

principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process to resolve all of the issues in this proceeding.

An evidentiary hearing began on May 18, 2022, and concluded the same day. All witness testimony in the case was admitted without cross examination with the exception of Staff Witness O'Dell.

IBEW Local 32 respectfully requests that the Ohio Power Siting Board (the "Board") adopt the Joint Stipulation and issue a certificate of environmental compatibility and public need to the Applicant for this project subject to the conditions set forth in the Joint Stipulation.

II. Legal Standard

A. Statutory Criteria

Pursuant to R.C. 4906.10(A), "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:

- (1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline;
- (2) The nature of the probable environmental impact;
- (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;
- (4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;
- (5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult

with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

- (6) That the facility will serve the public interest, convenience, and necessity;
- (7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.
- (8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

The evidentiary record in this matter supports a Board finding that the criteria under R.C. 4906.10(A) are either satisfied or, in certain cases, not applicable.

B. Stipulation Criteria

Ohio Adm.Code 4906-2-24 authorizes parties to Board proceedings to enter into stipulations. Although not binding on the Board, pursuant to Ohio Adm.Code 4906-2-24(D), the terms of such an agreement are accorded substantial weight. 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 (Mar. 17, 2014). The ultimate issue for the Board's consideration is whether the stipulation, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. 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, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The evidentiary record in this matter supports a Board finding that this three-prong test has been satisfied.

III. Law and Argument

There is no evidence in the record to support any finding other than the proposed project satisfies the statutory criteria of R.C. 4906.10(A). The Staff Report originally recommended denial of the certificate for failure to establish R.C. 4906.10(A)(2) and (A)(3). Staff Exhibit 1 p. 34 & p. 38. These were the **only criteria** Staff identified as reasons for recommending denial. Subsequently, the Applicant provided additional information **which Staff deemed sufficient to satisfy their concerns** related to R.C. 4906.10(A)(2) and (A)(3). Staff Exhibit 2 p. 4 lines 6-14.

Witness O'Dell's testimony states,

Staff originally recommended denial of the application in its staff report due to a failure of the Applicant to establish the nature of the project's probable impact (and minimization thereof) on cultural resources and the location of abandoned oil and gas wells. The Applicant has subsequently rectified these issues to Staff's satisfaction by filing sufficient information and analysis in the docket. Id.

However, contrary to this statement that the only two reasons for denial listed in the Staff Report were rectified to Staff's satisfaction, Staff Witness O'Dell reverses the Staff Report's original position and recommends denial of the certificate based on an alleged failure to satisfy R.C. 4906.10(A)(6). Id. Lines 16-18. Despite the Staff Report's originally finding the public interest criterion, R.C. 4906.10(A)(6), was satisfied. Staff Exhibit 1 p. 47. This is an egregious abuse of process and a recommendation not based in any evidence in the record.

A. Birch has satisfied R.C. 4906.10(A)(6) as determined by Staff in the Staff Report and through the evidence in the record.

The Staff Report found that the Applicant satisfied R.C. 4906.10(A)(6). Staff Exhibit 1 p. 47. Staff did note concerns with public input, particularly concerns noted by Shawnee Township, Logan Township, and the Allen County Commissioners, but found the project was in the public interest, convenience, and necessity despite this input. Id. pp. 46-47. Seven days before the evidentiary hearing, Staff reversed its determination regarding the Applicant's satisfaction of R.C. 4906.10(A)(6). Staff Witness O'Dell justified Staff's reversal on public comment at local hearings¹ and letters from County Commissioners and Township trustees filed as public comments in the docket², claiming this amounted to overwhelming public opposition. Staff Exhibit 2 p. 5 lines 8-19.

Staff's justification is disingenuous and unsupported by the evidentiary record. Public comments in the docket are not probative evidence according to the Board's own website, Board precedent, and Ohio common law. The Board website states,

Interested persons are encouraged to submit informal written comments to the OPSB. In order to be filed in the public comments section of the case record, submissions must include the case number. These comments inform the Board, as well as the staff during its investigation, but do not carry the same weight as the sworn testimony presented at the local public hearing.
<https://opsb.ohio.gov/processes/public-participation>.

Of particular note, the Board's website does not state these comments become part of the public record, like it does for public testimony given in a local public hearing³. In fact, the Board expressly states **they do not carry the same weight** as sworn testimony. Id. An example of the

¹ Staff Exhibit 2 p. 5 lines 13-15; Hearing Transcript p. 33 lines 12-17.

² Staff Exhibit 2 p. 5 lines 1-9.

³ <https://opsb.ohio.gov/processes/public-participation>. (“After the OPSB staff makes its recommendation, a formal public hearing is held. **At this hearing, hosted by the OPSB, members of the public provide sworn testimony that becomes part of the case record considered by the Board.**”)

weight given filed public comments can be found in Case Nos. 21-0972-EL-BLN and 21-0973-EL-BLN. In those proceedings, decided approximately two months ago, the Board approved two transmission lines, in spite of the opposing public comments of local residents and a State Representative, which the Board acknowledged represented “a large majority of the comments received.” Ohio Power Siting Board Case Nos. 21-0972-EL-BLN & 21-0973-EL-BLN, Opinion and Order, ¶¶12 & 26 (April 21, 2022).

Finally, Ohio common law has routinely held that in other administrative adjudicatory hearings, such as Zoning Board Appeals,

The rights of specific persons are determined based upon the direct evidence presented, not public opinion. *Adelman Real Estate Co. v. Gabanic*, 109 Ohio App.3d 689, 694-695, 672 N.E.2d 1087 (11th Dist.1996). Consequently, witnesses must testify about relevant facts, not their subjective and unsubstantiated opinions. Such witnesses must also be subject to cross-examination. *Id.* The unsworn testimony of a witness is not evidence that the board may consider. *Heiney v. Bd. of Zoning Appeals*, 126 Ohio App.3d 391, 396, 710 N.E.2d 725 (6th Dist.1998), citing *Arcaro Bros. Builders, Inc. v. N. College Hill Zoning Bd. of Appeals*, 7 Ohio St.2d 32, 218 N.E.2d 179 (1966).

Warren Family Funeral Homes, Inc. v. City of Toledo, 6th Dist. Lucas No. L-15-1325, 2016-Ohio-5076. Though the Board is not bound by the decision of any court other than the Ohio Supreme Court, the concepts discussed in reviewing similar administrative adjudicatory hearings are nonetheless instructive. It is clear, Ohio common law does not treat public comment, not subject to cross-examination, as probative evidence.

Yet, despite the Board’s express statements regarding the lack of weight given written public comments compared to actual testimony at a hearing (evidentiary or local public), and its precedent rejecting overwhelmingly opposing public comments in other cases decided in the last two months, Staff Witness O’Dell cites to public comments from Allen County Commissioners and the Shawnee Township Trustees opposing the project as especially compelling. Staff Exhibit

2 p. 5 lines 1-12. The notion these comments are “especially compelling” is confounding, especially considering the Allen County Commissioners subsequently entered into a Memorandum of Understanding, after filing their public comment, with the Applicant which Witness O’Dell conceded may have addressed their concerns⁴ and Staff Witness O’Dell’s concession that he made no attempt to verify the authenticity of the public comments.⁵ Further, Coalition Exhibit 2 Exhibit A contains over 250 signatures of local residents who support the project. These public comments are part of the evidentiary record. It is incredible that Staff is giving more credence to informal public comments, that it made no attempt to verify, over actual evidence in the record of this case.

Finally, the only opposing party, a local community group, in this proceeding withdrew. Therefore, no party, besides Staff, opposes this project and there is no other evidence, beyond Staff’s testimony, in the record in opposition to the proposed project. When the Applicant attempted to admit evidence regarding the announcement of the former party’s withdraw, Staff Counsel successfully objected to the admittance of that announcement on the grounds of hearsay.⁶ Yet, Staff cites unverified, out of court statements as “especially compelling”. The Administrative Law Judge, rightfully blocked admission of hearsay evidence, but Staff is basing the rationale for its recommendation of denial of the certificate on the very same type of information.

Public comment or participation in local public hearings should not be ignored. IBEW Local 32 supports the public participation process. But public comments must be weighed appropriately. Further, public comments, especially those that are not verified or subject to cross-

⁴ Hearing Transcript p. 35 Lines 16-21.

⁵ Hearing Transcript p. 36 Lines 16-20.

⁶ Hearing Transcript page 66 lines 19-25.

examination, cannot be used to outweigh the actual evidence in the record. The Staff Report acknowledges that this project will generate between 792-956 construction jobs for the state. Staff Exhibit 1 p. 17. The project will also create an additional 24-43 long-term operation jobs for the state. Id. The project will also generate between \$2.1 million and \$2.7 million annually for Allen and Auglaize counties through the Payment in Lieu of Taxes program. Id. p. 18. These are verifiable positive public impacts. Yet, Staff's is willing to sacrifice hundreds of jobs for the state and millions in revenue for the local communities based on unverified written comments, which is akin to basing a million dollar decision by tallying up the statements on a Facebook wall without making an attempt to determine the veracity of their substance.

The record is clear the Applicant has satisfied R.C. 4906.10(A)(6). Public comment, no matter how passionate, does not mean that the Applicant has failed to satisfy the statutory criterion, especially when Staff previously found the criterion was satisfied. The Joint Stipulation adopted all of the Staff Report's recommended conditions and went further to address concerns of the parties not captured by the Staff Report. The Staff Report previously determined, without those conditions, that the project was in the public interest, convenience, and necessity. IBEW Local 32 respectfully requests that the Board adopt the Joint Stipulation and issue certificate of environmental compatibility to the Applicant for the Project, subject to the conditions in the Joint Stipulation.

B. Staff's attempt to reverse the position it took in the Staff Report is prejudicial to the Applicant, the Signatory Parties, and undermines procedural due process.

Staff's decision to reverse a recommendation in the Staff Report, a week before the hearing is scheduled, is incredibly prejudicial to all parties involved and undermines procedural due process. The Ohio Supreme Court has determined the purpose of a Staff Report in the

context of a public utility's rate-increase application—is “to facilitate meaningful contest of rate increase applications by providing interested parties with the materials necessary for an informed challenge.” *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 161, 423 N.E.2d 820 (1981), quoting *Duff v. Public Utilities Com.*, 56 Ohio St.2d 367, 376, 384 N.E.2d 264 (1978).

Similarly, in Power Siting cases, the Court has held that the Staff Report is not a mere formality and provides the materials necessary for parties to make an informed challenge of Staff’s positions. *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 188, 2018-Ohio-5206, 124 N.E.3d 787. In this case, Staff changed a key determination, seven days before the hearing, based on information provided through informal comments, which were not subject to cross examination and which Staff Witness O’Dell admitted he made no attempt to verify.⁷

It is hard to imagine what could be more prejudicial to the remaining parties in the proceeding, who are all Signatory Parties to the Joint Stipulation, which adopted all of Staff’s recommendations and then added more. The Board should reject Staff’s attempt to subvert the process by arbitrarily switching its prior position based on information that is not part of the evidentiary record.

C. Calls to ignore the plain language of Senate Bill 52 must be rejected.

Senate Bill 52 created R.C. 303.58 (A)(1)-(3) which empowers boards of county commissioners to adopt a resolution restricting the development of renewable energy, such as solar projects, in their county. But Senate Bill 52 also contains uncodified language in Section 4 of the Bill which states, the provisions of the Bill do not apply to solar projects that, as of the Bill’s effective date, have applied to the Board for a certificate, are in the PJM new services

⁷ Hearing Transcript p. 36 Lines 16-20.

queue at the time the Board finds the application to be complete, and have received a completed systems impact study from PJM and paid PJM the applicable fees. This exemption process was included in the Bill to avoid prejudicing developers who had already invested tremendous amounts of resources into their project under an existing legal pathway which was being changed. It is undisputed that this project is exempt from any local restrictions passed under the authority granted local governments by Senate Bill 52.

Staff Witness O'Dell testified, both in his pre-filed testimony and in response to cross-examination, that he finds the statements of the Allen County Commissioners, which noted that but for certain provisions of Senate Bill 52, this project would not be eligible for consideration due to restrictions on development in the area, to be evidence of the County's opposition. Staff Exhibit 2 p. 5 lines 1-4; Hearing Transcript p. 57 lines 21-25.

Ohio Senate President Matt Huffman also filed public comment, on Senate President letterhead, urging the Board to take into account the local opposition in light of Senate Bill 52's passage and grant of authority to local governments to block development.⁸ Senate President Huffman went so far as to file a second public comment, again on Senate President letterhead, in response to the Applicant achieving resolution with the only local public opposition party in the proceeding, urging the Board to oppose the project and referenced Senate Bill 52, noting that "were the project to be starting at square one, it would be ineligible for development in this location."⁹

This argument related to Senate Bill 52 is meritless because it asks the Board to reject the plain language of the Bill regarding exemptions to applicability, in favor of the provisions related to local government control, claiming – but for the grandfathering provision of SB 52 this project

⁸ Public Comment of Senate President Matt Huffman (October 27, 2021).

⁹ Public Comment of Senate President Matt Huffman (May 20, 2022.)

could not be built. But in addition to disregarding legislative direction, that argument ignores the fact that, but for the Senate Bill 52, local governments did not have ability to restrict development at all. It is a tortured argument that fails on multiple levels.

Despite the logical inconsistency, both Senate President Huffman and Staff Witness O'Dell are urging the Board ignore the direction provided them by the General Assembly through Senate Bill 52's exemption language. This is simply something the Board, as a creature of statute, cannot do. It has no discretion to pick and choose which parts of the law it will choose to follow. Any argument urging the Board to embrace the local control provisions of Senate Bill 52 while simultaneously asking the Board to reject the exempting provisions is asking the Board to do that which it cannot – ignore the General Assembly's instructions.

A. The Board should determine that the Joint Stipulation meets the three-part test for reasonableness.

In addition to the statutory requirements set forth in R.C. 4906.10, the Joint Stipulation satisfies the Board's three-pronged test as it (1) is the product of serious bargaining among capable parties; (2) is in the public interest; and (3) does not violate any important regulatory principle or practice.

(1) The Joint Stipulation is the product of serious bargaining among capable, knowledgeable parties.

The Joint Stipulation is the product of an open process which included all intervenors through their counsel. There were extensive negotiations and the Joint Stipulation represents a compromise of the signatory parties' positions. Even certain parties that are only partial signatories still had their voice heard. IBEW Local 32 respectfully requests that the Board find that the Joint Stipulation is the product of serious bargaining among capable, knowledgeable parties.

(2) The Joint Stipulation is in the public interest.

The Joint Stipulation is in the public interest. The record reflects that the Project will bring major investment into the community; generate clean renewable energy during peak periods of demand; and will bring jobs to the area and the state. Additionally, the settlement process ensured the adoption of numerous conditions designed to protect the public. IBEW Local 32 respectfully requests that the Board find that the Joint Stipulation is in the public interest.

(3) The Joint Stipulation does not violate any important regulatory principle or practice.

There is no evidence in the record suggesting the Joint Stipulation violated any important regulatory principle or practice. The Joint Stipulation adopted all of the recommendations made in the Staff Report. IBEW Local 32 respectfully requests that the Board find that the Joint Stipulation does not violate any important regulatory principle or practice.

IV. Conclusion

For the foregoing reasons, IBEW Local 32 respectfully requests respectfully requests that the Board adopt the Joint Stipulation and issue certificate of environmental compatibility to the Applicant for the Project, subject to the conditions in the Joint Stipulation.

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Summary: Text Initial Post Hearing Brief electronically filed by Mr. Robert Dove on behalf of International Brotherhood of Electrical Workers, Local Union 32