BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of	**)**	
Alamo Solar I, LLC	**)**	
for a Certificate of Environmental	**)**	**Case No. 18-1578-EL-BGN**
Compatibility and Public Need	**)**	

MEMORANDUM CONTRA OF ALAMO 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 Alamo Solar I, LLC ("Alamo") 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 Alamo's application, transcripts from four 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 ("CCPC"). The Board's June 24, 2021 Opinion, Order and Certificate ("Order"), which was itself 147-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.

Even if the Board did have jurisdiction, the 117-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.[1] 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.

[1] CCPC was the only party to file an application for rehearing as evidenced by the filing stamp on CCPC's application for rehearing and the Board's electronic docket, which reflects that this application for rehearing was "filed by Mr. Jack A. Van Kley on behalf of Concerned Citizens of Preble County, LLC." Neither the docket nor the docket stamp on the filing reflects that the application for rehearing was filed on behalf of the other individuals or entities listed on the application for rehearing. To the extent the Board accepts the application for rehearing as being filed by the other individuals and entities listed on the application for rehearing (although those entities did not file for rehearing), the arguments in this memorandum contra apply to those individuals and entities as well.

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 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 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). 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

[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.

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 this 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 Order is "unlawful and unreasonable and ends that sentence with a colon followed by only two paragraphs. The first paragraph states:

> The Board did not find and determine the nature of the probable environmental impact of the Alamo Solar I wind project ("Project" or "Facility") under R.C. 4906.10(A)(2), because Alamo Solar I, LLC ("Alamo") 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. *CPCC'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

[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).

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 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 Alamo Solar I wind project ("Project" or "Facility") under R.C. 4906.10(A)(2), because Alamo Solar I, LLC ("Alamo") 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 147-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 Alamo'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 Alamo 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, ¶¶ 345, 350–351, 357, 367.) 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. 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 Alamo waivers from certain requirements of Ohio Adm. Code 4906-4. (Entry, ¶ 15 (April 3, 2019). On February 8, 2019, Board Staff docketed a letter informing Alamo 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 8, 2019).)

After Alamo'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 (May 28, 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 July 17, July 18, and July 19, 2019 and October 2, 2020) and collected evidence and testimony about the Project. Alamo, Board Staff, Ohio Farm Bureau Federation, Preble County Commissioners, the Preble County Engineer, the Preble Soil & Water Conservation District, the Preble County Planning Commission, the Board of Trustees of Gasper Township, and the Board of Trustees of Washington Township submitted joint stipulations. (Joint Stipulation (July 5, 2019); Amended and Restated Joint Stipulation (July 30, 2020).)

As the Board explained in its Order, the Board determined that Alamo's application was complete in February of 2019 and its "subsequent review focused on the application and the compliance with R.C. 4906.10." (Order, ¶ 367.) CCPC did not challenge the determination that Alamo's application was complete and did not challenge the admission of Alamo'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 Alamo 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, ¶ 358–361.) 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 ¶ 364–366, 368.)

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" to ensure that Alamo complies with the requirements and "such monitoring includes the convening of pre-construction conferences and the submission of follow-up plans by the Applicant." (Order, ¶ 365.) The Board correctly recognized that the Supreme Court of Ohio affirmed this practice in *Buckeye Wind*. (Order, ¶¶ 359–360, 364 (citing *Buckeye Wind* for holding that "the Board is statutorily authorized to allow Staff to monitor compliance with the conditions enumerated in this decision * * * Staff's ongoing duties are a necessary component in a dynamic process.") The Board correctly applied *Buckeye Wind* 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 Alamo 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	Alamo Solar I, LLC Certificate
Final equipment delivery route and transportation routing plan (Condition 8)	Transportation management plan (Condition 25) and final traffic plan (Condition 24)
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 10)
Submit decommissioning methods including surface water drainage control and backfilling, soil stabilization plan (Condition 65)	Submit decommissioning plan (Condition 28)
	Landscape and lighting plan (Condition 15)
	Public information program (Condition 9)
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 Order 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, ¶¶ 131-238); *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 and has not acquired a technical meaning or legislative definition).

a. The Board analyzed the socioeconomic impacts.

Under the category of socioeconomic impacts, the Board examined the record evidence concerning the proposed facility's economic impact, (Order, ¶¶ 135-44); visual impact, (*id.* at ¶¶ 145-60); and decommissioning plan. (*Id.* at ¶¶ 161-68.) Under this framework, the Board conducted a careful analysis of the socioeconomic impact of the proposed facility and concluded that "that the probable impact of the Project on socioeconomic conditions has been evaluated and determined." (*Id.* at ¶ 164.)

The Board carefully considered the Project's economic impact. 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 (Order, ¶¶ 135-44), the Board acknowledged "the positive economic impact that the construction and operation of the project will have on the local community." (*Id.* at ¶ 164.) It recognized that the approved PILOT plan and the local taxes to be generated from the construction and operation of the proposed facility will have a positive economic impact. (*Id.* at ¶¶ 164-65.) In fact, tax revenue from the project will be far in excess of the property taxes currently being paid on the parcels forming the Project area, and will amount to at least $629,100 per annum. (TR Vol. I at 85; Company Ex. 7 at 7; Company Ex. 14 at 4.) On top of the tax revenues, the Project is expected to generate new economic output of approximately $58 million to $151 million during the construction phase and $1.2 million to $1.5 million annually from operation. (Company Ex. 1 at 32.)

The Board carefully considered the Project's visual impact. The Board noted that Alamo performed a Visual Resource Assessment ("VRA") to determine the potential visibility of the Project, offered the expert testimony of Mathew Robinson regarding the same, and that Condition 15 obligates Alamo to maintain vegetative screening for non-participating adjacent landowners for the life of the Project. (Order, ¶¶ 145-47.) The VRA established that solar panels would be

potentially visible from only 11.8% of the 5-mile visual study area, the proposed substation from only 6.3% of the study area, that at distances beyond 0.5 miles any view of the Project would be minimal, and that at distances of 2.0 miles the Project will generally not be visible at all. (Company Ex. 13 at 4 and 8; TR Vol. II at 344-45). After also taking into consideration CCPC's arguments regarding visibility, (Order, ¶¶ 148-51), the Board concluded that, based on the record, the visual impact "would be minimal," and that Condition 15 obligates Alamo to mitigate those minimal impacts, thereby "serv[ing] the public interest by establishing measures to mitigate and limit the visual impact of the Project." (*Id.* at ¶ 167.)

Finally, the Board carefully considered the Project's decommissioning plan. The Board determined that the proposed decommissioning plan "satisfies the decommissioning requirements outlined in Ohio Adm. Code 4906-4-09(I)," and the required performance bond would "ensure the decommissioning requirements set forth in Ohio Adm. Code 4906-4-09(I) are observed." (Order, ¶ 168.) 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 Alamo. (*Id.*) This is significant because Alamo has committed to post the necessary financial security, prior to construction to ensure the availability of funds to pay for the net decommissioning costs at the end of the Project's life. (Company Ex. 9 at 5 (M. Bonifas testifying that Condition 28 will ensure "the Project Area can be returned to another use after the end of the Project's useful life").)

Based on its careful analysis of the record evidence, taking into consideration the arguments raised by the CCPC, the Board concluded that "the proposed facility has been sited such that it represents the minimum adverse environmental impact on … socioeconomic resources." (Order, ¶ 246; *see also id.* at ¶ 164 ("the Board finds that the probable impact of the Project on

socioeconomic conditions has been evaluated and determined.").) The Board's decision, taking into account the record evidence including testimony from many expert witnesses, is reasonable and lawful.

b. The Board analyzed the Project's 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, ¶¶ 169-205). The Board considered the evidence and arguments related to water, geology, and soil impacts (*id.* at ¶¶ 170-83); the potential impact on threatened and endangered species, (*id.* at ¶¶ 184-200); and the potential impacts on vegetation. (*Id.* at ¶¶ 201-05.)

First, with respect to "water, geology, and soil", the Board held that "Alamo should not be prohibited from moving forward with this project based on the concerns raised by the CCPC in this proceeding, as these concerns are premature, and can be properly addressed through the conditions set forth in the Order." (Order, ¶ 182.) In reaching this conclusion, the Board credited Staff's conclusion that "solar facilities are constructed and generate electricity without impacts to groundwater," and emphasized the expert professional engineering testimony of Noah Waterhouse that "[t]he Project should not have an impact on drainage, nor should it result in an increase in runoff from the project area" and, further, his testimony that the planting of ground cover will actually result in a reduction of ground water. (*Id.* at ¶ 182 citing Company Ex. 8 at 5 (emphasis added).) Not only did the Board credit Mr. Waterhouse's expert testimony, it also found that that Conditions 16 and 29 were integral because they require Alamo 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 obtaining a Construction General Permit from the Ohio EPA, among other requirements. (Order, ¶ 183.)

CCPC attempts to argue that the conditions miss the mark because they "do nothing to prevent flooding." Application for Rehearing at 88. The record evidence as examined by the Board, however, makes clear 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 any water runoff. Accordingly the record evidence addresses flooding (or the lack thereof). (Order, ¶ 182; *id* at ¶ 83 (observing that the Project "would not require a NPDES permit for operation of the facility because solar panels generate electricity **without water discharge**.") (emphasis added).)

Indeed, the Board specifically stated that "in reaching [its] determination, [it] is not overlooking the potential adverse ramifications resulting from the construction of solar panels in the project area" but credited "witness Waterhouse's testimony: '[t]he Project should not have an impact on drainage, nor should it result in an increase in runoff from the project area.'" (Order, ¶ 182.) Mr. Waterhouse's expert testimony carries significant weight given that he is a licensed Professional Engineer with a Bachelor of Science in Civil Engineering who has worked exclusively on solar projects for approximately five years including reviewing projects post construction. (Company Ex. 8 at 5.) Mr. Waterhouse also noted that "[i]n my experience, the construction and operation of similar projects to the Project has not led to drainage issues, or an increase in runoff." (*Id.*) In short, the Board's Order takes into consideration the record evidence addressing the possibility for flooding, and CCPC fails to explain how the Board's decision is unreasonable or unlawful.

Second, with respect to the impacts on threatened and endangered species, the Board thoroughly evaluated and summarized the evidence and the parties' positions (Order, ¶¶ 184-94) and concluded that "[b]ased on its review of the record…Alamo has made an adequate

demonstration of the nature of the probable environmental impact relative to threatened and endangered species." (*Id.* at ¶ 195.) Specifically, the Board found convincing Alamo'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. (Order at ¶ 195.) The Board's Order was further based on its conclusion that Alamo did conduct both literature and field surveys of animal species in the Project Area—rejecting CCPC's argument to the contrary—and that those surveys "did not observe rare, threatened, or endangered species". (*Id.* at ¶ 196 (citing Company Ex. 1 at Exhibit G at 4-5 to 4-6).) Further buttressing its conclusion, the Board found persuasive Alamo's expert witness, Ryan Rupprecht, who testified that the area is not expected to provide a habitat for any rare or endangered species. (*Id.* at ¶ 197; *see also* Company Ex. 11 at 4.)

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, ¶ 205.) The Board supported its conclusion by noting that Condition 18 ensures that Alamo will take adequate measures to prevent noxious and invasive weed species, a condition that the Board further noted addressed CCPC's concerns regarding the potential for noxious and invasive weed species. (*Id.*) Specifically, Condition 18 requires Alamo to consult with the Ohio Seed Improvement Association prior to the purchase of seed stock in order to prevent the propagation of noxious weeds. (*Id.*) 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 impacts.*

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, ¶¶ 206-15); construction and operational noise (*id.* at ¶¶ 216-31); and the potential impact for electromagnetic fields, (*id.* at ¶ 232), and "[found] that the probable impact of the project on public services, facilities, and safety has been evaluated and determined." (*Id.* at ¶ 233.)[4]

Specifically, with respect to the local roadways and traffic, the Board found that "Alamo is taking necessary precautions to minimize damage to local roads … and ensur[e] repairs are made in a timely manner." (Order, ¶ 234.) The Board placed particular emphasis on Alamo's preliminary route evaluation and the RUMA, entered into between Alamo and the local authorities, requiring it to work with the Preble County Engineer, post a bond, and repair any impacted roads at Alamo's expense. (*Id.*) In light of this evidence, the Board "disagree[d] with CCPC's argument that the Application does not describe the measures that will be taken to improve inadequate roads and repair roads and bridge[s]." (*Id.* at ¶ 233.) The Board's conclusion is entirely reasonable and CCPC's argument lacks any merit whatsoever considering that the (1) Route Evaluation Study has an entire section devoted to mitigation measures, (Application, Exhibit D), and that Alamo has committed to working with the Preble County Engineer, trustees for the impacted townships, and ODOT to ensure that any impacts to road surface conditions and traffic flows are accounted for and rectified. (Company Ex. 1 at Exhibit D at 10-11; *id.* at 36.) The fact that the Preble County Engineer is a signatory party to the Amended and Restated Joint Stipulation and agreed to the conditions in the Amended and Restated Joint Stipulation further supports the Board's decision. There can be no dispute that the Board's conclusion was reasonable, lawful, and supported by the record evidence.

[4] It is undisputed that any EMF generated will not impact signals or electronic devices. (Order, ¶ 238.)

Next, with respect to construction and operational noise, having evaluated the record and the parties' positions, the Board was "satisfied with Alamo's commitments, as delineated in Condition 13 … to mitigate construction noise." (Order, ¶ 236.) Specifically, Condition 13 requires Alamo 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 13 is that the condition is common for other projects that have been recently granted certificates by the Board, 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, at 18 (May 16, 2019); *In re Harrison Power LLC*, Case No. 17- 1189-EL-BGN, Opinion, Order and Certificate, at 33 (June 21, 2018).

As to operational noise, the Board found "David Hessler's expert testimony [] persuasive that there will be no significant change in what is audible at the houses and that operational sound emissions … should not have any negative impact in the surrounding community. (Order, ¶ 237.) CCPC takes issue with the Board's conclusion, claiming that the Board's Order "inaccurately states that CCPC appears to be concerned only about inverter noise at 100 feet" but that the "inverter noise of 40 dBA at 500 feet will be a bothersome six dBA above the average L90 background noise of 34 dBA." (Application for Rehearing, Memo. in Support at 42.) However, this argument by counsel with no supporting witness testimony is not new. The Board's thorough summary of CCPC's concerns include this precise issue. (*See* Order, ¶ 227 ("CPPC believes that based on the contour map of noise levels in witness David Hessler's testimony, the noise from the central inverters will be as high as 40 dBA at the property lines of non-participating neighbors.") citing CPPC Initial Br. at 28.)) While CCPC argues, without any evidence, that 40 dBA at a rural

property line will be "bothersome," Mr. Hessler, an experienced acoustical engineer, testified that at those property lines "… the project would be hardly audible if audible at all …" (TR Vol. IV 639.) Accordingly, the Board considered CCPC's unsupported argument, but ultimately found Mr. Hessler's testimony (the only expert acoustical testimony in the record) persuasive that there would be not significant audible change or negative impact from operational sound. (Order, ¶ 237.) The Board's conclusion, based on expert testimony, is reasonable, lawful, and further 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, ¶¶ 239-47.) 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), the Board further weighed the CCPC's contention that the provided-for setbacks do not represent the minimum adverse environmental impact (*id.* at ¶¶ 241, 243-44), Alamo's response, and the record evidence addressing the setbacks. (*Id.* at ¶¶ 239-244.) The Board succinctly summarized CCPC's position: "[a]ccording to CCPC, it is inexcusable to build an industrial facility along the perimeters of other people's land in an agriculturally zoned area." (*Id.* at ¶ 243.) The Board, responding to CCPC's argument that Condition 3 calls for "egregiously short setbacks," concluded that it "is not persuaded as to CCPC's philosophy [] that it is inexcusable to build an industrial facility along the perimeters of other people's land in an agriculturally zoned area." (*Id.* at ¶ 245.) As the Board noted, the Ohio Revised Code does not establish any mandatory minimum for setbacks for a solar facility (as it does for wind facilities) and that " 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.[5] (Joint Ex. 2 at 6; Company Ex. 16 at 1; TR Vol. IV at 653). For example, with respect to screening those property owners, Mr. Robinson testified that the setback distance 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. 16 at 2). Indeed, the setbacks in the Amended and Restated Joint Stipulation are more expansive than proposed in Alamo's application to the Board, being 25 feet from the Project fence to a property line, 150 feet from above-ground equipment to a non-participating residence and 500 feet from inverters to non-participating residences Moreover, Mr. Robinson explained how even the most aggressive screening module would fit in the 25 foot setback if the Project's fencing was installed 25 feet from a property line in his testimony at the October 26, 2020 hearing. (TR Vol. IV at 652-653.) With that, the Board properly concluded that "the evidence of record … indicates that the setbacks required by the application and the Amended and Restated Joint Stipulation are sufficient and reasonable." (Order, ¶ 245.)

In summary, the Board properly concluded that:

> the minimum adverse environmental impact **has been satisfied and that the proposed facility has been sited such that it represents the minimum adverse environmental impact** on the cultural and socioeconomic resources and on public services, facilities, and safety considering the state of available technology and the nature and economics of the various alternatives, provided that the certificate issued includes Staff's recommendations set forth in the Staff Report.

[5] 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. 14 at 4.)

(Order, ¶ 246 (emphasis added).) CCPC's conclusory claim that the Board erred in making this determination is without merit and should be rejected.

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, ¶ 291.) To that end, "… the Board's focus is to minimize, and not eliminate all adverse impacts of the Project." (*Id.* at ¶292.)

In making its determination, the Board considered the record including that:

- Alamo hosted a public informational open house, where attendees were provided an opportunity to give feedback on the Project;
- Alamo has involved the local public authorities in the development of the Project;
- Alamo has prepared a complaint resolution program to ensure a clear process is in place to allow for identification and resolution of concerns of members of the community;
- Alamo submitted an expert study from Cohn Reznick LLP that established that proximity to a commercial solar facility has "no consistent measurable negative impact" on property sales;
- Alamo has committed to working with local emergency responders, providing necessary training, and complying with applicable OSHA safety standards; and
- The County Commissioners as well as Gasper and Washington Township trustees and other local public authorities were actively engaged in negotiations and are signatories to both stipulations.

(Order, ¶¶ 272-78). The Board also highlighted later in its decision that "… the proposed electric generation facility will generate clean and quiet solar-powered renewable electricity that will provide 'on peak' power during the high demand period of mid-day and late afternoon (App. Ex. 14 at 13)." (Order, ¶ 339.) As to prosperity, the Project will contribute at least $629,100 per annum and is expected to generate new economic output of approximately $58 million to $151 million during the construction phase and $1.2 million to $1.5 million annually from operation.. (TR Vol. I at 86; Company Ex. 7 at 7; Company Ex. 14 at 4, Company Ex. 1 at 32).

Further, with respect to CCPC's concerns regarding perceived criminal activities and the need for a "risk assessment," the Board held that there was "no evidence to support [CCPC's] contention that the Project will lead to an increase of crime in the project area or that criminals will be stealing wire and other recyclable components," as the Sheriff did not indicate any issues out of the norm near the project area, and the Project area will be enclosed, gated, locked, and may be monitored by security cameras. (Order, ¶ 293.)

The Board decision that "the proposed facility satisfies the public interest, convenience, and necessity as specified in R.C. 4906.10(A)(6)," subject to the conditions in the Amended and Restated Joint Stipulation, was reasonable and lawful. (Order, ¶¶ 291-94.) CCPC has no basis to claim otherwise especially given that the Preble County Board of Commissioners, the Washington Township Board of Trustees, the Preble County Engineer, the Preble County Soil & Water Conservation District, the Gasper Township Board of Trustees and the Preble County Planning Commission signed the Amended and Restated Joint Stipulation.

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 Alamo 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 it 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 Alamo Solar I, LLC to the Application Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Alamo Solar I, LLC