

**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) Case No. 20-1605-EL-BGN
Solar-Powered Electric Generation Facility in)
Allen and Auglaize Counties, Ohio.)

REPLY BRIEF OF BIRCH SOLAR 1, LLC

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I. INTRODUCTION

The proceedings in this matter are being conducted by the Ohio Power Siting Board (“Board” or “OPSB”) in accordance with the provisions in Ohio Revised Code (“R.C.”) 4906 and Ohio Administrative Code (“Ohio Adm. Code”) 4906.

On June 15, 2021, as supplemented, Birch Solar 1, LLC (“Birch Solar” or “Applicant”) filed its Application¹ with the Board for a certificate to construct a solar-powered electric generation facility (“Certificate”) on privately-leased land in Shawnee Township, Allen County and Logan Township, Auglaize County, Ohio (“Project”) with a generating capacity of up to 300 megawatts (“MW”) alternating current.² The Board’s Staff (“Staff”) filed its Staff Report of Investigation (“Staff Report”) on October 20, 2021.³ The Board held a local public hearing in this matter on November 4, 2021.

On May 16, 2022, Birch Solar, the Allen Auglaize Coalition for Reasonable Energy (“Local Community Coalition”), the Ohio Farm Bureau Federation (“OFBF”), the Board of County Commissioners of Auglaize County (“Auglaize County Commissioners”), the Board of Township Trustees of Logan Township (“Logan Township Trustees”), and the International Brotherhood of Electrical Workers, Local Union 32 (“IBEW Local 32”) (jointly referred to herein as “Signatory Parties”) filed a Joint Stipulation and Recommendation (“Stipulation”). Birch Solar, the Local Community Coalition, OFBF,⁴ and IBEW Local 32 recommend the Board adopt the Stipulation and issue a Certificate to Birch Solar subject to the 40 conditions set forth in the Stipulation.⁵ The Auglaize County Commissioners and the Logan Township Trustees took no position on whether a Certificate should be issued for the facility, but requested the inclusion of the conditions in the Stipulation in any Certificate that is issued by the Board.⁶ In the Staff Report, Staff recommended that, should the Board issue a Certificate, the conditions in the Staff Report

¹ On February 12, 2021, Birch Solar filed its Application for a Certificate with the Board. Since that time, there have been six supplements to the Application and thirteen responses to data requests from Staff filed in the docket (App. Exs. 2- 22). Together, those documents are referred to herein as the “Application.”

² App. Ex. 1 at 1.

³ Staff Ex. 1.

⁴ OFBF’s recommendation was based on the inclusion of the recommended conditions, and OFBF took no position on the statutory findings of fact and conclusions of law in Part III of the Stipulation (*See* Jt. Ex. 1 at 2).

⁵ Jt. Ex. 1 at 3-12.

⁶ *Id.* at 2-3.

should become part of the Certificate,⁷ and as a result, the Stipulating Parties incorporated all of the conditions recommended in the Staff Report into the Stipulation.⁸

Ryan and Michelle Kalnins (the “Kalnins”) and Against Birch Solar, Inc. (“ABS”), were granted intervention in this matter. On April 26, 2022, the Kalnins withdrew from this case stating that they had “come to a mutually satisfactory agreement and have resolved any prior disagreements or objections to the Project.”⁹ Likewise, on May 16, 2022, ABS withdrew from this proceeding.¹⁰ The evidentiary hearing in this matter was called and continued on November 30, 2021, and then recommenced and concluded on the same day, May 18, 2022. At the evidentiary hearing, the Administrative Law Judge (“ALJ”) determined that the initial briefs and reply briefs would be due by July 15, 2022 and July 29, 2022, respectively.

On July 15, 2022, Birch Solar, the Local Community Coalition, IBEW Local 32, and Staff filed initial briefs in this proceeding. Staff is the only party contesting issuance of the Certificate. Of the eight criteria set forth in R.C. 4906.10(A) the Board must consider when issuing a certificate, the only criterion Staff alleges is not met is R.C. 4906.10(A)(6), which provides that the Board determine that the facility will serve the public interest, convenience, and necessity. Thus, Staff concedes and all parties agree that, based on the evidentiary record in this matter, the Board can determine:

- (1) 4906.10(A)(1): The basis of need for the facility is not applicable in this proceeding.¹¹
- (2) 4906.10(A)(2): There is enough information to determine the probable environmental impact of the facility.
- (3) 4906.10(A)(3): The facility represents the minimum adverse environmental impact.
- (4) 4906.10(A)(4): The facility is consistent with regional plans for expansion of the electric power grid and will serve the interests of electric system economy and reliability.

⁷ Staff Ex. 1 at 50.

⁸ The only conditions from the Staff Report that were not included addressed the need for the Engineering Constructability Report and the Programmatic Agreement with the State Historic Preservation Office, because those documents have been submitted on the record in this case (App. Exs. 4 and 22). Thus, as verified by Staff witness O’Dell, those conditions have been met and are no longer necessary (Staff Ex. 2 at 5).

⁹ See Kalnins Notice of Withdrawal, Apr. 26, 2022.

¹⁰ See ABS Notice of Withdrawal, May 16, 2022.

¹¹ This criterion only applies to electric transmission line and gas pipeline facilities.

- (5) 4906.10(A)(5): The facility complies with the requirements for air and water pollution control, withdrawal of waters of the state, solid and hazardous wastes, and air navigation.
- (6) 4906.10(A)(7): The impact of the facility on agricultural land can be determined.
- (7) 4906.10(A)(8): The facility incorporates the maximum feasible water conservation practices.

In its initial brief, Staff alleges the Application should be rejected because the facility will not serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6), due to:

- (1) The suggestion that the opposition in this case is prominent, one sided, and compelling and that the mixture of public support and opposition will create negative impacts to the community.”¹²
- (2) The potential negative impacts of aesthetic and visual impacts, health and safety, impacts to agricultural and residential land uses, drainage and runoff, wildlife, property values, fencing and lighting, setbacks, drinking and surface water, decommissioning, and population density on the local community voiced in the public comments section of the docket card by local elected officials.¹³
- (3) The belief that local government entities intervened to oppose the Application for purposes of “preserving the health, safety, and welfare of their communities.”¹⁴
- (4) The “single factor” that there is public correspondence in the public comments section of the docket card that opposes the Project.¹⁵

As thoroughly summarized in the Applicant’s initial brief, as well as the initial briefs filed by the Local Community Coalition and IBEW Local 32, and as further reinforced herein, the assertions by Staff in its initial brief regarding the Board’s ability to make its determinations under R.C. 4906.10(A)(6) and adopt the Stipulation in its entirety are incorrect and not supported by the evidence of record (including the Staff Report) in this case. The following sets forth the Applicant’s reply that points to the evidence in the record and the case law that fully support the

¹² Staff Br. at 4, *citing* Staff witness O’Dell Staff Ex. 2 at 5.

¹³ *Id.* at 5, *citing* Staff Ex. 1 at 46,

¹⁴ *Id.* at 3-4.

¹⁵ *Id.* at 4.

Board's adoption of the Stipulation without modification. The Applicant's arguments set forth in its initial brief filed on July 15, 2022, in support of the Application and Stipulation are fully incorporated herein.

II. ARGUMENTS

In determining whether a project is in the public interest, convenience, and necessity, it is the Board's obligation to "balance projected benefits against the magnitude of potential negative impacts on the local community."¹⁶ The Board uses a broad lens to make this determination.¹⁷ An objective review of the record supports a finding that the benefits to the community and the state of Ohio far outweigh any possible negative impacts, and that the support in the community for the Project is widespread. Any claims of potential negative impacts have either been resolved or fully mitigated through the all-encompassing commitments from Birch Solar in the Application and the Stipulation. Thus, as detailed herein, Staff's philosophy for recommending denial of the Certificate based on the public interest criterion in R.C. 4906.10(A)(6) is without merit and should be rejected.

A. There is widespread support for the Project in the community and the benefits to the local community, region, and the state of Ohio outweigh any unfounded claims of opposition.

The evidence of record in this case demonstrates strong prominent support for the Project. Of the numerous community members and trades people that support the Birch Solar Project, there is evidence in the record from 250 of them supporting the Project.¹⁸ As thoroughly explained in the Applicant's initial brief and further supported herein, Staff's contention that opposition to the Birch Solar Project is "unanimous" is not substantiated by the record in this case. Perhaps most obviously, by claiming that opposition to the Project is "one-sided," Staff refuses to acknowledge that the Local Community Coalition and the IBEW Local 32, who are Signatory Parties to the Stipulation, support the Project. In fact, the evidence on the record reflects that the Local

¹⁶ *Id.* at 2-3, citing *In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN ("*Republic Case*"), Opinion, Order, and Certificate (June 24, 2021) at 28 ¶ 91.

¹⁷ *In re Application of American Transmission Systems, Inc.*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022) at 31 ¶ 79.

¹⁸ See Local Community Coalition Ex. 2, Ex. 2; Local Community Coalition Exs. 1, 3-5; Local Community Coalition Brief; IBEW Local 32 Brief.

Community Coalition presented the testimony of five local community members at the evidentiary hearing. Local Community Coalition witness Wildermuth also presented a document containing more than 250 signatures from local community residents supporting the Project – this document is part of the evidence of record in this case and its authenticity was not contested by any party at the evidentiary hearing.¹⁹ Moreover, Staff’s position fails to acknowledge that the only other non-government community members that were parties to the case have withdrawn as their concerns had been addressed.²⁰ Consequently, where Staff gets the evidence on the record to support its unfounded position that opposition to the Project is “prominent” and “unanimous” in the community is unknown – but what is known is that Staff’s position is not based on the facts in the case.

To be certain, Birch Solar has taken every concern expressed by community members and governmental entities seriously and has committed to numerous conditions to ensure any potential, and even the merely alleged, adverse impacts from the Project have been addressed through the commitments in the Application and Stipulation.²¹ The Applicant held three public information meetings (“PIMs”), two virtually in November 2020 and one in-person in August 2021. At the November 2020 PIMs, Birch Solar experts spent over eight hours with interested stakeholders discussing the Project and answering their questions. A summary of the questions and answers were filed with the Application and reflect an open and responsive engagement between the Applicant and various community members.²² In August 2021, the Applicant held a third PIM, this time in person. Again, Birch Solar experts discussed the Project with the community and provided answers to the questions they posed. At no time did Birch Solar receive the impression at the third PIM that the community was against the Project. In fact, the reverse was true – feedback was very positive. Birch Solar considered all three PIMs as constructive and important opportunities to share information on the Project and to dialogue with the community. Birch Solar sincerely considered the feedback received at these PIMs and used it to adjust the facility layout

¹⁹ Local Community Coalition Ex. 2, Ex. 2.

²⁰ On April 26, 2022, the “Kalnins withdrew from this case stating that they had “come to a mutually satisfactory agreement and have resolved any prior disagreements or objections to the Project” (*See* Kalnins Notice of Withdrawal, Apr. 26, 2022). On May 16, 2022, ABS, withdrew from this proceeding (*See* ABS Notice of Withdrawal, May 16, 2022).

²¹ Significantly, even though one local entity refuses to communicate and engage in discussions with Birch Solar, Birch Solar has gone above and beyond to ensure that the commitments made by Birch Solar through the Application and Stipulation address that local entity’s alleged concerns as well.

²² App. Ex. 1, Ex. E.

and inform the ultimate conditions in the Stipulation. Regardless of these positive PIMs and important collaboration with the community, Staff bases its position to deny the Application because it is not in the public interest in part on “comments at informational meetings”²³ without further explanation as to the comments raised at those meetings. It is evident that Staff is confusing public input, which is a crucial component of developing any project, with the public interest review set forth in R.C. 4906.10(A)(6).

Given the dearth of positive support for the project in the record evidence, it appears that Staff is simply favoring testimony from individuals opposing the Project. For example, Staff references comments made at the local public hearing held on November 4, 2021 as grounds for its claim that the Project is not in the public interest.²⁴ However, at that hearing, testimony was presented from many individuals supporting the Project, including the school district superintendent.²⁵ And, notably, much of the testimony presented by individuals opposing the Project was duplicate testimony from members of the same household. Similarly, Staff places great emphasis on claims in the correspondence from public officials, suggesting that the mere voicing of concerns by a public official through non-record correspondence prevails over the facts in the record evidence and Staff’s careful and detailed analysis contained in the Staff Report along with the conditions included in the Stipulation.

Staff admits that its position to deny the Application because it is not in the public interest is based, in part, on “comments...in the public docket.”²⁶ However, it is unreasonable, improper, and prejudicial for Staff to make its recommendation on the public interest criterion solely by keeping score based on the quantity of communications from the public comments section of the docket.²⁷ Those communications are unauthenticated and oftentimes anonymous. The Applicant agrees that such correspondence should be reviewed and any legitimate concerns should be investigated by the Applicant and Staff - that is exactly what the Applicant and Staff did in this case. As the record reflects, and Staff agrees, all legitimate concerns have been addressed and/or

²³ Staff Br. at 4.

²⁴ *Id.*

²⁵ November 4, 2021, Public Hearing Transcript (filed Nov. 10, 2021) at 93.

²⁶ Staff Br. at 4.

²⁷ In the event the Board decides to consider the quantity, as opposed to the factual quality of the public comments filed in the public comments section of the docket card in this case, the Applicant respectfully requests the Board acknowledge all public comments in their count, including the 266 signatures submitted by the Local Community Coalition on July 18, 2022, that support the Project. These 266 signatures are in addition to the more than 250 signatures supporting the Project that are part of the evidence of record in this case (*See* Local Community Coalition Ex. 2, Ex. 2).

mitigated, thus, the Board is able to determine: the probable environmental impact and the impact of agricultural land; that the facility represents the minimum adverse environmental impact, is consistent with regional plans for the electric power grid, and incorporates the maximum feasible water conservation practices; and complies with the requirements for pollution control, waters of the state, waste, and air navigation.²⁸ A careful review of the public comments section of the docket shows that many of the concerns raised have already been addressed in the Stipulation. To be certain, just because someone keeps repeating the same concerns over and over again does not make those concerns true or factual; especially if the record evidence demonstrates that the concerns have been resolved or were not based on facts to begin with.

Importantly, as pointed out by IBEW Local 32, “[p]ublic comments in the docket are not probative evidence.”²⁹ By merely filing a comment in the public comments section of the docket card, such communications do not become evidence in the record. The Board agrees that:

“[t]hese [informal] comments [filed in the public comments section] 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...at the [local] public hearing members of the public provide sworn testimony that becomes part of the case record considered by the Board.”³⁰

Interestingly, although no mention of the Project’s proponents is present in Staff’s initial brief, Staff does admit that not everyone in the community opposes the Project. On the one hand, Staff argues that opposition to the Project is “unanimous,” but then they go on to state that there is “active disagreement on the project between local citizenry.”³¹ (*emphasis added*). Staff acknowledges that “some local opposition is common in many siting projects.”³² However, here, Staff suggests that, simply because there is a perceived split amongst community members, the Project should be denied. That is not the review that is required by R.C. 4906.10(A) and is not what the Board has concluded in previous cases.³³ Indeed, under Staff’s notion, no project would

²⁸ Staff Ex. 1 at 40, 43, 48-49; Staff Ex. 2 at 4.

²⁹ IBEW Br. at 5.

³⁰ *Id.*; see <https://opsb.ohio.gov/processes/public-participation>

³¹ Staff Br. at 4-5.

³² *Id.* at 5.

³³ See e.g., *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878; *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d, 489, 2016-Ohio-1513; *In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX (“*OPSB Duke Energy Case*”), Opinion, Order, and Certificate (Nov. 21, 2019); *In re Application of Duke Energy Ohio, Inc.* 166 Ohio St.3d 438, 2021-Ohio-3301 (“*Duke Case*”).

ever be built - because even if the record reflects compliance with all substantive and technical requirements in R.C. 4906.10(A) and there is strong support on the record for the project, if a public official submits off-the-record correspondence opposing the project, the project must be denied. Thus, Staff's misguided theory is untenable for the future economic growth of the local community and the state of Ohio, as well as the sustainability and reliability of the electric power grid.

By focusing only on the Project opponents and relying on unsubstantiated public comments instead of the record evidence, Staff ignores the multitude of benefits that will be achieved by approval of this Project, including, but not limited to: creating pollinator habitat to boost local biodiversity and foster wildlife habitat; improve air quality; payments of \$10,000 to \$50,000 under the Neighboring Landowner Financial Benefit program; providing \$500,000 to the counties' community fund; partnering with The Ohio State University, College of Food, Agricultural and Environmental Sciences on research relating to honey bee foraging in the Ohio agroecosystem; tax revenues to the local community of approximately \$94.5 million during the life of the Project; increased local jobs and wages; productive use of farm fields allowing families to diversify their income sources; and long-term soil health of the Project Area. Thus, contrary to Staff's uncorroborated arguments, the record evidence supports this Project and that the numerous positive benefits that will be received by the local community and the state of Ohio far outweigh the alleged negative impact on the community.

It is not the task of either Staff or the Board to pick a side based on who complains the loudest or has the greatest clout. It is Staff's responsibility to objectively review and investigate the actual facts in the record and advise the Board based on those facts – not conjecture or off-the-record comment. Each Board member represents an agency or sector with certain technical and/or scientific expertise that is essential in considering applications for certification that come before the Board. This aptitude of the Board members is a crucial factor when the Board deliberates on a proposed Project, because no single criterion in R.C. 4906.10(A) should be weighed greater than the others and they should all be considered and viewed as a package. Where there are legitimate issues, those issues should be resolved as they have been in this case by the Applicant and the Signatory Parties through the Conditions in the Stipulation.

B. The Application, as enhanced by the Stipulation, addressed, resolved, and/or mitigated any concerns related to aesthetic and visual impacts, health and safety, impacts to agricultural and residential land uses, drainage and runoff, wildlife, property values, fencing and lighting, setbacks, drinking and surface water, decommissioning, and population density.

In their initial brief, Staff made many factually inaccurate statements which contradict the recommendations in the Staff Report and in Staff's testimony. For example, as a basis for recommending that the Project is not in the public interest, in their initial brief, Staff states that:

[a]s evidenced in the Staff Report, Staff was concerned that the local elected officials voiced formal position against the proposed project, claiming that the project will have negative impacts including aesthetic and visual impacts, health and safety, impacts to agricultural and residential land uses, drainage and runoff, wildlife, property values, fencing and lighting, setbacks, drinking and surface water, decommissioning, and population density.³⁴

Staff's reference that "local elected officials voiced formal position" must be referring to the correspondence that was filed in the public comments section of the docket, because there is no evidence on the record by local elected officials voicing any of those concerns listed by Staff.

Further, the Applicant is perplexed by this statement from Staff. It seems incongruous to Staff's conclusion and recommendations regarding R.C. 4906.10(A)(2), (3), (4), (5), (7), and (8) where Staff found that there was sufficient information in the record for the Board to determine: the probable environmental impact and the impact of agricultural land; that the facility represents the minimum adverse environmental impact, is consistent with regional plans for the electric power grid, and incorporates the maximum feasible water conservation practices; and complies with the requirements for pollution control, waters of the state, waste, and air navigation.³⁵ Each of the claims voiced by the public officials that has been relied on by Staff have been addressed,

³⁴ Staff Br. at 5, *citing* Staff Ex. 1 at 46,

³⁵ Staff Ex. 1 at 40, 43, 48-49; Staff Ex. 2 at 4.

resolved, and /or mitigated. The evidence in the record includes, but is not limited to:

- Aesthetic and visual impacts –
 - 300-foot panel setbacks from Breese Road and panel setbacks starting at 300 feet from homes, in addition to extensive evergreen screening that eliminates or limits Project visibility.³⁶
 - Discreet 6-foot cedar post farm fence around the Project to match the aesthetics of the surrounding area.³⁷
 - A lighting plan where lights in the solar array must narrowly focus light inward toward the solar equipment, be downlit and shielded, be motion-activated, and result in a maximum horizontal illuminance level of 1 foot-candle.³⁸

- Health and safety and public - there are no public safety issues:
 - Electromagnetic fields do not indicate a public health burden, as documented by the Ohio Department of Health.³⁹
 - Only non-hazardous equipment from a Tier 1 manufacturer that has passed the United States Environmental Protection Agency Toxicity Characterization Leaching Procedure will be used.⁴⁰
 - Industry safety standards.⁴¹
 - Warning signs and restricted access.⁴²
 - An Emergency Response Plan, and equipment and training for on-site staff and first responders for emergencies related to the Project.⁴³
 - A Complaint Resolution Plan and notices to be sent prior to start of construction and operation.⁴⁴
 - Established sound maximums for construction and operation.⁴⁵

- Agricultural and residential land uses – population density –
 - Setbacks that are sufficient to allow stormwater and sewage infrastructure to be placed near the Project so the Project does not have negative impacts on county infrastructure improvements.⁴⁶
 - Very few changes to the land surface, with limited grading because the area is relatively level.⁴⁷

³⁶ App. Ex. 1 at 8, 19, 82, Ex. U; App. Ex. 11 at 8; App. Ex. 30 at 7.

³⁷ App. Ex. 1 at 19; App. Ex. 30 at 7.

³⁸ Jt. Ex. 1 at 6, Condition 16.

³⁹ Ohio Department of Health Solar Farm and Photovoltaics Summary and Assessments (Apr. 2022) at 9; <https://odh.ohio.gov/know-our-programs/health-assessment-section/media/summary-solarfarms>

⁴⁰ App. Ex. 1 at 9, 42-44; App. Ex. 30 at 7.

⁴¹ *Id.*

⁴² App. Ex. 1 at 44.

⁴³ *Id.* at 44-45; App. Ex. 11; Jt. Ex. 1 at 5, Condition 7.

⁴⁴ *Id.* at 8-9, Condition 26.

⁴⁵ *Id.* at 9, Conditions 27-28.

⁴⁶ App. Ex. 1 at 6, 17.

⁴⁷ *Id.* 1 at 85.

- Steps to prevent establishment and/or further propagation of noxious and invasive weeds during implementation of any pollinator-friendly plantings and other revegetation, as well as during construction, operation, and decommissioning and provide annual proof of weed control for the first four years of operation, with the goal of weed eradication significantly completed by year three of operation.⁴⁸
- Drainage and runoff –
 - A Drainage Road Use Agreement (“DRUMA”) with Auglaize County/Logan Township, and a Memorandum of Understanding (“MOU”) for a DRUMA with Allen County and drain tile system commitments.⁴⁹
 - A Stormwater Pollution Prevention Plan (“SWPPP”); a Spill Prevention, Control, and Countermeasure (“SPCC”) Plan; and a Horizontal Directional Drilling Inadvertent Return Contingency Plan (“Frac-out Plan”).⁵⁰
 - Compliance with the Ohio Environmental Protection Agency’s (“Ohio EPA’s”) National Pollutant Discharge Elimination System (“NPDES”) Construction General (“General Permit”).⁵¹
- Wildlife and ecological –
 - A Vegetation Management Plan and Revegetation Plan to ensure a mix of native and pollinator seeding will increase biodiversity and soil nutrients of the soil under the Project site and has the potential to increase pollinators on adjacent farmed parcels.⁵²
 - Create pollinator habitat to boost local biodiversity and foster wildlife habitat and a sheep grazing program, if acceptable to the local community and nearby landowners.⁵³
 - Maintain the natural environment of the area and conserve habitats by not removing wooded areas or wetlands, with generous setbacks from any wetland areas to ensure they are undisturbed.⁵⁴
 - Have an environmental specialist on site during construction activities who is authorized to report any issues and stop construction activities for up to 48 hours if the construction activities are creating unforeseen environmental impacts in the sensitive areas.⁵⁵
 - Contact Staff, the Ohio Department of Natural Resources, and the United States Fish and Wildlife Service within 24 hours if state or federal listed species are encountered - activities that could adversely impact the identified plants or animals shall be immediately halted.⁵⁶

⁴⁸ Jt. Ex. 1 at 7-8, Conditions 22, 24.

⁴⁹ *Id.* at 9-10, Conditions 29-30, Att. A; App. Ex. 30A, Att. SM-1.

⁵⁰ App. Ex. 1 at 37, 49-50, 61, Ex. L.

⁵¹ *Id.* at 35-36.

⁵² *Id.*, Ex. D; App. Ex. 9; App. Ex. 30 at 17.

⁵³ App. Ex. 1 at 11, 83; App. Ex. 30 at 7.

⁵⁴ App. Ex. 1 at 6, 19; App. Ex. 30 at 7.

⁵⁵ Jt. Ex. 1 at 7, Condition 18.

⁵⁶ *Id.*, Condition 19.

- Property values - undisputed evidence in the record that there will be no effect on property values.⁵⁷
- Drinking and surface water –
 - A SWPPP, a SPCC Plan, and a Frac-out Plan.⁵⁸
 - Compliance with the Ohio EPA’s NPDES General Permit.⁵⁹
- Decommissioning – A plan that includes provisions that:
 - Require a timeline for removal of the majority of the equipment as defined by 60% of the panel and racking equipment quantities, with all decommissioning to be finished within 18 months after the facility ceases operations.
 - Monitor the site for at least one additional year after completion of decommissioning to ensure successful vegetation and rehabilitation.
 - Ensure the performance bond is for the total decommissioning cost and excludes salvage value that will be recalculated every five years.⁶⁰
- Road use –
 - A DRUMA with Auglaize County/Logan Township and an MOU for a DRUMA with Allen County.⁶¹
 - Transportation permits and final traffic plan in coordination with the county engineer, the Ohio Department of Transportation, local law enforcement, and health and safety officials.⁶²

Throughout the development and Application process, stakeholders, including local government officials and other community members, have provided their list of concerns to Birch Solar as well as the Board. However, in their assessment of the record evidence, Staff disregards the numerous changes made to the Project that resolved any legitimate concerns, as well as the numerous commitments and mitigation measures required under the Application and the Stipulation Conditions, which are outlined in detail in the Applicant’s initial brief. The fact is that numerous commitments and mitigation measures agreed to in the Stipulation were literally proposed by Staff⁶³ – for Staff to say that the very commitments and mitigation measures they

⁵⁷ App. Ex. 37.

⁵⁸ App. Ex. 1 at 37, 49-50, 61, Ex. L.

⁵⁹ *Id.* at 35-36.

⁶⁰ *Id.* at 32, Ex. B; App. Ex. 30 at 17; Jt. Ex. 1 at 11, Condition 38.

⁶¹ *Id.*, Att. A; App. Ex. 30A, Att. SM-1.

⁶² Jt. Ex. 1 at 8, Condition 25.

⁶³ Staff Ex. 1 at 50-58.

stated in their Staff Report would warrant the issuance of a Certificate to Birch Solar are not now sufficient is troubling.

C. There is no evidence in the record that reflects the local government entities intervened to oppose the Application.

Staff erroneously states in their initial brief that “local governmental entities intervened to oppose the application.”⁶⁴ There are three government entities that are parties to this case: the Auglaize County Commissioners; the Logan Townships Trustees; and the Board of Township Trustees of Shawnee Township (“Shawnee Township Trustees”).⁶⁵ However, there is no evidence in the record from any of these government entities that states they oppose the Application or the Stipulation. In fact, both the Auglaize County Commissioners and the Logan Township Trustees are Signatory Parties to the Stipulation, and the only evidence on the record that reflects these government entities’ positions in this case is the provision in the Stipulation that states that the Auglaize County Commissioners and the Logan Township Trustees take no position on whether the Certificate is issued to Birch Solar.⁶⁶ As for the Shawnee Township Trustees, despite Birch Solar’s repeated attempts to engage with them, the Shawnee Township Trustees did not engage in the Application process beyond filing their initial request to intervene, nor have they agreed to meet with the Applicant outside of the stipulation process. Township officials would not discuss the Project with the Applicant and never requested any changes or mitigation for the Project to consider. It is difficult to address claims made by an uncooperative party. It is possible that many, if not all of the concerns of the Shawnee Township Trustees have already been addressed in the Application and Stipulation. However, because Shawnee Township did not engage, neither Birch Solar nor the Staff really know what Shawnee Township’s concerns are, and the evidence of record does not reflect the position of the Shawnee Township Trustees.

To support its claim that the local officials oppose the Project, Staff quotes letters filed in the comment section of the case docket that are not part of the evidence on the record in this case and have not been authenticated or offered for cross examination in the record in this case by any party.⁶⁷ As verified by Staff witness O’Dell, he made no attempt to validate whether the comments

⁶⁴ Staff Br. at 3.

⁶⁵ Allen County did not intervene in this matter.

⁶⁶ Jt. Ex. 1 at 2-3.

⁶⁷ Staff. Br. at 3-4.

he relied on for his recommendation were authentic.⁶⁸ Hence, Staff bases their entire opposition to the Application on hearsay.⁶⁹

Citing the *Republic Case*, Staff offers the opinion that “it was the concerns raised by the local elected officials that formed the basis for the Board’s decision to deny the [*Republic*] application.”⁷⁰ However, Staff fails to acknowledge some very crucial facts in the *Republic Case* that sets it apart from this case - in the *Republic Case*, there is evidence on the record from local government officials, through testimony, exhibits, and cross-examination. There is no such evidence of record in this case. In fact, the opposite is true. The evidence shows that: Logan Township and Auglaize County are neutral and not taking a position on the issuance of a Certificate;⁷¹ Auglaize County and Birch Solar have entered into a DRUMA;⁷² and Allen County and Birch Solar have entered into an MOU committing to enter into a DRUMA.⁷³ While a party to the case, Shawnee Township has remained silent and has provided no evidence on the record for the Board to consider. Moreover, the *Republic Case* did not have a large group of local community members that intervened in the case to support the Project. However, in this case, the Local Community Coalition is a Signatory Party to the Stipulation in this case and provided supporting testimony at the evidentiary hearing, along with the signatures of over 250 community members that support the Project.⁷⁴

Substitute Senate Bill 52 (“SB 52”) provided that, effective October 11, 2021, certain solar projects subject to its new provisions would need to undergo county-level review before applying to the Board.⁷⁵ In addition, another of the new provisions under SB 52 relates to having interests represented by townships and counties serve as voting *ad hoc* members on the Board.⁷⁶ For solar

⁶⁸ Tr. at 36.

⁶⁹ The Applicant finds it interesting that Staff solely relies on hearsay, non-record evidence to support their public interest claims, because, at the evidentiary hearing, the Applicant’s motion for admission of a news release issued by ABS documenting its withdraw from the case was denied. Counsel for Staff based the objection on the fact that the exhibit “was not properly authenticated and should not be part of the record,” and was hearsay. The press release was not admitted. Tr. at 67. The same day as the evidentiary hearing, the *Lima News* ran a story quoting from the ABS news release stating that ABS “entered into a confidential agreement and has withdrawn its status as an intervening party to with the [Board].” <https://www.limaohio.com/news/509136/birch-solar-opposition-dwindles-as-hearings-begin>

⁷⁰ Staff Br. at 3.

⁷¹ Jt. Ex. 1 at 2-3.

⁷² *Id.*, Att. A.

⁷³ App. Ex. 30A, Att. SM-1.

⁷⁴ Local Community Coalition Ex. 2, Ex. A.

⁷⁵ R.C. 303.59-303.62; Sections 4 and 5 of SB 52.

⁷⁶ R.C. 4906.02 and R.C. 4906.021; Section 5 of SB 52.

projects exempt from requirements under SB 52—that are effectively “grandfathered” from the new law (such as Birch Solar)—there is no county-level review and no *ad hoc* voting members representing the counties and townships.⁷⁷ However, regardless of its grandfathered status, throughout the development and application stages of the Project, Birch Solar has taken the input of the community and the local government officials very seriously and has designed the Project and made commitments in the Application and Stipulation to address any valid concerns. However, Staff has disregarded Birch Solar’s collaborative approach and is applying unfounded legal authority to the claims of local elected officials - contrary to the clear intent of the Ohio General Assembly’s requirements articulated in SB 52. Here, Staff appears to empower local government officials with veto authority over the Board as though SB 52 applied to this Project, thus giving no effect to the grandfathering provisions of SB 52.

As a quasi-judicial body, the role of the Board, like a court, is to apply the statutory scheme contemplated by the Ohio General Assembly. The Ohio Supreme Court (“Court”) has robustly defended the canons of statutory construction, ensuring that government actors comprehensively follow the intent of the Ohio General Assembly and apply the law as it is written. In *Columbia Gas Transm. Corp.*, the Court explained that: “the first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. *Lancaster Colony Corp. v. Limbach* (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389. Courts may not delete words used or insert words not used. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.”⁷⁸

When interpreting a statute, the proper aim is “to evaluate the statute as a whole and to interpret it in a manner that will give effect to every word and clause, avoiding a construction that will render a provision meaningless or inoperative.”⁷⁹ The interpretation posited by Staff eviscerates the express intent of the Ohio General Assembly’s recent enactment. Projects that meet certain requirements are simply exempt from the new law. Birch Solar is one of those few

⁷⁷ Sections 4 and 5 of SB 52.

⁷⁸ *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19 (holding that the Board of Tax Appeals erred in finding that Columbia was a natural gas company under R.C. 5727.01(D)(4) for the purpose of taxing the personal property of a public utility).

⁷⁹ *State ex rel. Nat’l. Lime & Stone Co. v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348 (holding that Norfolk Southern Railway owns a railroad right-of-way in fee and it falls within the exception to the definition of “owner” set forth in R.C. 709.02(E)).

exempt projects. The Staff is acting in direct contravention of this statute by granting veto authority to local officials.

Regardless, the Project's Application accomplishes the purpose of SB 52 and meets the requirements established in the new law, which emphasize that projects must demonstrate they will be community partners. Community voice and local support is always important in any development and Birch Solar has worked diligently with all stakeholders in the community to respond to and address any issues and concerns that were raised. As reflected through the commitments made by Birch Solar in the Application and the Stipulation, that community voice has time and time again been taken into consideration when crafting the Project details and arriving at the Certificate conditions contained in the Stipulation. Due to the Project's extensive track record of working with the community, and the record reflected in the hearing testimony by community members and the Local Community Coalition, the Project has proved to serve the public interest under R.C. 4906.10(A)(6). Not one party to the case offered testimony on the record opposing this Project. In fact, the only intervenors in this case that offered testimony on the record during the local public hearing were local residents voicing support for the Project.

D. Staff erroneously uses one “single factor” - unauthenticated hearsay correspondence in the public comments section of the docket card - to define public interest, convenience, and necessity.

In accordance with Board precedent, the Board uses a broad lens when considering whether a facility will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6).⁸⁰ In its initial brief, Staff states:

[t]he Board has found that the public interest can be served by adding clean, sustainable generation capacity, and by benefitting the local economy through the addition of new jobs, wages, and local revenue.⁸¹

Staff supports the Board's utilization of this broad view when considering the public interest applications by referring to a legal dictionary definition, stating:

[t]his approach is consistent with traditional definitions of public interest...[f]or example, Black's Law Dictionary defines 'public interest'

⁸⁰ *In re Application of American Transmission Systems, Inc.*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022) at 31 ¶ 79.

⁸¹ Staff Br. at 2, *citing In Re Application of Hardin Solar II, LLC*, Case No. 18-1360-EL-BGN, Opinion, Order, and Certificate (May 16, 2019) at 24-25 ¶ 64.

as ‘1. [t]he general welfare of a populace considered as warranting recognition and protection....2. [s]omething in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.’⁸²

In their initial brief, Staff refers to Board precedent that acknowledged that the broad lens used by the Board should not rely on a single factor and should include input from local citizens. Specifically, Staff stated:

there is **no single factor, or set of factors**, that defines ‘public interest, convenience and necessity’....‘[p]ublic, interest, convenience, and necessity should be examined th[rough] a broad lens....[t]hat lens must **‘encompass the local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion’**...[t]his requires that the Board ‘balance projected benefits against the magnitude of potential negative impacts on the local community.’⁸³
(*emphasis added*)

Regardless of Staff’s advocacy that “no single factor” defines public interest, Staff’s arguments to deny the Project focus solely on one factor – non-record correspondence.

The Applicant agrees that the above precedent, as affirmed by the Court, confirms the Board has not and should not just look at just one factor to make its decision. The Board must objectively look at the entire application package, including: the impact of the facility on the environment and agricultural land; whether the facility will result in the minimum adverse environmental impacts; whether the facility is consistent with the regional plans for the electric grid; and whether it incorporates water conservation and complies with certain state regulations on pollution, waste, and air navigation. In addition, the Applicant notes that the Court has upheld determinations by the Board that a project satisfies the public interest requirements under R.C.

⁸² Staff Br. at 2, *citing* Black’s law Dictionary (11th ed. 2019).

⁸³ Staff Br. at 2-3, *citing Republic Case*, Opinion, Order, and Certificate (June 24, 2021) at 28 ¶ 91.

4906.10(A)(6) by fulfilling the renewable energy mandate and serving electric utility needs, maintaining a competitive marketplace, as well as promoting employment benefits.⁸⁴

Importantly, Staff did consider and review each of these criteria and found that the Applicant satisfied each criteria.⁸⁵ Specifically, Staff found that the Project:

- Probable environmental impact – The Project satisfies the requirements under R.C. 4906.10(A)(2).⁸⁶
- Minimum adverse environmental impact – The Project satisfies the requirements under R.C. 4906.10(A)(3).⁸⁷
- Electric power grid - The Project “is consistent with the regional plans for the expansion of the electric power grid....[t]herefore, Staff recommends that the Board find that the facility complies with the requirements specified in R.C. 4906.10(A)(4), provided that any certificate issued by the Board ...include the conditions specified in the...*Staff Report*....”⁸⁸
- Air, water, solid waste, and aviation –The Project “complies with the requirements specified in R.C. 4906.10(A)(5), provided that any certificate issued by the Board ...include the conditions specified in the...*Staff Report*....”⁸⁹
- Viability of existing agricultural land in an agricultural district – The Project complies with the requirements specified in R.C. 4906.10(A)(7), provided that any certificate issued by the Board ...include the conditions specified in the...*Staff Report*....”⁹⁰
- Water conservation practices – The Project “complies with the requirements specified in R.C. 4906.10(A)(8) [water conservation practices], provided that any certificate issued by the Board ...include the conditions specified in the...*Staff Report*....”⁹¹

Therefore, the above references set forth in Staff’s initial brief seem to be incongruous with the position Staff has taken in this matter regarding how the Board should determine whether the facility is in the public interest, convenience, and necessity. In this case, Staff is recommending

⁸⁴ See *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878; *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d, 489, 2016-Ohio-1513; *In re Application of Duke Energy Ohio, Inc.* 166 Ohio St.3d 438, 2021-Ohio-3301 (“*Duke Case*”).

⁸⁵ Staff Ex. 1 at 40, 43, 48-49; Staff Ex. 2 at 4.

⁸⁶ See App. Exs. 4, 7, and 11.

⁸⁷ *Id.*

⁸⁸ Staff Ex. 1 at 40. The Applicant notes that the Stipulation incorporates these conditions recommended by Staff.

⁸⁹ Staff Ex. 1 at 43. The Applicant notes that the Stipulation incorporates these conditions recommended by Staff.

⁹⁰ Staff Ex. 1 at 48. The Applicant notes that the Stipulation incorporates these conditions recommended by Staff.

⁹¹ Staff Ex. 1 at 49. The Applicant notes that the Stipulation incorporates these conditions recommended by Staff.

that the Board look at this matter through a narrow lens and is advocating that the Board ignore the:

- Undisputed scientific record evidence that supports issuance of the Certificate;⁹²
- Undisputed testimony by numerous witnesses at the local public hearing supporting the Project;⁹³
- Undisputed testimony at the evidentiary hearing from the five Local Community Coalition members and the more than 250 signatures submitted with their testimony that support the Project;⁹⁴
- Stipulation that was signed by the Auglaize County Commissioners, the Logan Township Trustees, the Local Community Coalition, and IBEW Local 32;⁹⁵
- Language in the Stipulation that says the Auglaize County Commissioners and the Logan Township Trustees take no position and are neutral on whether the Certificate is issued to Birch Solar;⁹⁶
- Fact that Birch Solar, Auglaize County, and Logan Township have entered into a DRUMA;⁹⁷
- Fact that Birch Solar and Allen County have entered into an MOU committing to a DRUMA,⁹⁸ which Staff witness O'Dell admits may have addressed the concerns raised by Allen County;⁹⁹
- Fact that the concerns raised by the Kalnins and ABS have been addressed, resolved, and/or mitigated, and those parties have withdrawn from this proceeding;¹⁰⁰
- Fact that all record evidence in this case supports approval of the Stipulation and issuance of the Certificate to Birch; and
- Fact that all concerns raised in the correspondence in the local public comment section of the docket card have been addressed, resolved, and/or mitigated.¹⁰¹

⁹² App. Exs. 1-22, 30-37, 30A-34A, 36A.

⁹³ November 4, 2021, Public Hearing Transcript (filed Nov. 10, 2021).

⁹⁴ Local Community Coalition Exs. 1-5.

⁹⁵ Jt. Ex. 1.

⁹⁶ *Id.* at 2-3.

⁹⁷ *Id.*, Att. A.

⁹⁸ App. Ex. 30A, Att. SM-1.

⁹⁹ Tr. at 35.

¹⁰⁰ See Kalnins Notice of Withdrawal, Apr. 26, 2022; ABS Notice of Withdrawal, May 16, 2022.

¹⁰¹ App. Exs. 1-22, 30-37, 30A-34A, 36A.

Instead, rather than comply with the past precedent that even Staff concedes in its brief should be followed, Staff wants the Board to deny the Application and consider **one single factor only: unauthenticated, hearsay opponent correspondence** that was filed in the public comments section of the docket, which is not part of the evidence of record in this case, and none of which raised a legitimate potential negative impact with respect to the Project that was not considered by Staff and addressed through one or more conditions adopted in the Stipulation. Thus, contrary to Staff's position that "no single factor or set of factors" should define what public interest means, Staff is doing just that. But even worse, while Staff is looking at the correspondence that is not in the record, Staff has chosen to disregard any proponent correspondence. Staff is solely relying on input from opponents and ignoring the widespread support for the Project, including the record evidence from the Local Community Coalition. It is not the job of either the Board or the Staff to pick a side. The role of the Board is to objectively consider all of the facts in the record and sort fact from fiction. Yet Staff is advocating that the unsubstantiated claims from the public comments should outweigh the actual facts in the record and its own detailed and careful analysis of the Project and its potential impacts.

The Board is a creature of statute and can only make its determinations based on the authority given to it by the Ohio General Assembly as codified in R.C. Chapter 4906. R.C. 4903.09¹⁰² requires that:

[i]n all contested cases heard by the [Board], a complete record of the proceedings shall be made, **including a transcript of all testimony and of all exhibits**, and the [Board] shall file, with the records of such cases, findings of fact and written opinion setting forth the reasons prompting the decisions arrived at, **based on the said findings of fact**. (*emphasis added*).

The correspondence relied on by Staff is not part of the evidence of record in this case. The correspondence, much of which was submitted anonymously, was not authenticated, was not subject to cross-examination, was not included in the transcripts, and has not been admitted into the record as an exhibit. The Board can only base its decision on the facts in the record. Any reliance on correspondence that is not in the record in this case, such as that relied on by Staff to

¹⁰² R.C. 4906.12 provides that: "Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the [Board] under Chapter 4906. of the Revised Code, in the same manner as it the [B]oard were the public utilities commission under such sections."

arrive at their unfounded assumptions, is improper, prejudicial to the Signatory Parties, and contrary to law.

Staff's rationale in this proceeding is arbitrary, unreasonable, and contrary to the Board's past precedent and case law. A review of Board precedent reveals that applications are not denied based on local opposition alone.¹⁰³ In the *OPSB Duke Energy Case*, the Board received over 1,500 comments from members of the public and local government officials, which were noted by Staff in their report of investigation in that case as "overwhelmingly opposed" to the project.¹⁰⁴ Interestingly, Staff noted in that case that the concerns included "pipeline safety, the need for the pipeline, potential impacts to property value, and route selection."¹⁰⁵ Staff's recommendation in the *OPSB Duke Energy Case* further noted that the applicant "submitted detailed information on relevant items of public interest, convenience, and necessity, including noise, aesthetics, environmental concerns, social and economic impacts, long-term gas supply, and health and safety considerations." (*emphasis added*).¹⁰⁶ Thus, Staff concluded that "the information is sufficient to support the fulfillment of the statutory criteria [R.C. 4906.10(A)(6), public interest convenience, and necessity]."¹⁰⁷ The Board, regardless of the overwhelming opposition pointed out by Staff, found that, based on the evidence of record, Duke had addressed, resolved, or mitigated any concerns, concluded that the project was in the public interest, and issued a certificate to Duke.¹⁰⁸ The Court upheld the Board's decision in the *OPSB Duke Energy Case*.¹⁰⁹ The Applicant notes that local opposition in the *Duke Case* was arguably much stronger than the opposition in this case.

E. The Board should adopt the conditions contained in the Stipulation.

Staff acknowledges that the conditions in the Staff Report "have been enhanced and provide more detail than what was contained in the Staff Report."¹¹⁰ To name a few, Staff specifically references: Stipulation Condition 16, the Landscape and Lighting Plan; Stipulation Condition 22, the Landscape and Revegetation Goals; and Stipulation Condition 24, the steps to

¹⁰³ See e.g., *In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Opinion, Order, and Certificate (Nov. 21, 2019).

¹⁰⁴ *OPSB Duke Energy Case*, Staff Report (March 5, 2019) at 57.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *OPSB Duke Energy Case*, Opinion, Order, and Certificate (Nov. 11, 2021) at 82-82, 107.

¹⁰⁹ *Duke Case*, 166 Ohio St.3d 438, 2021-Ohio-3301.

¹¹⁰ Staff Br. at 6.

prevent the establishment and /or further propagation of noxious and invasive weeds. Thus, Staff recommends that, “if the Board chooses to grant a certificate to Birch, Staff recommends that the Board adopt the conditions set forth in the Stipulation...”¹¹¹ The Applicant appreciates Staff’s acknowledgement of the efforts the parties went through to enhance the Conditions in the Stipulation and include additional detail compared to the recommendations in the Staff Report. The Applicant agrees - the Stipulation is a comprehensive document that includes commitments that will ensure that the facility serves the public interest, convenience, and necessity.

III. CONCLUSION

As supported by the initial briefs filed by Birch Solar, the Local Community Coalition, and IBEW Local 32, as well as the arguments herein in response to Staff’s initial brief, there is no evidence in the record that that supports denial by the Board of the Application and Stipulation in this case. Therefore, the Board should adopt the Stipulation without modification and issue a Certificate to Birch Solar.

Respectfully submitted,

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¹¹¹ Staff Br. at 6.

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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 29th day of July, 2022.

/s/ Christine M.T. Pirik

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M.T. Pirik on behalf of Birch Solar 1, LLC