

**BEFORE
THE OHIO POWER SITING BOARD**

**In the matter of the Application of Birch
Solar 1, LLC for a Certificate of
Environmental Compatibility and Public
Need to Construct a Solar-Powered Electric
Generation Facility in Allen and Auglaize
Counties, Ohio.**

Case No. 20-1605-EL-BGN

Initial Post-Hearing Brief of the Allen Auglaize Coalition for Reasonable Energy

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*On Behalf of the Allen Auglaize Coalition for
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INTRODUCTION

The Allen Auglaize Coalition for Reasonable Energy (the “Coalition”) requests that the Board issue a certificate of environmental compatibility and public need (“Certificate”) to Birch Solar LLP (“Birch Solar” or “Applicant”), including the conditions recommended in the Joint Stipulation and Recommendation (“Joint Stipulation”), for the Birch Solar 1 Project (“Project”).

Birch Solar has provided ample evidence satisfying each of the applicable eight subsections of Ohio Revised Code Section 4906.10(A) as well as the Board’s three prong test for stipulations. During the May 18, 2022 hearing, Staff admitted the Applicant satisfied every substantive requirement for obtaining a Certificate. Nonetheless, Staff concluded that the Project does not satisfy the “public interest, convenience and necessity” test under R.C. 4906.10(A)(6) because of “one-sided” public opposition. Staff Ex. 2, at 4. The conclusion conflicts with data from scientific polling demonstrating overwhelming public *support* for solar development in Ohio, including overwhelming support in the local community. The record does not disclose the basis for the Staff’s conclusion and it should therefore be rejected.

STATEMENT OF THE CASE

I. The Birch Solar Project.

The Project is a proposed solar-powered electric generation facility with a capacity of 300 megawatts. Staff Ex. 1, at 6. The Project will be located on approximately 1,410 acres of private land in Allen and Auglaize Counties, Ohio (“Project Area”). Staff Ex. 1, at 6.

II. The Coalition.

The Allen Auglaize Coalition for Reasonable Energy (the “Coalition”) is an unincorporated nonprofit Ohio association, and a voluntary, independent organization of concerned citizens from Allen and Auglaize Counties formed to protect the interests of the local community, to promote alternative sources of electric power, to advocate for private property rights, wise economic development, protection of the environment, and to ensure that energy development promotes the local economy and local institutions such as public schools.

Several of the Coalition’s members have contracted with the Applicant to lease land for the Project, and members also regularly commute past the proposed Project site. In addition, members are involved with local schools and other institutions that will benefit from the Project. Finally, all members will benefit from the reduction of pollution associated with solar electric generation.

III. The Proceedings.

The Coalition adopts by reference the description of the proceedings contained in the Initial Post-Hearing Brief of Birch Solar 1, LLC, In Support of the Joint Stipulation and Recommendation and Issuance Of The Certificate. The Coalition adds the following:

On October 21, 2021, the Ohio Power Siting Board Staff (“Staff”) issued its Staff Report of Investigation, which found that Birch Solar’s application for a Certificate to construct its solar facility met most, but not all, of the requirements specified in R.C. 4906.10(A), and therefore

recommended that the Board reject the application unless Birch Solar took certain steps, such as completing a survey of abandoned oil wells in the area, and agreed to conditions that would assure that the Project has minimal adverse impacts and will therefore serve the public interest, convenience and necessity. Staff Ex. 1, at 47.

Thereafter, Birch Solar engaged in intensive discussions with all interested parties, including the Coalition, on the appropriate conditions. The Coalition specifically requested, and Birch Solar agreed to, conditions assuring that revegetation of the Project site after construction will consist largely of native and pollinator-friendly vegetation, and agreed to address the Coalition's diversity and inclusion concerns by following Birch Solar's established internal policies. Birch Solar carried out similar negotiations with all other parties, ultimately producing a comprehensive set of conditions that all interested parties either agreed to or did not oppose. Joint Ex. 1. Staff concedes that the conditions are sufficient to ensure that the Project will meet every substantive requirement of R.C. 4906.10(A). Staff Ex. 1; Tr., 31:16-24.

Nonetheless, Staff opposes the Project on the ground that it will not be in the public interest, convenience, and necessity, primarily based on supposedly "overwhelming" public opposition to the Project. Staff Ex. 1. As the Coalition now demonstrates, the public *support for*, not opposition to, the Project is overwhelming and Staff's conclusion is based on illusory evidence. Accordingly, the Board should approve the Certificate and allow Birch Solar to build the Project so the many benefits it will bring to the local community can be enjoyed by all.

ARGUMENT

I. The Board should determine the Project, with conditions as recommended in the Staff Report as modified by the Joint Stipulation and Recommendation, satisfies the criteria of R.C. 4906.10(a)(6).

A. The Staff's conclusion that the public overwhelming opposes the Project is unsupported by substantial evidence.

Of relevance here, in order to grant a Certificate pursuant to R.C. 4906.10(A), “The board shall ... find[] and determine[] all of the following: ... (6) That the facility will serve the public interest, convenience, and necessity.” O.R.C. § 4906.10(A).

Since Staff has already determined the Applicant meets all the applicable criteria except for subsection (6), the only issue before the Board is whether the Project will serve the public interest, convenience, and necessity. Staff Ex. 2, at 4. Staff’s testimony on this issue is based primarily on the contention that public opposition was overwhelming and “one-sided.” Staff Ex. 2, at 4-5.

This is incorrect. Ironically, Staff says as much in their Report: “Staff acknowledges the significance of the public input received ... both in favor and in opposition to the proposed project.” Staff Ex. 1, at 46. In fact, the only record evidence on this issue supports the opposite conclusion – the Coalition submitted to the record a petition with over 250 local signatures supporting the Project. Coalition Ex. 2, at 2. Staff bases its conclusion on the opposition of a few local elected representatives who neither submitted record evidence, nor did Staff provide any explanation for how they arrived at the conclusion that public opposition is “overwhelming.” Staff Ex. 2.

The record demonstrates just the opposite. Birch Solar has provided scientific polling showing overwhelming support for solar development across Ohio. Applicant Ex. 30A, at 5. Polling in and around the Lima, Ohio area shows that 7 in 10 voters agreed it is important to bring new sources of clean energy to Ohio and nearly 75% of local voters view solar farms as beneficial to the economy and environment. Applicant Ex. 30A, at 5. Similarly, 59% of Ohio voters support solar development in their communities. Applicant Ex. 30A, at 5. In light of these polling data, it is clear that Staff based its conclusion on statements from local

representatives that are likely influenced by a vocal minority or by those representatives' refusal to acknowledge support for the Project. But it is impossible to test the basis for Staff's findings because no evidence was introduced in the record to support the claims of local opposition.

Although the Board of Trustees for Shawnee Township, the Board of County Commissioners of Auglaize County, and Against Birch Solar ("ABS") intervened, and were included in multiple settlement discussions on December 15, 2021, April 20 and 27, 2022, and May 9 and 16, 2022, none of these parties has submitted any evidence supporting a finding that the Project does not satisfy the public interest, convenience, and necessity. In fact, the only citizens' opposition group that participated in the discussions, ABS, formally withdrew from the proceedings on May 16, 2022 without raising any concerns regarding safety, electromagnetic fields, public interaction, or any other issue implicating the public interest, convenience, or necessity. The only issue ABS raised was during a settlement discussion, and related to incorporating a time limit to remove the majority of equipment during decommissioning. Birch Solar, in agreement with all other parties, promptly incorporated the exact language requested in the Joint Stipulation Section 38 subsections (b) and (c). Joint Ex. 1, at 11. No other issues were identified during the settlement discussions.

By contrast, there is ample evidence of public support in the record. Staff acknowledged comments from the Lima and Allen County Chamber of Commerce and the Coalition which emphasized the importance of landowner property rights and the potential clean energy, economic, and revenue benefits of the Project. Staff Ex. 1, at 46. In supporting these Project benefits, the Coalition submitted into evidence testimony from a farmer emphasizing that solar development supports Ohio's traditional private property rights values (Coalition Ex. 3), testimony from a local healthcare professional stating solar power and other clean renewable

energy is needed to improve the air quality caused by burning fossil fuels (Coalition Ex. 4), expert economic analyses demonstrating that local government will receive \$81 million over 30 years (Coalition Ex. 5) and that, by conservative estimates, utility scale solar in Ohio would support over 18,000 construction phase jobs, and over 200 operations and maintenance jobs over the life of the projects (Coalition Ex. 1). There were no objections to any of this evidence during the hearing. All of these analyses remain unopposed.

The Project is also supported by the Ohio Farm Bureau Federation, which represents farmers across Ohio, who are both a significant segment of the public and represent an important pillar of Ohio's economy. Joint Ex. 1, at 20. In addition, the Project is supported by the International Brotherhood of Electrical Workers, a union that includes members across Ohio and likewise represents an important sector of Ohio's economy. Joint Ex. 1, at 20.

Local elected officials' comments claim allegedly common sense impacts ranging from visual impacts, drainage and runoff, property value reductions, setbacks, fencing and lighting, decommissioning, and more. Staff Ex. 1, at 46. However, none of the commenters have provided any evidence to support these claims or address the mitigation Birch Solar has agreed to that will obviate those concerns. Where parties would normally weigh claims in an evidentiary hearing, the Project opponents expect baseless complaints to carry the day. Even without credible evidence, it appears that Staff believes the mere existence of project opposition should be sufficient to deny a Certificate under R.C. 4906.10(A)(6). Such a hurdle would make the public interest requirement insurmountable.

The Board should find that the Project has evidence-based public support, and that Birch Solar has satisfied the requirements of R.C. 4906.10(A)(6).

B. The Project satisfies all necessary safety conditions.

In determining whether the Project satisfies R.C. 4906.10(A)(6), Staff evaluated four criteria: safety, electromagnetic fields, public interaction, and whether the project meets all the other elements in R.C. 4906.10(A). Staff Ex. 1, at 44-47. In the Staff Report, the agency recommended the Board find the Project serves the public interest, convenience, and necessity based on its thorough evaluation. Staff Ex. 1, at 47. Staff also noted concerns, but only as they related to R.C. 4906.10(A)(2) and (3). Staff Ex. 1, at 47; Tr., at 30:16-24. During the evidentiary hearing, Staff stated that because the Applicant incorporated all of Staff's proposed conditions, that Birch Solar had addressed any concerns relating to R.C. 4906.10(A)(2) and (3). Tr., at 28:20-30:24. Because Staff found the Applicant rectified all concerns applicable to R.C. 4906.10(A)(6), the Coalition will briefly discuss the first three criteria and demonstrate that the Project easily satisfies each one.

It is worth repeating that no party has provided any evidence that the Project will be unsafe. Regardless, the Applicant has taken appropriate precautions and incorporated industry safety standards into the application, and the Joint Stipulation. In its application, Birch Solar has committed to using reliable and certified equipment compliant with applicable industry standards. Staff Ex. 1, at 44. The Project will have warning signs, fencing, and gates to restrict access to the potential hazards within the solar project area. Staff Ex. 1, at 44. Birch Solar has also agreed to implement a 300 foot setback from non-participating residences and to Breese Road and portions of Wapakoneta Road. Staff Ex. 1, at 44. Birch Solar will follow the National Electrical Safety Code guidelines to restrict public access to the facility in line with what Staff acknowledged is common for Ohio solar facilities. Staff Ex. 1, at 44. Birch Solar even agreed to obtain Staff's approval for a solar panel perimeter fence that is permeable to small-wildlife and aesthetically fitting for the Project's rural location. Joint Ex. 1, at 6. Birch Solar will also have

an emergency response plan, subject to Board approval, and agreed to consult with emergency response personnel to help ensure public safety. Joint Ex. 1, at 5. Birch Solar also agreed to coordinate with appropriate authorities regarding temporary road closures, road use agreements, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the Project. Joint Ex. 1, at 8. Under these conditions, the Applicant details a final traffic plan for Staff to review and confirm. Joint Ex. 1, at 8. As acknowledged by Staff, the Project will also only have minimal environmental impacts as conditioned by the Joint Stipulation, and will not affect property values. Tr., at 44:17-19, 53:7-54:9.

Birch Solar has addressed any safety issue presented to it during this process, even to the extent of addressing traffic concerns and installing aesthetically appropriate fencing. The Board should find that there are no safety concerns with the Project, and that the Project is in the public interest, convenience, and necessity.

C. The Project's electromagnetic field will not impact human health.

Staff briefly identified concerns regarding the electromagnetic fields ("EMF") from electric transmission lines. Staff Ex. 1, at 44. Under Ohio Law, if a centerline of an electric transmission facility is within 100 feet of an occupied residence or institution, an applicant must discuss the production of electric and magnetic fields during operation. O.A.C. § 4906-5-07(A)(2). This section should not influence the Board's decision as Birch Solar agreed to not have a transmission line within 100 feet of any occupied residence or institution thereby removing the possibility for EMF impacts. Staff Ex. 1, at 44.

D. Birch Solar has engaged in thorough public interaction, and the OPSB has allowed for meaningful public comment.

Birch Solar has reached out to each intervenor, including the Coalition, to address any potential concerns regarding the Project. The Applicant has not opposed any motion for intervention, and has negotiated in good faith with every party. Birch Solar has hosted virtual and in-person public informational meetings for the Project, and all attendees were provided the opportunity to participate during the meetings and provide feedback. Staff Ex. 1, at 44. The OPSB has also received over 400 public comments. The now-withdrawn local opposition group, ABS, intervened in the matter and had every opportunity to produce evidence-backed concerns. The same goes for the Board of Trustees for Shawnee Township and the Board of County Commissioners for Auglaize County. These parties chose to not provide any evidence-backed concerns during numerous settlement conferences. These parties chose to not submit evidentiary testimony. These parties chose to not participate in the evidentiary hearing. In fact, ABS voluntarily withdrew from the matter prior to the hearing, but after having an opportunity to review the evidentiary testimony. Notice of Withdrawal (filed May 16, 2022).

Now, despite these parties choosing to not participate, Staff is apparently inferring concerns based on unsubstantiated public comments that have never been entered into evidence. Tr., at 36:3-38:4. It makes no sense to elevate unverified public comments over the evidence-backed testimony of the parties actually participating in the process. The Board should find it significant that the only local interest group that actually participated in the evidentiary hearing supports the Project. Relying on hypotheticals in anonymous or otherwise unverified public comments would be nothing less than a collateral attack on the evidentiary hearing and a procedural injustice to those who participated. The Board should find that the public and interested parties have been afforded numerous meaningful opportunities to participate in this

matter, and that the Project, as supported by the evidence, satisfies the public interest, convenience, and necessity.

E. The Project satisfies an unmet need.

Ohio courts have found a project may also satisfy the requirements of R.C. 4906.10(A)(6) when the proposal addresses an unmet need like addressing economic or environmental concerns, or promoting employment benefits. *See In re Application of Champaign Wind*, 58 N.E. 3d 1142, 1157-58 (Ohio 2016) (finding wind farm project served public interest because it helped fulfill renewable energy mandate and deliver energy to serve electric utility needs); *see also In the Matter of the Application of the Ohio State Univ. for A Certificate of Env't Compatibility & Pub. Need to Construct A Combined Heat & Power Facility in Franklin Cnty., Ohio.*, No. 19-1641-EL-BGN, 2020 WL 5717149, at *24 (Sept. 17, 2020) (finding project's significant local economic benefits of employment during construction and operation satisfies the public interest requirement).

Birch Solar's proposal addresses environmental concerns through combatting climate change and toxic air pollution from the burning of fossil fuels. Coalition Ex. 4. The Project will also create jobs and job training for local workers. Coalition Ex. 1. Ohio is the second largest automobile workforce in the country which could help fulfill electric vehicle demand, and ranks as a top state for solar development in the Midwest. Coalition Ex. 1. Therefore, the Project addresses environmental concerns and would significantly benefit the local economy during construction and the operational lifetime of the solar farm.

The Board should recognize that the weight of the evidence proves the Project will benefit the local community, create green energy and jobs, and do it all safely. The Board should agree with the Staff Report and find that the Applicant has proven the Project satisfies the public

interest, convenience, and necessity requirements of R.C. 4906.10(A)(6). Therefore, Birch Solar has met the statutory requirements, and the Coalition respectfully requests that the Board issue a Certificate to Birch Solar.

II. The Joint Stipulation satisfies the Board's three-part test.

In order to approve a stipulation, the Board must satisfy the requirements of Ohio Adm. Code 4906-2-24, which authorizes parties to Board proceedings to enter into stipulations. The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Board proceedings. *See, e.g., In re Hardin Wind LLC*, Case No. 13-1177-EL-BGN, 2014 Ohio PUC LEXIS 54, *64-65 (Mar. 17, 2014). The ultimate issue for the Board's consideration is whether the stipulation is reasonable and should be adopted. *Id.* In considering the reasonableness of a stipulation, the Board has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement package violate any important regulatory principle or practice?
- (3) Does the settlement, as a package, benefit ratepayers and the public interest?

In the Matter of the Application of Nw. Ohio Wind Energy, LLC for A Certificate to Site A Wind-Powered Elec. Generation Facility in Paulding Cnty., Ohio., No. 13-197-EL-BGN, 2013 WL 6813396 (Ohio PUC, Dec. 16, 2013). Although not binding upon the Board, stipulations are given careful scrutiny and consideration, particularly where no party is objecting to the stipulation. *Id.* The evidentiary record in this matter supports a Board finding that this three-prong test has been satisfied.

A. The Joint Stipulation is a product of serious bargaining among capable knowledgeable parties.

Birch Solar held numerous settlement discussions with Staff and every intervenor where parties were consistently represented by competent counsel. The stipulation was rigorously edited and discussed until each party was satisfied. Birch Solar would distribute drafts of the stipulation prior to the negotiations to ensure all parties were aware of the issues and any potential changes. Birch Solar spearheaded negotiations for four months, and all parties appeared receptive to bargaining. The Coalition expressed concerns regarding revegetation, and engaged local groups to develop a revegetation goal to address potential noxious and invasive weeds, and promote native, pollinator-friendly plantings. Birch Solar incorporated the revegetation goal into the Joint Stipulation to address the Coalition's concern. Joint Ex. 1, at 7-8.

B. The Joint Stipulation benefits ratepayers and the public interest.

As discussed above, the Joint Stipulation incorporates all of Staff's proposed conditions thereby adequately protecting against runoff, drainage, environmental impacts, safety concerns, and more, while providing local, renewable energy. The Project will also generate significant economic benefits in terms of tax revenue and job creation during construction and operation. Coalition Ex. 1.

C. The Joint Stipulation does not violate any important regulatory principles or practices.

The Joint Stipulation does not violate any regulatory principles or practices. There are no claims of wrongdoing, and the record reflects compliance with every applicable statutory and regulatory requirement. In addition to satisfying the Board's requirements for issuance of a Certificate, the Project also enjoys the support of local groups, like the Coalition, and hundreds of local residents. Coalition Ex. 2, at 2.

Based on the evidence in the record, the Board should approve the Stipulation without modification and issue a Certificate to Birch Solar for the Project.

CONCLUSION

Based on all the evidence in the record, Birch Solar has satisfied the statutory requirements of R.C. 4906.10(A) and the Board's three-part stipulation test. The Project is supported by the Ohio Farm Bureau Federation, the Coalition, the International Brotherhood of Electrical Workers – a local union, and more than 250 local residents. Joint Ex. 1, at 19-20; Coalition Ex. 2, at 2. Staff officially recommended that the Board find the Project satisfies the public interest, convenience, and necessity requirements of R.C. 4906.10(A)(6). Staff Ex. 1, at 47. The Project is supported by hundreds of pages of information and studies that Birch Solar and the Coalition introduced into the record during the evidentiary hearing, the testimony of expert witnesses with years of experience in their respective fields, and the testimony of Coalition members with a deep local interest in the communities surrounding the Project. The Board should find that Birch Solar has provided evidence satisfying the criteria in R.C. 4906.10(A), and that the Joint Stipulation meets the Board's three-prong test. The Board should grant Birch Solar's application subject to the recommended conditions contained in the Joint Stipulation, without modification.

Respectfully Submitted, this 15th day of July, 2022.

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*On Behalf of the Allen Auglaize Coalition
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/s/Eric L. Christensen

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