

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

**REPLY BRIEF OF THE INTERNATIONAL BROTHERHOOD OF ELECTRIC
WORKERS, LOCAL UNION 32**

I. Introduction

The Board should grant a certificate to Birch Solar I, LLC (“Birch” or “Applicant”) Solar Project (“Project”) because the evidence supports a determination that the Project meets every applicable requirement of R.C. 4906.10(A). No party, except Staff, opposes the Project and Staff can point to no substantive evidence in the record to support the reversal of its original finding that the Project was in the public interest, convenience and necessity.

Staff relies on admittedly unverified public comments, misunderstands and misstates the level of opposition, and claims the linchpin of its denial is predicated on the opposition of four governmental entities, two of which are actually signatory parties to the Stipulation, who urge the Board to do what it cannot – ignore the directives of the General Assembly. Staff’s position is wholly unsupported by the record.

II. Law and Argument

**A. The Project, as proposed in the Joint Stipulation will serve the public
interest, convenience, and necessity as required by R.C. 4906.10(A).**

Staff opens its arguments correctly acknowledging that the “public interest, convenience, and necessity” have not been defined by the Board. Staff Brief p. 2. Staff also correctly

acknowledges that the Board has provided guidance that the determination of public interest, convenience, and necessity must be viewed through a broad lens. Staff Brief pp. 2-3. Staff notes that the Board stated the lens must encompass local public interest including taking into account local government opinion. Staff Brief p. 3. However, this is where Staff's argument runs aground. Staff spends the rest of their Brief focusing on only public comments and alleged opposition by four local governments. Staff makes no attempt to balance any other interests or even discuss any other interests. Staff alleges opposition that is "very prominent, one sided, and compelling" and that there is "overwhelming public opposition." Staff Brief p. 4. These allegations are unsupported by the record.

i. Public Participation in this case does not demonstrate an overwhelming opposition.

Staff claims the public participation, "including comments at informational meetings, local public hearings, and in the public docket, amounts to overwhelming and one-sided opposition. Staff Brief p. 4. The record does not support this statement. First and foremost, according to the Board's own website, only public testimony made as part of the local public hearing or the evidentiary hearing are considered part of the record.¹ Public comments, according to the Board's website, "do not carry the same weight as the sworn testimony presented at the local public hearing."² This makes sense as public comments are unverified and not subject to cross-examination and therefore do not meet the minimum accepted standards of probative evidence. In fact, public comments are the definition of hearsay, out of court statements meant to

¹ <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.**")

² <https://opsb.ohio.gov/processes/public-participation>.

prove the truth of the matter asserted, which are routinely barred from Board hearings because these hearing comments are unreliable. Public comments are also regularly filed after the close of the record. In this proceeding, no fewer than 150 comments were filed after the conclusion of the evidentiary hearing when the record was closed.

A good faith review of both the local public hearing transcript and the public comments in the docket fail to support Staff's assertions that public participation is overwhelmingly opposed. A review of the local public hearing transcript reveals that of the 53 individuals who testified, who did not later withdraw from the proceeding³, 32 testified in opposition and 21 in favor. This amounts to approximately a 60/40 split, hardly overwhelming.

A review of the public comments in the docket, which are not part of the record upon which the Board can base its decision, identified 434 documents posted⁴, some of which contain comments from multiple individuals, but most do not. Of these 434 documents, numerous commenters filed multiple times:

- Lynn McCray filed no fewer than six comments opposing the project;
- Travis Unterbrink filed no fewer than six comments opposing the project;
- Leslie and Shannon Kubinski filed no fewer than three comments opposing the project, two of which are substantially the same;
- Allyshia and Kyle Kuhbander filed no fewer than four and five comments opposing the project, respectively;
- Chris and Ann Fisher filed no fewer than five comments opposing the project, and then withdrew from the case as members of the now-withdrawn local opposition party.

To be clear, public participation in the case is not and should not be meaningless. But a meaningful consideration of public interest is not served by a blind tally of the number of

³ It should be noted an additional six individuals testified at the public hearing in opposition and identified themselves as part of an intervening party. The only opposing intervening party withdrew from this case, which expressly included five of the six opposing individuals. It is unclear which party Mr. Belton was a member of but he represents the sixth individual not included in the above numbers.

⁴ As of 10:43 p.m. on July 27, 2022.

comments in favor or opposition to a project without a careful examination of the substance of those comments. Yet, that is exactly what Staff is doing in this proceeding.

Staff Witness O'Dell admitted he made no attempt to verify any of the public comments, noting that their presence in the docket was sufficient for him. Hearing Transcript p. 36 Lines 16-20. Worse yet, Staff is ignoring the over 250 signatures in support of the Project that are a part of the record through Coalition Exhibit 2 Exhibit A. Even if approximately 434 public commenters were distinct individuals, which is clearly disproven, and each of those commenters was in opposition, which they are not, compared to the 250 supportive signatures in the record, that would still be, at best, a ratio of opposition/support of about 63%/37%. A cursory review reveals approximately 90 supportive comments in the public comment sections, which would yield, without accounting for duplicative comments either in support or opposition, approximately 340 supportive comments which brings the ratio of supportive and opposing parties to 50/50. Again, the opposition is not overwhelming by any measure. Further, this calculation fails to consider the vast majority of people who did not care enough to comment at all. Which all goes to show that Staff's characterization that public participation/sentiment as overwhelmingly in opposition is contrived or demonstrably false.

ii. The public opposition in this proceeding is neither prominent nor compelling, especially considering Staff failed to verify any of the comments.

Staff claimed that “the opposition in this case is very prominent, one sided, and compelling.” Staff Brief p. 4. It is unclear what is meant by “one sided” opposition, but the opposition is neither prominent nor compelling. Staff stated, “it was undeniably the opposition of local elected officials that ultimately tipped the scales in formulating a recommendation.” Id.

Presumably, this is the basis for Staff's conclusion that the opposition is "prominent". The local governments Staff cites to are:

- The Shawnee Township, Allen County, Ohio;
- The Board of Allen County Commissioners;
- The Board of County Commissioners of Auglaize County, Ohio; and
- The Board of Township Trustees of Logan Township, Auglaize County, Ohio.

Staff Brief p. 3.

A review of the Joint Stipulation demonstrates that both the Board of County Commissioners of Auglaize County, Ohio and the Board of Township Trustees of Logan Township, Auglaize County, Ohio are both signatory parties to the Stipulation. In fact, the Joint Stipulation states: "The Auglaize County Commissioners and the Logan Township Trustees, **take no position on whether a certificate should be issued for the facility**, but request the inclusion of the conditions below in any certificate that is issued by the Board." Joint Exhibit 1 pp. 2-3. (Emphasis added.) The record directly contradicts Staff's statement that these two local governments are opposed to the project. They have expressly taken no position on whether a certificate should be issued.

As far as the remaining opposition of the Board of Allen County Commissioners, Staff rests its understanding of the Commissioner's opposition on a letter, filed as a public comment, stating that but for the grandfather provisions of SB 52 the Project could not be developed where it is currently proposed. Staff Brief p. 4. This is utterly irrelevant. As discussed in IBEW's Local 32's Initial Brief, this Project unquestionably falls within the grandfathering provisions of Senate Bill 52. Further, but for Senate Bill 52, the Board of Allen County Commissioners would have no authority whatsoever to attempt to restrict to development. Therefore, they cannot now urge the Board to selectively choose which portions of a law the Board will enforce. Further, the

Board has no discretion to ignore the grandfather provisions of Senate Bill 52 as the Board is a creature of statute that must follow the directives given it by the General Assembly.

The opposition of Shawnee Township came in the form of a letter, also filed as a public comment, which stated “projects of this size are not suitable for areas abutting residential properties in any jurisdiction.” Staff Brief pp 3-4. A statement that could be paraphrased as, “Not in my backyard, or anyone else’s”.

The limited local government opposition Staff cites to the linchpin of its recommendation for determining the project is not in the public interest are two out of court statements that do not constitute part of the record the Board can consider. Staff also oddly cites to alleged opposition by two other local governments that have expressly stated on the record that they take no position on whether a certificate should be granted. Staff noted that local elected officials voiced “formal positions against the proposed project, **claiming** that the project will have negative impacts including aesthetic and visual impacts, health and safety, impacts to agricultural land [sic] residential land uses, drainage and runoff, wildlife, property value, fencing and lighting, setbacks, drinking and surface water, decommissioning, population density.” Staff Brief p. 5 (citing Staff Report p. 46).

It is clear from the Staff Report all those concerns were voiced by Allen County officials, not the other local governments. However, more importantly, Allen County is not a party to this case. Allen County did not present a shred of evidence to substantiate any of the above claims. Further, all of the above claims are addressed by R.C. 4906.10(A) which Staff Witness O’Dell testified Staff found the Applicant satisfied in every way. Failing to identify any substantive issue with the Project, Staff was left to grasp at unsupported opposition alleging a failure to demonstrate the public interest necessity and convenience. Staff Exhibit 2 p. 4 lines 6-14. Worse

yet, Staff makes this finding based solely on the local government’s “claims” which were never proven or even attempted to be proven. Staff is substituting the unsupported beliefs of a subset of local government officials for its own judgment. It is an astounding lack of awareness and disregard for Staff’s own decisions and the Board’s authority.

It must be noted that the public comments, which again, are not part of the record, also fail to support Staff’s position that the local opposition is compelling. As noted in IBEW Local 32’s Initial Brief, it is hard to understand how Staff can determine the local opposition is compelling when it failed to verify any of the public comments. However, a sampling of the public comments demonstrates they are filled with misinformation, xenophobia, outlandish claims, and objective falsehoods.

Leslie and Shannon Kubinski – “Matthew, listen to the thousands of voices who oppose the raping of our heritage by those who promise the world but destroy the soul of the land. One has only to look at the carnage produced by these fields of Chinese panels and Towering Avian killers to realize that they are not synonymous with nature's goal.”⁵; “The panels not only increase global warming through reflection of heat back into the air but are produced in China with the help of slave labor.”⁶

Craig L. Somers – “I am against the solar project due to enriching China by purchase of the panels, and the potential damage to area farmland that will be critical in the near future.”⁷

⁵ Leslie and Shannon Kubinski Public Comment July 8, 2022 [DIS - Document Record \(state.oh.us\)](#)

⁶ Leslie and Shannon Kubinski Public Comment July 11, 2022. [DIS - Document Record \(state.oh.us\)](#)

⁷ Craig L. Somers Public Comment July 11, 2022 [ViewImage.aspx \(state.oh.us\)](#)

Travis Unterbrink – “The panels contain hazardous materials and are manufactured in overseas slave labor camps.”⁸

Rachelle Harmon – “Stud[ies] have shown that temperatures get hot enough inside solar sites to burn birds upon entry.”⁹

William Hodosko – “If you, as a committee, want another Flint, Michigan, on your hands, good luck with dealing with those problems. This is just one scenario of thousands of things that can go wrong.”¹⁰

Robert Violet – “So now in our community we are to accept that Birch Solar and its corporate brethren can replace the solar energy reserves condensed over hundred of millions of years in the fossil fuels with realtime power from the sun. We have been fortunate to have had access to fossil fuels for over 100 years now. Mankind did get along without them for thousands of years, but that means no cars, no airplanes, colder houses, no air conditioning, and lots of other things that we enjoy if we are to believe that realtime power from the sun can do the same job.”¹¹

Sarah Norris – “I’m concerned, obviously about who knows the truth about toxicity of panels. I’m concerned that I do not understand why on earth it would be acceptable for us to use panels manufactured in China.”¹²

The comments listed above are just a small sampling of the misinformation, falsehoods, and questionable motives commenters have demonstrated. Yet, Staff, without verifying, tallies these comments up and relies on them as “compelling”. Staff’s reliance on the unverified, and at times unhinged public comments, combined with its decision to ignore their own Staff Report

⁸ Travis Unterbrink Public Comment July 7, 2022 [ViewImage.aspx \(state.oh.us\)](#)

⁹ Rachelle Harmon Public Comment November 17, 2021 [ViewImage.aspx \(state.oh.us\)](#)

¹⁰ Transcript of Local Public Hearing p. 195 lines 2-6.

¹¹ Id. p. 208 lines 7-18.

¹² Id. p. 235 lines 12-16.

and testimony to rely on the “claims” of local government officials who did not intervene or put forth evidence calls into question the necessity of Staff or the Board as a whole. Under Staff’s argument, it is replacing its judgement with the beliefs of local elected officials. Evidence takes a backseat to public comments that are neither verified nor based in fact. Staff’s position, if accepted, amounts to governing via Facebook and eliminates the need for the evidentiary process or the Board - instead deferring to local governments to make all future siting decisions. The Board cannot accept Staff’s position without undermining its own existence and threatening future energy development in Ohio.

The only evidence in the record fully supports a determination that the Project is in the public interest, convenience, and necessity. There are no opposing parties in the proceeding besides Staff. Staff has misstated the level of public opposition compared to the level of public support. Further, Staff has mischaracterized the level of opposition by the local governments as clearly shown above. Senate Bill 52 provides no authority to deny this project as it is undeniably covered by the grandfathering provisions. Staff’s attempts to avoid the grandfathering provision by citing to the concerns of a local government are unsupported by the record and any reliance on Staff’s attempts would certainly fail on appeal given the strength of the evidence in the record in support of granting a certificate for the Project.

III. Conclusion

For the foregoing reasons, 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.

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I certify that The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. An electronic courtesy copy will be sent to the parties listed below on this 29th day of July 2022.

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