

**BEFORE THE  
OHIO POWER SITING BOARD**

In the Matter of the Application of : Case No. 20-1605-EL-BGN  
Birch Solar 1, LLC for a Certificate of :  
Environmental Compatibility and :  
Public Need :

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**REPLY BRIEF FILED ON BEHALF OF THE STAFF OF  
THE OHIO POWER SITING BOARD**

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**On Behalf of the Staff of the  
Ohio Power Siting Board**

**July 29, 2022**

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**I. INTRODUCTION**

Applicant Birch Solar 1, LLC (“Applicant” or “Birch”) filed an Application for a certificate of environmental compatibility and public need on February 12, 2021 for a 300 MW solar electric generation facility in Allen and Auglaize Counties. Staff filed a report of investigation (“Staff Report”) recommending denial of a certificate on October 20, 2021. The Report’s denial was based upon the Applicant’s failure to establish the nature of the probable environmental impact related to oil and gas wells and cultural resources, as required by R.C. 4906.10(A)(2); and that the facility represents minimum adverse environmental impact; primarily related to oil and gas wells and cultural resources, as required by R.C. 4906.10(A)(3). Staff also noted concerns regarding Birch’s satisfaction of R.C. 4906.10(A)(6): whether the facility would serve the public interest, convenience, and necessity. The Applicant remedied the deficiencies related to the oil and gas wells. Subsequent to the Staff Report being docketed, county and township officials filed letters in opposition to the project. After these opposition letters were docketed, Staff filed testimony recognizing the local opposition and recommended that the Board deny Birch’s

Application for failure to meet the necessary criteria set for in R.C. 4906.10(A)(6) relating to public interest, convenience, and necessity. A hearing was held on May 18, 2022. Initial briefs were filed on July 15, 2022. Staff timely files its Reply Brief recommending that the Board deny approval for the Birch solar generation project.

If the Board decides to issue a certificate for the Birch project, Staff recommends that the project be subject to all of the conditions contained in the Stipulation and Recommendation filed on May 16, 2022.<sup>1</sup>

## **II. ARGUMENT**

In order to approve an Application to build a solar generation facility in Ohio, Birch must show that it has met eight statutory criteria. In this case, Birch failed to demonstrate the criteria set forth in R.C. 4906.10(A)(6). The Board shall not grant a certificate to Birch unless it determines the following:

- (1) 4906.10(A)(1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline;
- (2) 4906.10(A)(2) The nature of the probable environmental impact;
- (3) 4906.10(A)(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) 4906.10(A)(4) The facility is consistent with regional plans for expansion of the electric power grid and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;
- (5) 4906.10(A)(5) The facility will comply with Chapters 3704, 3734, and 6111 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under 4561.32 of the Revised Code, the Board shall consult with the office of aviation of the division of

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<sup>1</sup> Stipulation and Recommendation, Joint Ex. 1 (May 16, 2022).

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

- (6) 4906.10(A)(6) That the facility will serve the public interest, convenience, and necessity;
- (7) 4906.10(A)(7) What its impact will be on the viability as agricultural land; and
- (8) 4906.10(A)(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.

**A. The Birch Application does not meet the public interest and convenience standard of R.C. 4906.10(A)(6), nor does the Stipulation satisfy the three-part test for evaluation of a contested settlement because it does not benefit the public interest.**

In order for the Board to approve a settlement agreement in a contested case, longstanding caselaw dictates that each of the following criteria must be met:

The settlement must be a product of serious bargaining among capable, knowledgeable parties; the settlement, as a package, must benefit ratepayers and the public interest, and the agreement cannot violate important regulatory principles or practices.<sup>2</sup>

In approving a settlement agreement, the Board must find that each one of these prongs be met.<sup>3</sup> In this case, the settlement agreement does not meet the public interest standard in light of the strong public opposition to the project. Staff witness O'Dell testified that due to the strong opposition of local government groups, the Application did not meet the necessary requirements of R.C. 4906.10(A)(6).<sup>4</sup> Ohio Revised Code 4906.10(A)(6) requires that the project satisfy the public interest, convenience, and necessity. According to Staff's investigation into the Birch Application, the project does not satisfy the

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<sup>2</sup> *In the Matter of the Application of Hardin Wind LLC for a Certificate to Construct a Wind-Powered Electric Generation Facility in Hardin and Logan Counties, Ohio*, Case No. 1177-EL-BGN, Opinion, Order, and Certificates at 33 (March 17, 2014).

<sup>3</sup> *Id.*

<sup>4</sup> O'Dell Testimony, Staff Ex. 2 at 4.

statutory criteria of R.C. 4906.10(A)(6), nor meet the settlement requirement that the agreement benefits the public interest.

Intervening party Brotherhood of Electrical Workers, Local Union 32 (“Local Union”) criticized the Staff’s position regarding the public interest, arguing that the public’s opinion should be given very little weight in this proceeding.<sup>5</sup> Appellant Birch entirely ignores the public opposition and argues that though support for the project is not unanimous, Birch has gone above and beyond any commitments made by companies in previous cases to address and mitigate valid concerns of the project.<sup>6</sup> Both of these arguments fail to address the Board’s findings in both the *Republic* and *ATSI* cases regarding public interest.<sup>7</sup> In contradiction to what the Local Union stated in its brief, the Board does consider the public comments. The Board denied the application of American Transmission Systems, Incorporated (“ATSI”) relying on public comments:

In consideration of the *significant number of public comments* received and the issues raised in the public comments . . . the Board finds that the requirements of R.C. 4906.10(A)(6) (that the facility will serve the public interest, convenience, and necessity) and part two of the three-part test (whether the stipulations, as a package, benefits ratepayers, and the public interest) used to evaluate stipulations have not been met. The local community has, *post hearing*, raised universal local opposition . . .<sup>8</sup>

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<sup>5</sup> Local Union Brief at 5.

<sup>6</sup> Birch Brief at 44.

<sup>7</sup> *In the Matter of the Application of Republic Wind, LLC for a Certificate to Site Wind-Powered Electric Generation Facilities in Seneca and Sandusky Counties, Ohio*, Case No. 17-2295-EL-BGN, Opinion, Order and Certificate (June 24, 2021) (“*Republic*”), *In the Matter of the Application of American Transmission Systems, Incorporated for a Certificate of Environmental Compatibility and Public Need to Construct the Lincoln Park-Riverbend Transmission Line in Mahoning County, Ohio*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022) (“*ATSI Case*”).

<sup>8</sup> *ATSI Case* at ¶ 81 (emphasis added).

In the *ATSI Case*, the Board recognized that the local community, post hearing, expressed universal opposition to the ATSI’s proposed project. Similar to the *ATSI Case*, the Birch docket shows that numerous public comments have been filed post hearing<sup>9</sup> that voice strong opposition to the proposed Birch project. In the *ATSI Case*, the Board found that the record in that case failed “to adequately establish that the Project will serve the public interest, convenience, and necessity, consistent with R.C. 4906.10(A)(6).”<sup>10</sup>

Board precedent clearly recognized the importance of “public comments”. The Board’s denial of a certificate focused on these public comments. In this case, the Local Union argues that these comments carry little weight.<sup>11</sup> However, the *ATSI* case demonstrates that the Board can and does afford great consideration to public comments. In this case, the local elected officials, Shawnee Township, Allen County, Ohio, the Board of County Commissioners of Auglaize County, Ohio, and the Board Township Trustees of Logan Township, Auglaize County, Ohio voiced opposition to the project:

- “[T]he majority [of constituents] are still opposed to this project”. Shawnee Township Board of Trustees (July 13, 2022).
- Letters from three Shawnee Township Trustees (Clark Spieles, Russell Holly, and Ted Ciminillo) opposing the solar project proposed by Birch (May 10, 2022).
- “[T]he Birch Solar Project . . . would be detrimental to our Township and our County.” David Belton, Trustee Vice Chairman, Shawnee Township Board of Trustees (Nov. 20, 2020).
- Resolution of Auglaize County Board of Commissioners restricting the unincorporated areas of Auglaize County (proposed Birch project

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<sup>9</sup> The adjudicatory hearing was held at the Board offices on Nov. 30, 2021. Tr. I at 1.

<sup>10</sup> *ATSI Case* at ¶ 105.

<sup>11</sup> Local Union Brief at 5.

located within these areas) as a restricted area for construction of large solar facilities. Resolution of Board of Commissioners, Auglaize County, Ohio (April 27, 2022).

- Resolution of the Board of Logan Township Trustees to defeat the proposed Birch Solar project. Board of Logan Township Trustees' Resolution (November 20, 2020).
- Correspondence signed by the Allen County commissioners, engineer, auditor, and treasure expressing the officials' concerns regarding where energy from the project will be used, local zoning regulations and comprehensive land use planning, property valuation, decommissioning, drinking water resources, road use and maintenance, drainage, and the PILOT program, Allen County, Ohio. Letter, Board of County Commissioners (June 30, 2021) and Supplemental Letter (July 6, 2021).

These are positions of opposition from the local government bodies. There are many more individual letters of opposition to this project filed by citizens who reside in these townships and counties. A review of the docket shows overwhelming opposition from individual residents in the project area.

Another claim made by the Local Union is that the Board should not adopt the Staff's recommendation because Staff's recommendation changed after the issuance of the Staff Report.<sup>12</sup> Staff witness O'Dell clarified that the Staff Report noted concerns regarding the facility's ability to serve the public interest.<sup>13</sup> In fact, the Staff Report provided that "Staff notes its concerns regarding the Applicant's satisfaction of R.C. 4906.10(A)(6): *whether the facility will serve the public interest, convenience, and necessity.*"<sup>14</sup> The Local Union mischaracterizes Staff's position as it relates to R.C.

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<sup>12</sup> Local Union Brief at 4.

<sup>13</sup> Tr. I at 30, line 19, Staff Report, Staff Ex. 1 at 46.

<sup>14</sup> Staff Report, Staff Ex. 1 at 1 (emphasis added).



4906.10(A)(6). The Staff Report clearly stated its concern regarding the public interest. Staff witness O'Dell's testimony is not a reversal of a Staff position in the Staff Report.

In its Initial brief, Staff and Applicant claim that the *ATSI Case* supports their positions. Birch claims that the *ATSI Case* supports its argument that the Birch project meets the public interest standard in R.C. 4906.10(A)(6).<sup>15</sup> Birch states that this project supports sound energy policies for the benefit of the Ohio citizens, promoting the state's economic interests, and protecting the environment and land use.<sup>16</sup> Birch believes that it “has gone above and beyond any commitments made by companies in previous cases heard by the Board[. <sup>17</sup>]” This self-serving statement – that Birch has gone above and beyond other companies' commitments – fails to actually address the concerns of the citizens in the project area. The Applicant lists 26 items that it perceives to be benefits. These listed items on pages 46 – 47 of Birch's Brief do not recognize many of the public comments in opposition to the project. Birch simply reiterates the items that it has provided either in its Application or added in the Stipulation in order to obtain more signatory parties, i.e., increased setbacks, additional screening, etc. Birch itself has determined that these commitments are in the public interest; therefore, the public should find these commitments to benefit them and their communities. But this is not what the public has indicated nor the government bodies that represent the public in the project area. The government bodies that represent these residents have filed letters and resolutions clearly demonstrating their opposition to the Birch project.

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<sup>15</sup> Birch Brief at 43 – 44.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 44.

In support of its argument that the project will benefit the public, Birch claims that “[s]ince day one, Birch Solar’s approach with the Project has been to ‘work with the local community and neighbors to ensure that it develops and constructs the Project as a good neighbor and long-term member of the local community.’”<sup>18</sup> And furthermore, “[s]ince 2020, Birch Solar has been communicating and working with the Auglaize County Commissioners, the Logan Township Trustees, the Allen County Commissioners, and the Shawnee Township Trustees.”<sup>19</sup> But the act of “meeting” and “communicating “ with these local entities does not automatically determine that the project is in the public interest. The Applicant itself cannot simply schedule meetings and open houses and thereby meet the public interest criteria of R.C. 4906.10(A)(6). The Board is the body that must weigh the facts and circumstances of the case in order to determine whether the project is in the public interest. In this case, though Birch met with the community groups, these groups, such as the Logan Township Trustees, the Allen County Commissioners, Auglaize County Commissioners and the Shawnee Township Trustees continued to voice their opposition to the project.<sup>20</sup>

A recent decision by the Board clarified that “[p]ublic interest, convenience, and necessity should be examined through a broad lens.”<sup>21</sup> Additionally, that lens must “encompass the local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion.”<sup>22</sup> This requires that the Board

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<sup>18</sup> Birch Brief at 47.

<sup>19</sup> *Id.* at 48.

<sup>20</sup> *See* above, pages 5 – 6.

<sup>21</sup> *Republic* at ¶ 91.

<sup>22</sup> *Id.*

“balance projected benefits against the magnitude of potential negative impacts on the local community.”<sup>23</sup> In this case, the local community has spoken and it is up to the Board to weigh the public comments and determine whether the Birch project is in the public interest.

In an effort to discredit Staff’s investigation of the project, Birch argues that Staff witness O’Dell had no direct contact with the local government officials since the Staff report was issued; therefore, the local government position was not a determining factor in the public interest determination for the Staff Report.<sup>24</sup> This argument conveniently ignores the filings made in this case after the Staff Report was filed on October 20, 2021. Since the filing of the Staff Report, numerous opposition letters have been filed, i.e., “I am writing to the Board in opposition to the subject [Birch Solar 1] project. I am an appointed person of the Board of County Commissioners, Allen County, Ohio assigned the responsibility to oversee and manage the Allen County, Ohio Sanitary Sewer District . . . [t]he construction of the Birch Solar 1 Project as presented would eliminate the ability for the County to expand its sanitary sewer collection system[.]”<sup>25</sup> Another letter that was filed post-Staff Report states opposition to the project – “[a]s the State Senator for Ohio’s 12<sup>th</sup> Senate District, I would like to express my opposition to the Birch Solar 1 project located in Allen and Auglaize counties.”<sup>26</sup> There are hundreds of other letters in opposition to the Birch project that were filed after publication of the Staff Report.

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<sup>23</sup> *Id.*

<sup>24</sup> Birch Brief at 55 – 56.

<sup>25</sup> Letter, Stephen Kayatin, Allen County Sanitary Engineer (Oct. 25, 2021).

<sup>26</sup> Letter, Senator Matt Huffman, Senate President (Oct. 28, 2021).

Birch’s statement that Staff’s decision on the public interest criteria failed to look at the project with a broad lens was not supported by the record in this case<sup>27</sup> and is inaccurate. The docket in this case clearly shows that local government representatives continued to voice their opposition after the Staff Report. Birch’s claim that the Staff’s position lacked support is wrong and must be rejected.

The record of public interest in this case demonstrates the local opposition. On May 10, 2022 (before Staff witness O’Dell’s testimony was filed) the Shawnee Township Chairman Spiels summarized his opposition, stating “[p]rojects of this size are not suitable for areas abutting residential properties[.]” Staff witness O’Dell testified that locally elected officials are responsible for representing and serving their communities and have the responsibility for preserving the health, safety, and welfare of their communities; therefore, their interest in this case, and strong opposition to it, are compelling.<sup>28</sup> The public opposition can create negative impacts to the community and staff found that any benefits to the local community were outweighed by the overwhelming public opposition and, therefore, the project would not serve the public interest, convenience, and necessity. As noted in the Staff Report, Staff considered all of the local input, including comments at information meetings, local public hearings, and the public docket.<sup>29</sup> There was clearly general opposition to the project from local government bodies and disagreement among the local citizenry. As indicated in the Staff

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<sup>27</sup> Birch Brief at 57.

<sup>28</sup> O’Dell Testimony, Staff Ex. 2 at 5 (May 11, 2022).

<sup>29</sup> Staff Report, Staff Ex. 1 at 33 – 34.

Report, the local interest in and the strong opposition to the project was found by Staff to be compelling.

Additionally, Staff observed that the local elected officials voiced formal positions against the proposed project, claiming that the project would have negative impacts, including aesthetic and visual impacts, health and safety impacts to agricultural land and residential uses, drainage and runoff, wildlife, property value, fencing and lighting, setbacks, drinking and surface water, decommissioning, and population density.<sup>30</sup>

**B. The parties in the case were afforded due process.**

The Staff Report recommended denial of a certificate for the Birch project based upon the Applicant's failure to address the concerns of the oil and gas wells.<sup>31</sup> Additionally, within the Staff Report, Staff found that Birch failed to adequately address the cultural resources in the project area. The Report also mentioned a concern regarding the public interest.<sup>32</sup> The Local Union claims that Staff's "decision to reverse a recommendation in the Staff Report, a week before the hearing is scheduled, is incredibly prejudicial ... and undermines procedural due process."<sup>33</sup> The Local Union does not complain about the Staff's change of position as it relates to the oil and gas wells. In other words, the Staff Report recommended denial of the certificate based up on the lack of the Applicant's analysis of the oil and gas wells on the property. However, after supplemental information was submitted regarding these wells, the Staff recognized that

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<sup>30</sup> Staff Report, Staff Ex. 1 at 46 (Oct. 20, 2021).

<sup>31</sup> O'Dell Testimony, Staff Ex. 2 at 4, lines 9 – 14.

<sup>32</sup> *Id.* lines 14 – 15.

<sup>33</sup> Local Union Brief at 8.

the necessary analysis was met by Birch.<sup>34</sup> According to the Local Union’s argument (there should be no change to Staff’s position post-Staff Report), the Birch project should be denied based upon its failure to properly analyze the oil and gas wells. This argument is not logical. There was information produced after the Staff Report, and produced before the hearing, that changed the facts of the case. The same is true of the public interest facts. The Staff Report noted a concern regarding the public interest.<sup>35</sup> Subsequent information from the local communities amplified this concern and ultimately changed the factual landscape of the case.

The Local Union had a week in order to prepare for the hearing and challenge the Staff’s finding regarding public interest. However, no representative of the Local Union appeared at the evidentiary hearing. No Local Union witness testified at the evidentiary hearing. In fact, Local Union’s counsel informed the presiding Administrative Law Judge Williams “that IBEW [Local Union] does not have any cross-examination of any witnesses nor any witness testimony to present in the case[.]”<sup>36</sup> The Local Union did not cross examine nor challenge the Staff’s witness regarding the public interest at the evidentiary hearing. The Local Union was afforded its due process rights to ask questions of the Staff’s finding regarding the public interest. In fact, one of the purposes of the hearing is to provide due process through cross examination. The Local Union had the ability to exercise its due process rights through the hearing process; but chose not to; thereby waiving its ability to make a due process claim in its brief. The Local Union

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<sup>34</sup> O’Dell Testimony, Staff Ex. 2 at 4, lines 9 – 14.

<sup>35</sup> Staff Report, Staff Ex. 1 at 46 (Oct. 20, 2021).

<sup>36</sup> Tr. I at 12, Lines 17 – 19.

cannot claim a lack of due process when it chose not to use the due process rights afforded to it.

### **III. CONCLUSION**

Staff respectfully submits that any benefits to the local communities are outweighed by the public opposition and would not serve the public interest, convenience, and necessity. As required by R.C. 4906.10(A)(6), the Board can only grant a certificate if the facility will serve the public interest, convenience, and necessity. This project does not meet that statutory criteria for issuance of a certificate and should not be issued. Nor does the Stipulation meet the necessary criteria for Board approval because it fails to satisfy the public interest requirement for approval of settlement agreements.

Respectfully submitted,

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*/s/ Jodi J. Bair*

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**On Behalf of the Staff of the  
Ohio Power Siting Board**



## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the **Reply Brief** on behalf of the Staff of the Ohio Power Siting Board, has been served upon the below-named counsel via electronic mail, this 29<sup>th</sup> day of July 2022.

*/s/ Jodi J. Bair*

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