundamental flaw of the Petition is that it does not identify any specific member of NPS so that the Board could adequately consider the applicability of the relevant criteria for intervention. The Board has repeatedly declined to grant intervention to individuals that do not own property within a project's footprint or abutting a project, finding that without such close proximity such individuals "have failed to demonstrate a sufficient direct interest at stake in the outcome of" a project application. *In re Application of Firelands Wind, LLC*, Case No. 18-1607-EL-BGN, Entry (June 25, 2019) at 6 (denying intervention to individuals who "reside outside of the project area and do not have property that abuts the project"); *see also, e.g., In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Entry (Apr. 23, 2019) at 5 (denying intervention to individuals that submitted generic arguments alleging close proximity to the project area); *id.*, Entry (Aug. 21, 2018) at 7 (denying intervention to individuals that reside outside of the project area and do not have property that abuts the project area); *In re Application of Icebreaker Windpower, Inc.*, Case No. 16-1871-EL-BGN, Entry (May 23, 2018) at 5-6 (denying intervention because the residents failed to assert a sufficiently direct interest in the outcome of the case). As the Board has previously explained, "it is not enough for a person seeking to intervene in a proceeding . . . to merely state that he or she resides in a county wherein the project under

consideration is proposed to be sited.” *In re Application of Black Fork Wind LLC*, Case No. 09-546-EL-BGN, Entry (Mar. 2, 2010).

Absent the identification of any individual member of NPS who lives or owns property within or abutting the Project area, this precedent dictates a finding that NPS has failed to allege any particularized interest in the Project Application that warrants intervention. Without that essential information, the Board cannot make a credible determination as to the nature and extent of the Project’s purported impacts on any of NPS’s members with respect to the issues they seek to raise in this case. For example, the Petition alleges that the vegetative screening and setbacks proposed in the Application are inadequate, Petition at 4-5, but neither Applicant nor the Board can assess how far the Project would actually be located from any property or residence belonging to NPS’s members. Similarly, the assertion that the Applicant will not adequately address potential drainage tile damage from the Project is not accompanied by any indication that any NPS member would experience any drainage tile impacts. Without these details, NPS’s members are indistinguishable from any other individual living anywhere in the general vicinity of the Project who might have an opinion about whether it should or should not be constructed – a population that potentially encompasses all residents of Pleasant and Prairie Townships, or Franklin County, where the Project will be located.

Rather than granting party status to all such individuals with generic concerns about the impact of a project, the Board has emphasized that local input properly can and should be provided at the local public hearings required as part of the OPSB siting process. *See, e.g., In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Entry (Aug. 21, 2018) at 7 (interests of residents of a county where project is proposed to be sited may be raised during the local public hearing); *In re Application of Icebreaker Windpower, Inc.*, Case No. 16-1871-EL-BGN, Entry

(May 23, 2018) at 6 (explaining that generic interests of residents living in vicinity of proposed project “would be more appropriately raised during the second local public hearing” and “encourag[ing] them to attend that hearing and voice their concerns for the Board’s consideration”).

The Board’s established approach of granting intervention to those actually located within or adjacent to the project area while considering other local input through the public hearing process is the only practicable way to manage the hearing process. Otherwise, dozens or even hundreds of area residents could seek intervention through a group as with the 75 unidentified members of NPS, and in an extreme case could flood the Board with cumulative testimony regarding generic grievances that are more appropriately aired in the separate public hearing process. The Board should not open the door to such an approach here.

2. Existing Parties to the Case Can Sufficiently Represent the Interests Set Forth in the Petition to Intervene, and NPS Will Not Contribute to a Just and Expeditious Resolution of the Proceeding.

The Petition to Intervene focuses on three types of purported impacts from the Project as proposed in the Application: aesthetic (visual impacts of the Project absent vegetative screening, glare from the solar arrays, and “annoyance” from night lights), Petition at 4-5; insufficient “protect[ion]” of neighboring properties due to “too short” setbacks,² Petition. at 5; and inadequate plans for “identification, protection, and repair of drainage tiles that are damaged by the Project’s construction.” Petition at 5. NPS generically asserts that no other parties in the proceeding will adequately represent its interests in the resolution of these issues and that its “participation in this proceeding will contribute to a just and expeditious resolution of the issues involved,” Petition at

² The specific basis for NPS’s claim that the setbacks are “too short” absent from the Petition.

5, but fails to account for the fact that OPSB Staff, existing parties, and the Applicant itself are all well-positioned to achieve resolution of these issues.

Foremost, the Board's rules require the Applicant to address each of the specific concerns raised by NPS, and it has done so in its Application -- extensively. Although we will not attempt to reproduce the content of the more than 2,000 pages filed by the Applicant to date, we highlight the following:

- Application Exhibit J provides an 80-page Visual Resource Assessment and Mitigation Plan prepared by an expert consultant in accordance with Ohio Adm. Code 4906-04-08(D)(4).
- The Project was designed incorporating setbacks of “the greater of 100 feet from residence boundary lines or 300 feet from residences” and “100 feet from road rights of way (ROW) or as otherwise dictated via lease agreements or Good Neighbor Agreements with area residents.” Application at 25.
- The Application includes a commitment that “[t]he Applicant will ensure that drain tile mains or main irrigation lines damaged in connection with the construction of the solar farm will be promptly repaired or replaced if needed to maintain site drainage. . . . The Applicant will hire an experienced drain tile contractor from the local area, approved by the landowner, to perform drain tile repairs in a manner that meets industry standards and all state and local code requirements. Following decommissioning, the Applicant shall be responsible for correcting any material problems with drain tile mains caused by Project construction. The landowner will be given the opportunity to inspect and approve repairs to drain tiles on the property.” Application at 98. Application Exhibit K additionally provides a 20-page Drain Tile Mitigation Plan prepared by an expert consultant in accordance with Ohio Adm. Code 4906-04-08(E)(2)(c).

OPSB Staff has likewise scrutinized these submissions and addressed their consistency with the applicable criteria under R.C. 4906.10 and implementing rules under Ohio Adm. Code Chapter 4906-4 in the July 1, 2021 Staff Report. *See* Staff Report (July 1, 2021) at 11-12, 45 (aesthetics); 22, 23, 39 (setbacks); 31, 41, 46 (drain tiles).

Additionally, other parties have already intervened specifically to provide input on all of these issues. The Boards of Trustees for both of the townships that would host the Project have

intervened in this proceeding “to represent and provide the Township perspective with respect to this proposed facility.” Notice of Intervention of Pleasant Township, Franklin County, Ohio (May 12, 2021), Ex. A at 1; Notice of Intervention of Prairie Township, Franklin County, Ohio (May 7, 2021), Ex. A at 1. These elected representatives are well able to hear and convey their constituents’ concerns regarding each of the potential impacts cited in the Petition, especially compared to a private entity representing a selection of unidentified residents. In fact, the Board has previously affirmed denial of a motion to intervene by a citizen group articulating generic interests on the basis that such “general concerns . . . are better represented by the intervening local governments representing their citizens.” *In re South Field Energy LLC*, Case No. 15-1716-EL-BGN, Opinion, Order, and Certificate (Sept. 22, 2016).

The Ohio Farm Bureau Federation (“OFBF”) and the Board of Park Commissioners of the Columbus and Franklin County Metro Parks (“Metro Parks Board”) have also already been granted intervention. OFBF has asserted its interest on issues including pursuing “effective solar energy development with respect to aesthetic impacts on “[r]esidents in rural neighborhoods” as well as “ensuring appropriate consideration of drainage infrastructure.” Motion to Intervene of OFBF (June 22, 2021) Mem. in Supp. at 2, 3 (motion granted by Entry issued June 28, 2021). The Metro Parks Board, meanwhile, has indicated it will seek to raise concerns regarding Project setbacks and aesthetic and visual impacts. Petition for Leave to Intervene of Metro Parks Board (May 2, 2021) at 2 (motion granted by Entry issued June 28, 2021).

NPS makes no effort to explain how its input on these same topics will be different from or additive to the perspective of OPSB Staff, Pleasant and Prairie Townships, OFBF, and the Metro Parks Board. That failure to address two express criteria for intervention – the extent to which NPS’s interests are duplicative of those of existing parties and its ability to contribute to a just and

equitable resolution of the proceeding – provides another, independent basis for denying the Petition.

III. CONCLUSION

As Board precedent makes clear, simply seeking intervention is not enough; a proposed intervenor must satisfy four separate criteria to demonstrate concrete, particularized standing and the capacity to provide added value to the Board’s consideration of relevant issues. NPS does not credibly address three of the four criteria, and the Board should therefore deny its Petition to Intervene.

Respectfully submitted,

/s/ Christine M.T. Pirik
Christine M.T. Pirik (0029759)
William Vorys (0093479)
Matthew C. McDonnell (0090164)
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
(614) 591-5461
cpirik@dickinsonwright.com
wvorys@dickinsonwright.com
mmcdonnell@dickinsonwright.com

Attorneys for Pleasant Prairie Solar Energy LLC

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 12th day of July, 2021.

/s/ Christine M.T. Pirik

Christine M.T. Pirik (0029759)

Counsel:

kyle.kern@ohioattorneygeneral.gov

thomas.shepherd@ohioattorneygeneral.gov

jhuber@bjglaw.net

pgriggs@bjglaw.net

jvankley@vankleywalker.com

bojko@CarpenterLipps.com

paul@CarpenterLipps.com

Administrative Law Judges:

jay.agranoff@puco.ohio.gov

david.hicks@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/12/2021 12:55:15 PM

in

Case No(s). 20-1679-EL-BGN

Summary: Memorandum Contra Petition to Intervene of No Prairie Solar, LLC electronically filed by Christine M.T. Pirik on behalf of Pleasant Prairie Solar Energy LLC