

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Border)	
Basin I, LLC for a Certificate of)	
Environmental Compatibility and Public)	
Need to Construct a Solar-Powered Electric)	Case No. 21-277-EL-BGN
Generation Facility in Hancock County,)	
Ohio.)	

**MOTION TO STRIKE IMPROPER REPLY EVIDENCE AND
ARGUMENTS OF BORDER BASIN I, LLC**

Pursuant to Ohio Adm.Code § 4906-2-27(A), Intervenor Robin L. Gardner ("Gardner") moves to strike portions of the Reply Brief submitted by Border Basin I, LLC ("Border Basin"). Border Basin presents certain evidence and arguments that are not within the record in this case and, therefore, must be struck in accordance with settled law. A memorandum in support of this Motion is attached.

Respectfully submitted,

/s/ Devan K. Flahive

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MEMORANDUM IN SUPPORT

1. Introduction

The adjudicatory hearing on Border Basin's Application for a Certificate of Environmental Compatibility and Public Need was held on April 19-20, 2022. Initial post-hearing briefs were due on June 10, 2022; replies were due on July 1, 2022.

Per Ohio Adm.Code § 4906-2-30, the Board shall "issue a final decision based **only on the record**, including such additional evidence as it shall order admitted." Ohio Adm.Code 4906-2-30 (emphasis added). The record in this case was fully established during the adjudicatory hearing. Yet Border Basin's Reply Brief cites newly-created evidence that was never subject to cross-examination and presents arguments that were never raised during the adjudicatory hearing. Because Ms. Gardner never had an opportunity to address or respond to either, these portions of Border Basin's Reply Brief should be stricken as follows:

- Attachment 1;
- Arguments in reliance upon Attachment 1; and
- Arguments citing the PJM Open Access Transmission Tariff relative to substation siting.

Even though the novel evidence and arguments are plainly self-contradictory, they are procedurally improper. Ms. Gardner would thus be prejudiced by the Board's consideration of such matters outside the record of this proceeding and they should be ordered stricken from Border Basin's Reply Brief.

2. ARGUMENT

2.1. **Attachment 1, along with related arguments, in Border Basin's Reply Brief should be struck pursuant to the Board's rules because the evidence was not presented during the adjudicatory hearing.**

The Board will grant a motion to strike when a party attempts to enter new evidence into the record following a hearing when the evidence was previously available and could have been presented at the hearing. *See, e.g., In re Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, Entry on Rehearing at *6 (July 15, 2010) ("The Board agrees that it is not appropriate for a party to attempt to introduce new evidence into the record in an application for rehearing, when the information was available prior to the hearing and could have been presented, thus allowing other parties the opportunity to cross examine on the information.").

Border Basin's Reply Brief attaches a new document, Attachment 1, not previously introduced into the record or made available to the parties, purporting to depict a "repositioned" substation and viewpoint of the same "for purposes of illustration." (*See* Reply Brief of Border Basin at 9 and at Attachment 1.) Yet Ms. Gardner and the other local resident intervenors never had the opportunity to examine Border Basin's witness(es) about the substance of this document, nor about its logical implications (*e.g.*, why the "conceptual photo simulation" of mature vegetative screening omits any depiction of the substation and why it could be feasible to "reposition," but not relocate, the substation, as Border Basin now suggests). A slew of questions—unanswerable at this juncture—renders Attachment 1 prejudicial to Ms. Gardner (and to the other intervenors) and inappropriate for the Board to consider in its review of Border

Basin's Application and the Joint Stipulation and ultimate decision whether to grant a Certificate for this project.

Moreover, the Board would violate Ms. Gardner's right to procedural due process by considering Attachment 1 and arguments derivative from the same. Due Process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by Section 16, Article I, of the Ohio Constitution require that administrative proceedings comport with due process. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *LTV Steel Co. v. Indus. Comm'n*, 140 Ohio App.3d 680, 748 N.E.2d 1176 (10th Dist.2000). Accordingly, the Ohio Supreme Court recognizes the right to procedural due process in proceedings before the Board. *See e.g., In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173 (2013) (holding that the Power Siting Board did not violate appellants' right to procedural due process when the board did not prevent appellants from cross-examining any witness or presenting evidence).

By including Attachment 1 in its Reply Brief, rather than offering it into evidence during the administrative hearing, Border Basin denied Ms. Gardner the opportunity to cross-examine its witness(es) about the environmental impacts of substation "relocation." Thus, Attachment 1 and arguments based upon this attachment are procedurally improper and should be stricken from Border Basin's Reply Brief as follows:

Pages 9-10:

"...the Applicant has provided, as Attachment 1 to this reply, an aerial view of the existing transmission line and steel lattice tower ("tower") owned by American Electric Power ("AEP"). Attachment 1 shows: the existing 138 kilovolt ("kV") transmission line owned by AEP; the existing tower; the proposed substation location that was repositioned to provide a setback of over 600 feet from the Overmyers' residence; the existing hedgerow, which provides approximately 850 feet of natural vegetative screening north of the existing

tower; and the proposed vegetative screening that the Applicant has committed to provide south of the tower (note the inset photograph to Attachment 1 provides a conceptual photo simulation of the vegetative screening that Border Basin will provide south of the tower). In furtherance of its commitment to provide vegetation screening in order to mitigate any potential visual effect of the substation, Border Basin continues to pursue a plan to provide vegetative screening near the existing tower. This additional vegetation would be located within the right-of-way of AEP's transmission line. In order to ensure reliability of the electric network, there are restrictions on what vegetation can be planted in the right-of-way of a transmission line. Therefore, the Applicant has been working with AEP to come up with a workable plan for vegetative screening in this area that continues to ensure reliability of the electric network. By providing vegetative screening near the existing tower, the Applicant will be creating additional vegetative screen for the proposed substation.

Thus, contrary to the unsupported claims of the Intervenor, the Board has the evidence in the record that is necessary to consider the substation and determine the probable environmental impact of the facility, including the substation."

Page 22:

"It is also important to acknowledge that currently there is approximately 850 feet of existing vegetation that is approximately 15 feet tall along the corner of Township Road 238 and Country Road 216 on the parcel where the Project substation and the new AEP Switching Station will be located. This vegetation, as shown in Attachment 1 to this reply, wholly or partially blocks the view from the majority of residences on the corner."

Attachment 1: The Aerial View of Project Substation and AEP's Switching Station

Attachment 1: Vegetative Screening.

The Board cannot consider these portions of Border Basin's Reply Brief because they implicate evidence that never became part of the administrative record and the Board should therefore strike the same.

2.2. Border Basin cannot raise new, unsupported arguments regarding the PJM queue and PJM Open Access Transmission Tariff in its Reply Brief.

Border Basin's claims about the PJM queue and corresponding citation to the PJM Open Access Transmission Tariff ("OATT") relative to substation siting in its Reply Brief are similarly improper because Border Basin never previously offered such arguments to support its

substation siting during the adjudicatory hearing or otherwise as part of the administrative record.

Border Basin presents a litany of “background” statements in its Reply Brief that should be stricken as inadmissible hearsay. *See In re Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (March 31, 2016) (granting motion to strike portions of post-hearing brief as inadmissible hearsay because not offered on the record); *In re Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013) (granting request to strike certain testimony of Champaign witnesses as inadmissible hearsay).

Further, Border Basin’s footnote reference to the PJM OATT, suggesting that PJM is the arbiter for its substation siting, should be stricken as improvidently raised.

These portions of Border Basin’s Reply Brief are as follows:

Page 13: Footnote 37 –

PJM Open Access Transmission Tariff Section 36.2A.4 provides that “...any change to the Point of Interconnection ... or increase in generating capacity shall constitute a Material Modification. The Interconnection Customer may then withdraw the proposed modification or proceed with a new Interconnection Request for such modification.”
<https://www.pjm.com/media/documents/merged-tariffs/oatt.pdf>

Page 13:

“Furthermore, because the Project has advanced into and beyond the SIS and is now in the PJM facilities study stage, any changes at this time to the location of the POI may be deemed a material modification under the PJM Open Access Transmission Tariff Section 36.2A.4, thus, requiring the Project to withdraw from the interconnection queue and begin the PJM process over again.”

3. CONCLUSION

Border Basin's Reply Brief relies upon certain evidence and arguments that were never presented in the administrative record. This is procedurally improper and violates Ms. Gardner's right to procedural due process in a Board proceeding. All local resident intervenors, including Ms. Gardner, would be prejudiced by the Board's consideration of these portions of Border Basin's Reply Brief, as follows:

- Attachment 1;
- Arguments in reliance upon Attachment 1; and
- Arguments citing the PJM Open Access Transmission Tariff relative to substation siting.

For the foregoing reasons, Ms. Gardner therefore requests that the Board strike the above-described portions of Border Basin's Reply Brief.

Respectfully submitted,

/s/ Devan K. Flahive

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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 on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served upon the persons below this 12th day of July, 2022.

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Summary: Motion Motion to Strike Applicant's Improper Reply Evidence and
Arguments electronically filed by Ms. Devan K. Flahive on behalf of Gardner, Robin
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