**BEFORE THE OHIO POWER SITING BOARD**

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

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# MEMORANDUM CONTRA OF ANGELINA SOLAR I, LLC TO THE APPLICATION FOR REHEARING

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## I. Introduction

The Ohio Power Siting Board ("Board") correctly granted a certificate for the Angelina Solar I, LLC ("Angelina") Solar Project (the "Project") after reviewing the record evidence and determining that the Project meets every element of R.C. 4906.10(A). It made that determination after reviewing the application, transcripts from multiple days of hearings, other record evidence, and briefing from parties and Board Staff – including over one-hundred pages of briefing from the Concerned Citizens of Preble County, Robert Black, Marja Brandly, Campbell Brandly Farms, LLC, Michael Irwin, Kevin and Tina Jackson, Vonderhaar Family ARC, LLC, and Vonderhaar Farms Inc. (collectively referred to herein as "CCPC"). The Board's June 24, 2021 Opinion, Order and Certificate ("Order"), which was itself 158-pages long, carefully walked through and analyzed the record evidence to determine that the Project met all of the elements of R.C. 4906.10(A).

CCPC has now filed an Application for Rehearing that fails to present any grounds for rehearing that are specific enough to comply with the statutory requirements of R.C. 4903.10. As a result, the Board lacks jurisdiction to even consider CCPC's Application for Rehearing.[1]

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[1] The Board's electronic docket reflects that the Application for Rehearing was "filed by Mr. Jack A. Van Kley on behalf of Local Resident Intervenors and the docket stamp on the filing also only references the "Local Resident Intervenors." Ohio Adm. Code 4901-1-02 requires parties to comply with the Board's electronic filing manual and technical requirements. Section 6.05 of the manual requires a filer to select which of the parties the filing is on behalf

Even if the Board did have jurisdiction, the 123-page Application for Rehearing and Memorandum in Support do nothing but regurgitate the same arguments from CCPC's post-hearing briefs that the Board has already considered and rejected. Thus, if the Board determines it has jurisdiction over some portion of the Application for Rehearing, the Board should not do anything in response to the Application for Rehearing so that it will be denied by operation of law in thirty days.

If the Board does engage in any review of or action on the Application for Rehearing, the Board need not engage in a point-by-point analysis of the very same issues that it already exhaustively addressed in its Order. The Board should again emphasize that CCPC's arguments are flawed in two major ways: (1) CCPC improperly confuses and conflates Board rules regarding how to complete an application with the separate statutory elements that a Board must evaluate based on the record evidence when granting a certificate; and (2) CCPC ignores Supreme Court and Board precedent allowing the Board to require a certificate holder to make post-certification submissions to Board staff for certificate-compliance purposes.

Simply put, on the merits, the Board was required to review the record evidence and determine whether the Project met the statutory elements of R.C. 4906.10(A). The Board did just that and issued the Certificate. CCPC has failed to show that the Board's determination was unlawful or unreasonable.

## II. Argument

### A. The Board lacks subject matter jurisdiction over the Application for Rehearing.

The Board lacks subject matter jurisdiction over the Application for Rehearing because it

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of, but the filer here clearly did not select any valid party. While Angelina defers to the Board on how it wishes to handle the defective filing, for ease of reference, Angelina has referred to all names listed on the pleading as "CCPC" throughout.

fails to state any grounds for rehearing with enough specificity to meet the requirements of R.C. 4903.10.

**1. Applications for rehearing must be perfected under R.C. 4903.10, and the requirements of that statute must be strictly applied.**

The Supreme Court of Ohio has "held repeatedly that when the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by the applicable statute." *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, ¶ 14. The failure to perfect an appeal as required by statute leaves a court or administrative agency with no jurisdiction over the appeal. *Ohio Partners. for Affordable Energy*, 115 Ohio St. 3d at 211, 2007-Ohio-4790 ¶ 18; *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St. 3d 47, 52-53, 2007-Ohio-2877, ¶ 18-19. A court or administrative agency thus has no jurisdiction to hear an assignment of error that is not presented in compliance with the governing statute. Here, R.C. 4903.10 governs applications for rehearing before the Board, and its requirements are jurisdictional. *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 332-33 (1988).[2] R.C. 4903.10 requires that an application for rehearing "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." The Supreme Court has strictly construed this statutory requirement. *See Discount Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 248, 638 N.E.2d 550 (1994)). The Supreme Court of Ohio has often noted that "[i]t may fairly be said that , by the language which it used, the General Assembly indicated clearly its intention to **deny the right to raise a question on appeal** where the appellant's application for

[2] R.C. 4903.10 is incorporated into Board proceedings by virtue of R.C. 4906.12 which states, in part, that Section 4903.10 shall apply to any order of the Board in the same manner as if the Board was the Public Utilities Commission of Ohio.

rehearing used a **shotgun instead of a rifle** to hit that question." *Office of Consumers' Counsel v. PUC of Ohio*, 70 Ohio St. 3d 244, 1994-Ohio-469 (1994) *quoting Cincinnati v. Pub. Util. Comm.* 151 Ohio St. 353, 378 (1949) (emphasis added). And, when "it is necessary to examine minutely" a movant's documents "merely to discovery what questions he is raising" then the movant "has failed to comply with the provisions of [R.C. 4903.10]." *Agin v. Pub. Util. Com.*, 12 Ohio St.2d 97, 99, 232 N.E.2d 828 (1967).

Operating under R.C. 4903.10, the Public Utilities Commission of Ohio has dismissed assignments of error where it "gives no indication as to how the order is in any way unreasonable or unlawful" and the "assignment of error does not mention what action to the Commission should have taken" and does not "make any cite or reference to the opinion and order." Entry on Rehearing, *In the Matter of the Complaint of Allied Erecting & Dismantling Co., Inc.*, Commission Case No. 07-905-EL-CSS (Nov. 6, 2013); *see also In re Complaint of Robert M. Stambaugh, Complainant, v. Ohio Edison Company* (dismissing assignment of error that "[t]he Commission erred in finding that complainant failed to provide by a preponderance of the evidence that respondent did unreasonably, unjustly, and unlawfully disconnect his electric service" as general and conclusory).

**2. At best, CCPC's Application for Rehearing can be read to list only two grounds for rehearing and neither are specific enough for the Board to have jurisdiction to review.**

a. *CCPC only lists two conclusory grounds for rehearing*

CCPC's Application for Rehearing is entirely unclear exactly what constitutes "the ground or grounds on which [CCPC] considers the order to be unreasonable or unlawful." *See* R.C. 4903.10. CCPC does not number, indent, or otherwise label any grounds for rehearing. At no point in its five pages does the Application for Rehearing "make any cite or reference to" any

paragraph of the Order and the only reference to the Board's Order being "unlawful and unreasonable" is in the first paragraph.

Specifically, CCPC states in the first paragraph that the Opinion is "unlawful and unreasonable" and ends that sentence with a colon followed by two paragraphs. The first paragraph states:

> The Board did not find and determine the nature of the probable environmental impact of the Angelina Solar I wind project ("Project" or "Facility") under R.C. 4906.10(A)(2), because Angelina Solar I, L.L.C. ("Angelina") failed to provide the information in the evidentiary record required by the Board's rules necessary to make such a finding and determination

The second paragraph states:

> The Board erred in finding and determining that the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations, pursuant to R.C. 4906.10(A)(3).

(Application for Rehearing, pp. 1-2.)

After arguably stating these two alleged "unreasonable and unlawful" grounds for rehearing, the Application for Rehearing then shifts gears, stating that "[a]ll of the paragraphs in this Application for Rehearing below **are examples** of the Board's failures to comply with R.C. 4906.10(A)(2), (3), and (6)," and lists four pages worth of examples, **without any claim that any of the examples in the list are unlawful or unreasonable** (a failure to perfect these examples as grounds for rehearing). Simply providing a laundry list of alleged rule errors as examples is not a specific ground for rehearing that is required to perfect an appeal under R.C. 4903.10. Thus, CCPC's application for rehearing is limited to the two grounds for rehearing in the two paragraphs following the first paragraph and, as explained below, neither is specific enough to bestow jurisdiction upon the Board to hear them.

b. *CCPC's second ground for rehearing is conclusory and not specific.*

CCPC's second ground for rehearing states at page 1 that "[t]he Board erred in finding and determining that the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations, pursuant to R.C. 4906.10(A)(3)." This ground for rehearing **is general and conclusory and simply parrots the language of R.C. 4906.10(A)(3)**.[3] It does not cite to any part of the Board's Order that is unlawful or unreasonable and does not provide any specific reason as to why the Board erred. Nowhere in the ground for rehearing does CCPC provide any detail on how the Board erred or that the Board made incorrect factual findings. The failure of CCPC to "specifically allege in what respect …" the Board's Order was unreasonable or unlawful means the requirements of R.C. 4903.10 have not been met. *Disc. Cellular, Inc. v. PUC*, 2007 Ohio 53, ¶ 58-59, 112 Ohio St. 3d 360, 374, 2007 Ohio LEXIS 55, *36 (Ohio 2007).

Indeed, CCPC's second ground for rehearing is exactly the type of shotgun approach that has been rejected by the Court. Rather than be specific in the ground for rehearing on exactly how the Board's Order was unreasonable, CCPC has left it to the Board to decipher the ground for rehearing. Moreover, CCPC cannot claim that its examples listed in the Application for Rehearing or its memorandum in support can be relied upon to decipher the ground for rehearing. R.C. 4906.10(B) is clear that the application itself must "set forth **specifically the ground or grounds** on which the application considers the order to be **unreasonable or unlawful**." R.C. 4906.10(B), emphasis added. And, nowhere in CCPC's list of examples "of the Board's failures to comply

[3] "The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:
* * *
(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations" R.C. 4906.10(A)(3).

with R.C. 4906.10(A)(2), (3) and (6)" does CCPC indicate that any of the examples was unreasonable and unlawful and it does not make any attempt to link these "examples" to the alleged ground for reversal.

The Board lacks jurisdiction to hear the second ground for rehearing in CCPC's Application for Rehearing.

c. *The first ground for rehearing is also not specific*

CCPC's first ground for rehearing states that "[t]he Board did not find and determine the nature of the probable environmental impact of the Angelina Solar I wind project ("Project" or "Facility") under R.C. 4906.10(A)(2), because Angelina Solar, LLC ("Angelina") failed to provide the information in the evidentiary record required by the Board's rules necessary to make such a finding and determination." The problem with this ground for rehearing is that it provides no indication as to what required information in the evidentiary record is missing that the Board should have considered. *See Disc. Cellular, Inc.* 112 Ohio St. 3d at 374 ("Nor have appellants specifically alleged that the PUCO made incorrect factual findings"). And as noted above, CCPC cannot use its examples "of the Board's failures to comply with R.C. 4906.10(A)(2), (3), and (6)" to cure this failure. The "examples" in the list with rule references do not even reference which criteria of R.C. 4906.10 is at issue in each "example." Again, the Board and the parties are left to guess what CCPC is claiming is unlawful and unreasonable and why. That contradicts the intent and requirements of R.C. 4906.10, which are to be strictly applied against CCPC.

At most, CCPC provides two grounds for rehearing in its Application for Rehearing. Neither are specific enough to meet the requirements of R.C. 4903.10, and as a result the Board lacks jurisdiction over the Application for Rehearing and should issue a corresponding order.

### B. If the Board decides it can exercise jurisdiction over some portion of the Application for Rehearing, it should not act on the Application so it will be denied by operation of law after thirty days.

Even if the Board were permitted to consider CCPC's Application for Rehearing it raises no new arguments. Absent a handful of cosmetic changes, the Application for Rehearing is nothing more than a copy-and-paste job from CCPC's post-hearing briefs. There is nothing to be gained by the Board reviewing the same arguments it just reviewed in order to write the same opinion on rehearing.

The Board and the Public Utilities Commission of Ohio ("Commission") regularly deny applications for rehearing when they "are nothing but a reiteration of the arguments made [in earlier briefing]" and an applicant "has not presented any new or persuasive arguments that were not already considered." *See In the Matter of the Application of Buckeye Wind LLC*, Board Case No. 08-666-EL-BGN, Opinion, Order and Certificate at ¶ 37 (July 15, 2010); *see also In the Matter of the Application of Suburban Natural Gas Company*, PUCO Case Nos. 18-1205-GA-AIR, 18-1206-GA-ATA, 18-1207-GA-AAM 2020, Second Entry on Rehearing at ¶ 26 (April 22, 2020) (denying application for rehearing because it had "thoroughly addressed" the arguments and applicant "raises no new arguments"); *In the Matter of the Application of Duke Energy Ohio, Inc.*, Board Case No. 16-253-GA-BTX, Entry on Rehearing at ¶ 86 (February 20, 2020) (denying application for rehearing because party did "not offer any new argument for the Board's consideration").

Therefore, in the interest of preserving the Board's time and resources and to prevent further delay of the approved Project, the Board should take no action on the Application for Rehearing, meaning it will be denied by operation of law after thirty days. *See* R.C. 4903.10(B). The Board's thoughtfully written 158-page Order provides a more-than-sufficient basis for the Supreme Court of Ohio to review the Board's decision if CCPC chooses to appeal and the existing

record supports the Board's decision.

### C. CCPC's arguments remain based on two underlying flawed premises.

Responses to each of CCPC's re-hashed arguments are provided in Angelina's and Board Staff's post-hearing briefing, and then carefully laid out again in the Board's Order. There is no need to go through each again on rehearing, even if the Board finds that the Application for Rehearing sets forth grounds compliant with R.C. 4903.10. Broadly speaking, however, CCPC's Application for Rehearing can be largely rebutted by addressing the two major mistakes it makes throughout.

#### 1. Board rules addressing when an application for a certificate is complete in order to trigger evidence gathering are not applicable to the statutory elements the Board must evaluate based on the record when deciding whether to grant a certificate.

Throughout its Application for Rehearing, CCPC improperly cites to Board rules regarding the format and content of an application for a certificate as if those rules supply the substance of what the Board must decide before granting a certificate. (*See, e.g.*, Application for Rehearing at 2–4 (claiming Board erred by not requiring Angelina to submit certain information pursuant to various provisions of Ohio Adm. Code 4906-4-06, -07, and -08.). The Board has already correctly considered and rejected this argument. (Order, ¶¶ 362-64.) As already acknowledged by the Board, the rules setting forth what contents an application should contain to be complete and the statute setting forth what the Board must review before granting a certificate are distinct, and the Board's statutory determination is not dependent on the application rules.

CCPC incorrectly states, without support, that Ohio Adm. Chapter 4906-4 "describes the information that the Board must obtain, and the applicant must supply, in order to determine whether the criteria of R.C. 4906.10(A) have been met." (Application for Rehearing, Memo. in Support at 11.) This is not so. Chapter 4906-4 of the Ohio Administrative Code sets forth what

the Board wishes to see in an application, but the rules are not mandatory and may be waived by the Board. *See* Ohio Adm. Code 4906-4-01(B). These rules help the Board determine whether an application is complete, which then triggers the evidence gathering phase of the proceedings. Here, the Board granted Angelina waivers from certain requirements of Ohio Adm. Code 4906-4. (Entry, ¶ 10 (January 17, 2019). On February 8, 2019, Board Staff docketed a letter informing Angelina that its application complied with the rules and that "Board's staff has received sufficient information to begin its review of this application." (Letter of Compliance (February 1, 2019).)

After Angelina's application was deemed complete, Board Staff conducted an investigation into the Project and issued a report pursuant to R.C. 4906.07(C). (Staff Report of Investigation (April 15, 2019).) Board Staff conducted this investigation pursuant to the criteria in R.C. 4906.10(A). (*Id.* at 3.) The Board then held multiple days of hearings (on April 30, 2019, May 14, 2019, July 31, 2019, August 1, 2019, August 12, 2019, September 10, 2019, and October 29, 2020) and collected evidence and testimony about the Project. Angelina, Board Staff, Ohio Farm Bureau Federation, Preble County Commissioners, the Preble County Engineer, the Preble Soil & Water Conservation District, the Preble County Planning Commission, and the Board of Trustees of Dixon Township also submitted the Amended and Restated Joint Stipulation (July 29, 2020).)

As the Board explained in its Order, the Board determined that Angelina's application was complete in February of 2019 and its "subsequent investigation did encompass the review of additional information and resulted in recommendations regarding the application's compliance with 4906.10(A)." (Order, ¶ 362.) CCPC did not challenge the determination that Angelina's application was complete and did not challenge the admission of Angelina's application into the record. Once the application was complete, and the evidence gathering finished, the Board

considered all of the information in the record and determined that the Project meets the statutory requirements in R.C. 4906.10(A). (*Id.* at ¶ 365.) R.C. 4906.10(A) does not require the Board to find that an applicant has submitted all information set forth in Chapter 4906-4 of the Ohio Adm. Code. CCPC's pointing to Board rules regarding what information should be in the initial application is irrelevant to evaluating the Board's determination to grant the Certificate under R.C. 4906.10(A).

**2. The Board may require a certificate holder to make post-certificate submissions to Board Staff for compliance review purposes.**

CCPC argues that the Board improperly permitted Angelina to conduct certain studies after the Certificate was granted, claiming that it improperly delegates Board responsibilities to staff and would not allow CCPC to review or test the studies. (Application for Rehearing, Memo. at 9–12.) As an initial matter, the post-Certificate submissions are not studies, but are plans related to the construction and operation of the Project. These plans will be submitted to Board Staff who will then confirm that the plans comply with the Certificate conditions. Board Staff noted that these post-Certificate submittals are regularly required with similar projects and are consistent with case law. (Order, ¶ 355–357.) The Board has already considered CCPC's arguments and properly determined that the post-certification submissions and Board Staff's ongoing role post-certification is appropriate. (*Id.* at ¶ 337–364.)

As the Board explained in its Order, now that it has set conditions in the Certificate pursuant to R.C. 4906.10, "ongoing monitoring is required in the form of pre-construction conferences, the submission of final plans, and permitting requirements" to ensure that Angelina complies with the conditions. (Order, ¶ 361.) The Board correctly recognized that the Supreme Court of Ohio has already affirmed this practice in *Buckeye Wind*. (Order, ¶¶ 360 (citing *Buckeye Wind*).) The Board correctly applied the *Buckeye Wind* precedent here. In *Buckeye Wind*, facing

a similar challenge, the Supreme Court held that "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." *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, ¶ 18. Specifically, the *Buckeye Wind* certificate required the applicant to submit to the Board's Staff after the issuance of the certificate: (1) A final equipment delivery route and transportation routing plan; (2) 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; (3) A stream crossing plan; (4) A detailed frac-out contingency plan; (5) A final electric collection system plan; (6) A tree clearing plan; (7) A final access plan; (8) A fire protection and medical emergency plan; (9) An avian and bat mortality survey plan; (10) A Phase I cultural resources survey program; (11) An architectural survey work program; (12) A screening plan for one specific property; (13) A determination of the probable hydrologic consequences of the decommissioning and reclamation operations; (14) A study identifying any Prime Farmlands; and (15) 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.

On appeal, the Court affirmed post-certificate submittals of 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 below table shows how the submittals by Angelina following the issuance of the Certificate are very similar to those upheld in *Buckeye Wind* (and in other similar applications), and **much** less than what Buckeye Wind's certificate required.

| Buckeye Wind Certificate | Angelina Solar I, LLC Certificate |
|---|---|
| Final equipment delivery route and transportation routing plan (Condition 8) | Transportation management plan (Condition 26) |
| Final engineering drawings (Condition 8) and final electric collection line plan (Condition 8) | Final engineering drawings (Condition 3) |
| Tree clearing plan (Condition 8) | Vegetation management plan (Condition 18) |
| Final access plan (Condition 8) | Construction access plan (Condition 22) |
| Complaint resolution process (Condition 31) | Final complaint resolution process (Condition 13) |
| Submit decommissioning methods including surface water drainage control and backfilling, soil stabilization plan (Condition 65) | Submit decommissioning plan (Condition 29) |
| | Landscape and lighting plan (Condition 11) |
| | Public information program (Condition 12) |
| Stream crossing plan (Condition 8) | |
| Frac-out contingency plan (Condition 8) | |
| Geotechnical report and final foundation design (Condition 8) | |
| Fire protection and emergency plan (Condition 8) | |
| Construction SWPPP and SPCC procedures (Condition 9c) | |
| Post-construction avian and bat mortality survey plan (Condition 15) | |
| Prepare Phase I cultural resource survey program (Condition 20) | |
| Conduct Architectural survey of project area (Condition 21) | |
| Submit blade shear maximum distance potential and formula (Condition 33) | |
| Conduct Fresnel-Zone analysis for turbine (Condition 40) | |

Considering the above table and the Court's decision in *Buckeye* Wind, it is entirely proper for the Board's Staff to review those plans to ensure the Project is in compliance with the conditions in the Certificate. The Board properly followed precedent in this proceeding. CPCC's complaints regarding the post-Certificate submission of plans and the Board's Staff reviewing those plans for compliance with the Certificate conditions are flawed and should be rejected on rehearing.

### D. The Board properly determined that the facility met the required elements set forth in R.C. 4906.10.

The Ohio Supreme Court has made clear 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.(A)(1)-(8). *Buckeye Wind*, 2012-Ohio-878, at ¶ 27 (citing R.C. 4906.10(A)). The Board did just that. Its highly detailed opinion walks through all of the evidence and arguments for each statutory element and made the required finding based on the record. CCPC claims in its memorandum in support that the Board did not correctly evaluate the R.C. 4906.10(A)(2), (3), and (6) elements. Without rehashing every argument, the following makes clear that this Board did not make any unreasonable or unlawful determinations for any of these elements.

#### 1. The Board's determination of the nature of the probable environmental impact of the Project under R.C. 4906.10(A)(2) was not unlawful or unreasonable.

Pursuant to R.C. 4906.10(A)(2) the Board reasonably and lawfully determined the "nature of the probable environmental impact" of the proposed facility. The Board analyzed the probable environmental impact by considering three broad categories: (1) socioeconomic impacts; (2) ecological impacts; and, (3) public services, facilities and safety impacts of the proposed facility.

(Order, ¶¶ 123-229); *See In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 77 (noting that the term "environmental" in R.C. 4906.10(A)(2) and (3) is not defined, has not acquired a technical meaning or legislative definition).

a. *The Board analyzed the socioeconomic impact.*

Under the category of socioeconomic impacts, the Board examined the record evidence concerning land use and planning, cultural resources, and economics, (Order, ¶¶ 125-30); visual impact, (*id.* at ¶¶ 131-47); and decommissioning (*id.* at ¶¶ 148-149). Under this framework, the Board conducted a careful analysis of the socioeconomic impact of the proposed facility.

First, having examined the economic impacts and the parties positions with respect to regional development, revenue generation, and the minimal impact on cultural and historic resources, the Board concluded that "the Facility is unlikely to conflict with the regional planning of Preble County" given that the area could be returned to agricultural use following decommissioning. (Order, ¶ 150). The Board further acknowledged that the Project will have a significant positive economic impact, noting specifically that, through the PILOT program, the "local schools and taxing districts and represents approximately 11 times more revenue to these entities than is currently generated via property taxes," that the "estimated 518 to 1,076 direct and indirect construction-related jobs, with corresponding payroll of $25.4 million to $55.6 million, represents meaningful employment for area workers," and that the "approximately $630,000 to $1 million, during operation of the Facility is also a notable benefit for workers." (*Id.* at ¶ 151.)

Second, with respect to visual impacts, the Board noted that Angelina performed a Visual Resource Assessment ("VRA") to determine the potential visibility of the Project and that Angelina presented the expert testimony of Mathew Robinson regarding the same. (Order, ¶ 152.) The Board specifically found that the "conclusions of the VRA…are significant and support Angelina's contention that it has addressed the visual impacts that the Facility may have on the

surrounding parcels." (*Id.* at ¶ 152.) This conclusion is reasonable considering that the VRA, which took into account topography and vegetation demonstrated that solar panels could be potentially visible from only 16.79% of the 5-mile visual study area, the proposed substation would be potentially visible from only 9.7% of the study area, that at distances beyond 0.5 miles any view of the Project would be minimal, and that at distances of 2.5 miles or more, the Project would generally not be visible at all. (Company Ex. 12 at 4, 7). Regarding CCPC's argument that the VRA should have included solar panels with a height of 15 feet, the Board found Mathew Robinson's testimony that even if a panel height of 15 feet had been used, "his ultimate conclusions in the VRA would not change." (Order, ¶ 152 citing Tr. II at 205.) Further, the Board rejected CPCC's concerns regarding lighting as completely unfounded because the application and Condition 11 both require light mitigation measures including light shields, downward facing fixtures, and motion-activated lighting. (*Id.*)

Finally, the Board determined that the proposed decommissioning plan "satisfies the decommissioning requirements outlined in Ohio Adm. Code 4906-4-09(I)." (Order, ¶ 153.) Further, the Board emphasized that, pursuant to the Amended and Restated Joint Stipulation, the decommissioning costs are to be recalculated at least every five years by an engineer chosen by Angelina, and that the Board will retain the authority to accept or reject the engineer chosen by Angelina to conduct the analysis, and Angelina is required to post a performance bond to cover these costs, naming the Board as obligee.

Based on its careful analysis of the record evidence, taking into consideration the arguments raised by the CCPC, the Board concluded that that "the Facility's probable impact on socioeconomic conditions has been properly evaluated and determined." (Order, ¶ 150.) CPCC's cut-and-paste arguments presented in its Application for Rehearing present nothing new for the

Board's consideration. Having already fully considered those arguments, and taking into account the record evidence, the Board should reaffirm that is conclusions with respect to R.C. 4906.10(A)(2) are reasonable and lawful.

b. *The Board analyzed the ecological impact.*

In evaluating the environmental impact, the Board further provided a detailed and thorough analysis of the record evidence and the parties' arguments with respect to the potential ecological impacts of the proposed facility. (Order, ¶¶ 154-85). The Board considered the evidence and arguments related to water, geology, and soil impacts (*id.* at ¶¶ 155-68); the potential impact on threatened and endangered species, (*id.* at ¶¶ 169-79); and the potential impacts on vegetation. ( *Id.* ¶¶ 180-85.)

First, with respect to "water, geology, and soil, the Board held that "the concerns discussed by CCPC are premature and, to the extent that they raise potential issues, such issues can be addressed through the conditions outlined in the Amended Stipulation and Order." (Order, ¶ 182.) In reaching this conclusion, the Board emphasized that it was "dismissing the potential for adverse ramifications resulting from the construction of solar panels…[but] must also rely on the expert testimony in the record." (*Id.*) Specifically, the testimony of Noah Waterhouse and Matt Marquis, who testified that "the construction and operation of similar projects…has not led to drainage issues or an increase in runoff," and that it is "actually expect[ed] the Facility [will] have superior drainage and runoff characteristics." (*Id.* citing Co. Ex. 8 at 4 and TR I at 150.) The Board also found that that Conditions 16 and 30 were integral because they require Angelina to follow established Ohio EPA programs for the management of stormwater including implementing a SWPPP as part of its Ohio EPA construction stormwater permit, and obtain a Construction General Permit from the Ohio EPA, among other requirements. (Order, ¶ 186.)

CCPC attempts to argue that these conditions miss the mark because they "do nothing to

prevent flooding." (Application for Rehearing Memo. in Support at 96-97.) The record evidence examined by the Board makes clear, however, that the facility will not present a hazard or danger of flooding because (1) a solar facility does not have any water discharges; and (2) the vegetative cover that will be planted under the panels will actually reduce water runoff. Accordingly the record evidence clearly addresses the potential (or lack thereof) for flooding. (Order, ¶ 186; *id* at ¶ 81 (observing Staff's conclusion that the Project is unlikely to require an NPDES permit "because the solar panels generate electricity **without water discharge**.") (emphasis added).) Indeed, as noted above, the Board specifically credited Messrs. Waterhouse's and Marquis's expert testimony that water runoff and discharges would be at worst minimal, and, in all likelihood, actually be decreased as a result of the construction the facility. (Order, ¶ 186.) As Mr. Marquis testified, "[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, Vol IV at 525).

Second, with respect to the impacts on threatened and endangered species, the Board thoroughly evaluated and summarized the evidence and the parties' positions (Order, ¶¶ 169-79) and concluded that "[b]ased on its review of the record…Angelina has made an adequate demonstration of the nature of the probable environmental impact relative to threatened and endangered species." (*Id.* at ¶ 187.) Specifically, the Board found convincing Angelina's coordination and consultation with the Ohio EPA, Ohio Department of Health, the Ohio Development Services Agency, ODNR, and the Ohio Department of Agriculture in preparing its wildlife plans submitted in support of its application, as well as Staff's coordination with ODOT, OHPO, and USFWS on this subject. (*Id.*) The Board's conclusion was further based on the fact

that the literature and field surveys filed in support of Angelina's application, specifically observed "minimal wildlife" and no rare, threatened or endangered species. (*Id.* at ¶ 188.) Furthermore, the Board found persuasive Angelina's expert witness, Ryan Rupprecht, who testified that the area is not expected to provide a habitat for any rare or endangered species. With respect to the testimony of CCPC's witnesses Brandly and Vonderharr regarding wildlife, the Board rejected it, determining it was merely lay testimony that presented only "theoretical concerns regarding wildlife." (*Id.*)

Finally, with respect to the impact on vegetation the "Board [found] that the nature of the probable environmental impact on vegetation has been determined…in accordance with R.C. 4906.10(A)(2)." (Order, ¶ 189.) The Board supported its conclusion by noting that Condition 18 ensures that Angelina will take adequate measures to prevent noxious and invasive weed species, a condition that the Board further noted, addresses CCPC's concerns regarding the potential for noxious and invasive weed species. (*Id.*) Condition 18 requires, in part, that Angelina consult with the Ohio Seed Improvement Association prior to the purchase of seed stock in order to prevent the propagation of noxious weeds. (*Id.*) Condition 18 also requires the Project's vegetation management plan to include steps to be taken to prevent the establishment and/or further propagation of noxious weeds. (*Id.*, pp. 38-39). The Board further recognized that requiring specific vendors or seed types for planting at this stage is impracticable and may not result in the best vegetation. And notably, the Ohio Farm Bureau Federation agreed with Condition 18 and signed the Amended and Restated Joint Stipulation.

c. *The Board analyzed public services, facilities, and safety*

Regarding the third sub-category, public services, facilities, and safety, the Board examined the record evidence and the parties' positions regarding the potential impact to local roadways and traffic, (Order, ¶¶ 190-99); construction and operational noise (*id.* at ¶¶ 200-24);

and the potential impact for electromagnetic fields, (*id.* at ¶ 225), and "[found] that the probable impact of the project on public services, facilities, and safety has been evaluated and determined." (*Id.* at ¶ 225.)[4]

Specifically, with respect to the local roadways and traffic, the Board "disagree[d] with CCPC's arguments that the application does not describe measures…to mitigate[e] potential impacts to road conditions." (Order, ¶ 225.) As the Board found, Angelina (1) committed in its application to working with local authorities on road impacts; (2) Angelina's traffic management plan provides an effective framework; and (3) the Road Use and Maintenance Agreement for Solar Projects and Infrastructure ("RUMA") requires Angelina to work with the Preble County Engineer to repair, at Angelina's expense, roads that are impacted by Angelina's activity; and, Conditions 25 and 26 will provide an effective framework, that includes local input, to deal with any issues that arise. (*Id.*) Accordingly, there can be no dispute that the Board's conclusion was reasonable, lawful, and supported by the record evidence. Further supporting the Board's conclusion is that the Preble County Engineer is a signatory party to the Amended and Restated Joint Stipulation.

Next, with respect to construction and operational noise, having evaluated the record and the parties' positions, the Board was satisfied that, pursuant to Condition 10, "Angelina and Staff have created parameters within which [the] effect [of construction noise] on the surrounding community is minimized." (Order, ¶ 226.) Specifically, Condition 13 requires Angelina to limit the hours of construction, maintain construction vehicles in proper working condition, and advise residents of those times they can expect sustained construction activity near to their homes. (*Id.*) Supporting the reasonableness of the Board's conclusion with respect to Condition 10 is that the condition is common for other projects that have been recently granted certificates by the Board,

[4] It is undisputed that any EMF generated will not impact signals or electronic devices. (Order, ¶ 228.)

both for renewable and fossil fuel 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; *In re Harrison Power LLC*, Case No. 17- 1189-EL-BGN, Opinion, Order and Certificate, June 21, 2018 at 33.

As to operational noise, "the Board agrees with [Angelina] and Staff that there will be no significant change in what is audible at nearby residences and that the operational sound emissions from the Facility should have any negative impact on the surrounding community." (Order, ¶ 227.) Significant to the Board's decision was the testimony of David Hessler, who the Board acknowledged is a "an engineer with 30 years of experience specializing in acoustical design and the analysis of power generation facilities …," who concluded that "… inverter noise is not a legitimate concern for nearby non-participating residences [,which] would be so low as to be virtually inconsequential, even in a rural environment where the background sound level is essentially negligible." (*Id.* citing (Co. Ex. 23 at 3-4).) 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) 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). The Board's conclusion is reasonable, lawful, and supported by the record evidence.

**2. The Board's determination that the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations under R.C. 4906.10(A)(3) was not unlawful or unreasonable.**

Having completed its thorough analysis of R.C. 4906.10(A)(2), the Board next considered R.C. 4906.10(A)(3). (Order, ¶¶ 230-42.) In addition to all the factors, arguments, and evidence that the Board considered in its discussion of R.C. 4906.10(A)(2), which it expressly incorporated

into its analysis of (A)(3),[5] the Board further weighed the CCPC's contention that the provided-for setbacks do not represent the minimum adverse environmental impact (*id.* at ¶¶ 233-36), Angelina's response, and the record evidence addressing the setbacks. (*Id.* at ¶¶ 237-241.) The Board concluded that "[…] the evidence before us supports a finding that [the setbacks] will result in the minimum adverse impact on the community." (*Id.* at ¶ 240.) Acknowledging that CCPC "would prefer that the Board require Angelina to site the panels with more expansive setbacks," the Board found that "there is no evidence to support a finding that such a modification would be economically and technologically feasible or, in light of all other probable environmental impacts identified, create a facility representing the minimum adverse environmental impact." (*Id.*) As the Board concluded: the question of sufficient setbacks "is an evidentiary issue" and that the Supreme Court of Ohio "[has] consistently refused to substitute [its] judgment for that of the commission on evidentiary issues." (*Id.*) Indeed, the evidence here makes clear that the setbacks from the Project Area are more than adequate to allow for robust visual screening for non-participating adjacent property owners.[6] (Joint Ex. 2 at 6, Condition 3; Co. Ex. 24 at 1). For example, with respect to screening those property owners, Mr. Robinson (Master's Degree in Landscape Architecture, *see* Company Ex. 12) testified that the setback distances allow for "greater options and flexibility … [and] provide[] more room for vegetation to grow and become an established part of the existing landscape … providing a more natural appearance that blends the Project into the background." (Company Ex. 24 at 2)." (*Id.*) Mr. Robinson also explained that

[5] *See* Order at ¶ 242 "Based on the above and **drawing from our discussion and conclusions relative to R.C. 4906.10(A)(2)** […] the Board determines that the Facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economic of the various alternatives, and other pertinent considerations in compliance with R.C. 4906.10(A)(3) (emphasis added); *see also id.* at ¶ 232, fn. 4 ("To the extent an argument made any party under R.C. 4906.10(A)(2), R.C. 4906.10(A)(3), and R.C. 4906.10(A)(6) is primarily discussed under one criterion but not all, the Board has nevertheless given the argument full and careful consideration and that argument is denied as to the remaining criteria."

[6] The Project setbacks are 25 feet from property lines to the Project fencing, 150 feet from equipment to residences and 500 feet from inverters to residences. (Company Ex. 22 at 4)

the mature size of the various types of trees and vegetation that would make up the modules would not grow to the full height and width because when planted in more of a hedgerow manner and not as a single specimen tree, the plantings will grow together and limit their actual width and height. (TR Vol. V at 619).

The Board also took into consideration that " … Angelina has provided testimony demonstrating that a complete screen would create a greater impact than properly designed landscaping[]" and that a "… complete screen would create a greater impact than properly designed landscaping." (Order, ¶240). The Board also noted that "[f]urthermore, there is no evidence that the setbacks from solar fences to roadways will impeded motorists." Id. This is especially true considering that the setback for fencing along roadways is to be measured from the road right-of-way and not the edge of the road. (Company Ex. 1 at 54; Joint Ex. 2 at 6, Condition 3).

In summary and based on the record, the Board properly concluded that "… the Facility represents the minimum adverse environmental impact considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations in compliance with R.C. 4906.10(A)(3). (Order, ¶ 242.)

### 3. The Board's determination that the facility will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) was not unlawful or unreasonable.

Finally, the Board correctly found that the facility will serve the public interest, convenience, and necessity as required under R.C. 4906.10(A)(6). Its conclusion is reasonable and lawful. As the Board held, this criteria "should be examined through a broad lens," and, to that end it should "consider the public's interest in energy generation that ensures continued utility services and the prosperity of the State of Ohio … encompass[es] the local public interest, [and that] ensur[es] a process that allows for local citizen input, while taking into account local

government opinion and impact to natural resources." (Order, ¶ 288.) In this context, the Board "fully considered the testimony presented by the Citizens concerning crime and the impact on emergency services." (*Id.*) Recognizing that local citizens have an understanding of the typical crimes within their community, the Board found, having examined the record, that there is not "any evidence in the record that solar facilities are generally susceptible to criminal activity." (*Id.*) Similarly, the Board understood the CCPC's concerns as to the potential impact on local emergency services; however, found "sufficient evidence to determine that any impact … if manifested, will be nominal …." (*Id.*)

Having found the record lacked any evidence to support the CCPC's concerns with respect to crime and emergency services, contrasted with the evidence showing the Project will include significant tax revenue to the local community, the Board concluded that "[t][hese findings, together with our foregoing discussion and conclusions regarding the probably environmental impacts and Facility's minimal adverse impacts on the community as a whole, persuade the Board that the Facility will serve the public interest, convenience and necessity. (*Id.* at ¶ 288.) The Board's decision was reasonable and lawful. CCPC has no basis to claim otherwise especially given that the Preble County Board of Commissioners, the Preble County Engineer, Preble County Soil & Water Conservation District, the Dixon Township Board of Trustees, and the Preble County Planning Commission, all signed the Amended and Restated Joint Stipulation. (*Id.* at ¶ 25.)

The Board properly determined that the Project meets all of the elements in R.C. 4906.10(A). The Board also properly determined that the Amended and Restated Joint Stipulation was reasonable and satisfied the Board's criteria for stipulations. The Board's conclusions are supported by record evidence, and CCPC has failed to demonstrate that the Board acted

unreasonably or unlawfully.

## III. Conclusion

The Project is supported by six separate local government entities. It is supported by the Ohio Farm Bureau Federation. It is supported by Staff. It is supported by the hundreds of pages of information that Angelina introduced into the record through the Application and associated exhibits, and the testimony of expert witnesses with years of experience in their respective fields. After carefully considering all of the briefing and the Amended and Restated Joint Stipulation, the Board correctly found that the Project meet all statutory requirements and issued a Certificate. Ignoring the thoroughness of the Board's decision, CCPC has continued its shotgun approach of opposing the Project. CCPC's Application for Rehearing, however, is flawed because it does not contain any grounds for rehearing that meet the statutory requirements of R.C. 4903.10, mandating that the Board not take jurisdiction. Even if the Board determines that it has jurisdiction over some portion of the Application for Rehearing, it just regurgitates all of the arguments as before and asks the Board to engage again in the exact same analysis it just completed. For that reason, the Board should take no action on the Application for Rehearing so that it will be denied by operation of law after 30 days. If the Board does take action on the Application for Rehearing, it should deny the Application for Rehearing for the same reasons it denied CCPC's flawed objections when the Board issued the Certificate.

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 2nd day of August 2021.

/s/ Michael J. Settineri

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Summary: Memorandum Contra of Angelina Solar I, LLC to the Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Angelina Solar I, LLC