

**BEFORE
THE OHIO POWER SITING BOARD**

**IN THE MATTER OF THE APPLICATION)
OF BIRCH SOLAR 1, LLC FOR A)
CERTIFICATE OF ENVIRONMENTAL)
COMPATIBILITY AND PUBLIC NEED TO)
CONSTRUCT A SOLAR-POWERED)
ELECTRIC GENERATION FACILITY IN)
ALLEN AND AUGLAIZE COUNTIES,)
OHIO.)**

CASE NO. 20-1605-EL-BGN

**JOINT APPLICATION FOR REHEARING ON BEHALF OF THE ALLEN AUGLAIZE
COALITION FOR REASONABLE ENERGY AND THE INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 32**

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*On Behalf of the Allen Auglaize Coalition for
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Intervenors Allen Auglaize Coalition for Reasonable Energy (“the Coalition”) and the International Brotherhood of Electrical Workers, Local Union 32 (“IBEW”) hereby submit this Joint Application for Rehearing in accordance with R.C. 4903.10, through the application of R.C. 4906.12.

The Coalition and IBEW submit that the Opinion and Order (“Opinion”) of the Ohio Power Siting Board (“OPSB”) dated October 20, 2022 is unlawful and unreasonable for the reasons expressed in the following assignments of error:

1. The Board unlawfully and unreasonably denied the certificate to a Birch Solar 1, LLC under R.C. 4906.10(A)(6) against the manifest weight of the evidence in violation of R.C. 4903.09, through the application of R.C. 4906.12.
2. The Board unlawfully and unreasonably deferred to the opinion and opposition of local governments in denying the application in violation of R.C. 4906.13(B).

3. The Board unlawfully and unreasonably applied S.B. 52 retroactively in violation of the Ohio Constitution.

The basis for this Application for Rehearing and more detailed descriptions of the Board's errors are set forth in the Memorandum in Support below, which is incorporated in its entirety as part of this Application for Rehearing.

Respectfully Submitted, this 21st day of November, 2022.

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MEMORANDUM IN SUPPORT OF JOINT APPLICATION FOR REHEARING

The Board recognized, “[t]he record is uncontroverted as to the determination that Birch Solar’s application satisfies the statutory requirements in R.C. 4906.10(A) in every respect except as to whether the Project serves the public interest, convenience, and necessity.”² There was no formal opposition to the Project. The only organization formally opposing Birch Solar withdrew its opposition. A few local governments and citizens submitted statements in opposition to the Project at public hearings, but they presented no evidence to support their asserted grounds for opposition. Indeed, they did not even participate in the evidentiary hearings and Birch Solar presented evidence demonstrating that all the credible grounds for opposition were baseless.

Nonetheless, the Board rejected Birch Solar’s application based on the “unanimous and consistent opposition to the project” by local governments and individuals.³ But, as the participation of the Coalition and IBEW demonstrate, opposition to the Project is neither unanimous nor consistent. In any event, the Board’s decision effectively permits local governments to veto the Project in direct violation of R.C. 4906.13 and impermissibly applies S.B. 52 retroactively to Birch Solar.

² Oct. 20 Decision at ¶ 45.

³ Oct. 20 Decision at ¶ 72.

I. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1:

THE BOARD UNLAWFULLY AND UNREASONABLY DENIED THE CERTIFICATE TO BIRCH SOLAR 1, LLC UNDER R.C. 4906.10(A)(6) AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF R.C. 4903.09, THROUGH THE APPLICATION OF R.C. 4906.12.

The Board's decision ignores the manifest weight of the evidence in the record, which demonstrates that the opposition to the Project is neither "unanimous" nor "consistent," as the Board concluded. Record evidence also demonstrates that the asserted grounds for opposition are baseless. The Board therefore abused its discretion by failing to reach a conclusion supported by the record evidence. Further, the Board violated R.C. 4903.09, through the application of R.C. 4906.12, which requires that "...the [Board] shall file, with the records of such cases, findings of fact and written opinions *setting forth the reasons prompting the decisions arrived at, based upon such findings of fact.*" (Emphasis added). As demonstrated below, the Board's decision was based on information that was either false or not part of the record and therefore their alleged "findings of fact" as it pertains to R.C. 4906.10(A)(6) are invalid and insufficient to satisfy the requirements of R.C. 4903.09 as applied through R.C. 4906.12.

A. The Board's Decision Must Be Supported by Substantial Evidence in the Record.

The Board must make a complete record of all the proceedings including testimony and exhibits that support its findings of fact upon which the Board bases its decisions. R.C. 4903.09. *See, e.g., Elyria Foundry Co. v. Pub. Util. Comm.*, 2007-Ohio-4164, 114 Ohio St. 3d 305, 310. Revised Code 4903.09 applies to the Board through the application of R.C. 4906.12. The Board's decisions must show, "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed...in reaching its conclusion." *Indus. Energy Users-Ohio v.*

Pub. Util. Comm., 117 Ohio St.3d 486, (2008). A “legion of cases” establishes that the Board “abuses its discretion if it renders an opinion on an issue without record support.” *Id.* Here, the Board’s speculative concerns cannot satisfy the factual findings required by R.C. 4903.09 as applied through R.C. 4906.12.

B. The Record Evidence Does Not Support the Board’s Claim That the Project Does Not Satisfy the Public Interest, Convenience, and Necessity.

The Board concedes that the Project satisfies every substantive requirement for a certificate of public need set forth in R.C. 4906.10(A) but nonetheless concludes that the Project fails to demonstrate that it will “serve the public interest, convenience and necessity.”⁴ The conclusion is a *non sequitur*. If an applicant satisfies every substantive requirement specified in the statute, there is no basis for determining that the project is not in the public interest and necessity.

The Board bases its decision solely on “unanimous and consistent” local opposition.⁵ In fact, there is nothing to suggest that the opposition is anything other than a loud and uninformed minority. To start with, the Coalition entered into evidence over 250 signatures from local residents in support of the Project without objection. There was no opposition testimony, no opposition experts, no opposition evidence, and no opposition resolutions. Likewise, IBEW, which represents nearly 300 members, over 200 of whom live in Allen and Auglaize Counties including several in and around the Project area, has consistently supported the Project. Indeed, the Board itself concedes that, at the November 4, 2021, public hearing, 21 witnesses supported the Project and 38 opposed. Subtracting the five witnesses of Against Birch Solar, which

⁴ Oct. 20 Decision at ¶ 45.

⁵ Oct. 20 Decision at ¶ 72.

withdrew its opposition on May 16, 2022, that leaves only 33 of the remaining witnesses opposed to the Project: hardly “unanimous” opposition.

Birch Solar’s scientific polling – the only scientific polling in the record – confirms that, if anything, the local community supports solar development. Birch Solar has provided scientific polling showing overwhelming support for solar development across Ohio. Applicant Ex. 30A, at 5. Polling in and around the Lima, Ohio area shows that 7 in 10 voters agreed it is important to bring new sources of clean energy to Ohio and nearly 75% of local voters view solar farms as beneficial to the economy and environment. Applicant Ex. 30A, at 5. Similarly, 59% of Ohio voters support solar development in their communities. Applicant Ex. 30A, at 5. By contrast, there is no reason to believe that the statements of opposition relied on by Staff are anything other than a vocal minority.

Nor is there any evidence to support the various factual bases cited by those opposing the Project. In fact, the Board does not evaluate the merit or substance of any Project opponents’ claims. The Board does not discuss whether the Project opponents have identified any valid concerns. Nor does the Board consider whether the evidence submitted by Birch Solar, and the mitigation measures it has agreed to, obviate the concerns expressed. In fact, the Board specifies the grounds for opposition expressed by a number of the public witnesses (not subject to cross-examination) who opposed the Project,⁶ but fails to acknowledge the extensive record evidence submitted by Birch Solar demonstrating that these grounds are unfounded or the dozens of conditions Birch Solar agreed to in the Stipulation that would fully mitigate these claimed impacts. The Board is apparently satisfied that simply because opposition exists, the Project cannot satisfy the statutory criteria.

⁶ Oct. 20 Decision at ¶ 52.

Nor is there any evidence that any of these public witnesses were aware of Stipulations or other measures Birch Solar agreed to address these claimed impacts. For these reasons, the Board has fundamentally undermined the evidentiary nature of its hearings and relegated decision-making to the unsubstantiated nether-realm of unchallengeable, faceless, public commenters. The only evidence in the record is uncontroverted and unanimously supports the Project.

Instead, to support its position, the Board lists various concerns of Project opponents raised at local public hearings, none of which have been substantiated. There is no evidence that the Project will impact local property values, no evidence that the Project will pose a danger from chemical use or panel attachment, and no evidence that the Project will have any impacts to wildlife. This is pure speculation. To require an applicant to address each and every concern regardless of merit or relevance will doom any project before its inception.

The failure to consider whether the opposition has a rational basis renders the Board's decision arbitrary and capricious. Consider one example, the claim that the Project will use "Chinese solar panels" built with "slave labor."⁷ Even setting aside the racist undertone of this testimony, there is no record evidence that the Project will use panels manufactured in China rather than panels manufactured in Ohio, which is now home to the largest solar panel manufacturing facility outside China.⁸ More importantly, Congress has enacted legislation prohibiting the importation of products, including solar panels, from the region of China where

⁷ For example; (1) "The panels...are produced in China with the help of slave labor" (Public Comment of Leslie and Shannon Kubinski, filed July 20, 2022); (2) "Solar panels...come from The Peoples Republic of China. Whose global interests make them an enemy of the United States and the free world" (Public Comment of David Dean, filed July 18, 2022); and (3) "[The panels] will be made from cheap Chinese manufacturers with no care at all on our environment globally" (Public Comment of Mark Stombaugh, filed July 14, 2022).

⁸ See M. Egan, "Ohio Will Soon Be Home to the Largest Solar Factory Complex Outside China," CNN Buiness, June 9, 2021 (available at: <https://www.cnn.com/2021/06/09/business/solar-manufacturing-china-ohio/index.html>).

authorities purportedly use the forced labor of the Uighur minority.⁹ Further, since well before that legislation was enacted, the solar industry has been actively engaged in efforts to ensure that solar panels and other products are produced in compliance with internationally-recognized labor standards.¹⁰ This example exposes the folly of accepting Project opponents' claims at face value. The Board must evaluate the substance of each claim to determine whether Project opponents' claims have merit. The failure of the Board to conduct even a cursory examination and rely on a laundry list of claims exposes the arbitrary and capricious nature of the Board's Opinion.

Even the Board's characterization of Auglaize County and Logan Township is mistaken. The Partial Stipulating Parties explicitly took no stance regarding the certificate. The Board cannot, in good faith, unilaterally infer opposition in direct contradiction to the Partial Stipulating Parties' explicit position. See Opinion, fn. 3. Moreover, since two of the four local government entities participated in negotiations with the Applicant and signed the Stipulation, the Board's claim of "unanimous and consistent opposition to the Project by the government entities" is facially inaccurate. Opinion, at ¶72.

Regardless, this is a far cry from the "unanimous opposition" required in past decisions. In *Republic Wind*, the opposition testified as to the incompatibility between the project and the underlying karst formations, had a petition of over 3,000 residents opposing the project, Seneca County had passed a resolution to "void any [road use and maintenance agreement]" with the

⁹ Uighur Forced Labor Prevention Act, HR 6256, enacted Dec. 23, 2021 (<https://www.congress.gov/bill/117th-congress/house-bill/6256#:~:text=Public%20Law%20No%3A%20117%2D78,related%20to%20such%20forced%20labor>). Even prior to the enactment of that legislation, the Biden Administration took steps to bar the importation of solar panels potentially connected to forced Uighur labor. See T. Kaplan, C. Buckley & B. Plumer, "U.S. Bans Import of Some Chinese Solar Materials Tied to Forced Labor," New York Times, June 24, 2021, updated Aug. 2, 2021 (available at: <https://www.nytimes.com/2021/06/24/business/economy/china-forced-labor-solar.html>).

¹⁰ See K. Pickerel, "Solar Industry Prepares for Implementation of Uighur Forced Labor Prevention Act," Solar Power World, June 20, 2022 (available at: <https://www.solarpowerworldonline.com/2022/06/solar-industry-prepares-for-uyghur-forced-labor-prevention-act-implementation/>).

project proponents, *and*, the opponents had expert testimony from a Ph.D geoscientist concerning the structural complications of topography, all which the applicant failed to refute. *In the Matter of the Application of Republic Wind, LLC for A Certificate to Site Wind-Powered Elec. Generation Facilities in Seneca & Sandusky Ctys., Ohio*, No. 17-2295-EL-BGN, 2021 WL 2667132, at *1-19 (OPUC June 24, 2021). In that case, the Board found that because “Local Government Entities and the other parties...presented evidence with respect to the compliance analysis” the Board considered that evidence and found the Board did not violate R.C. 4906.09. Here, the local governments and the public commenters in opposition failed to present any evidence to support their claims. In fact, they did not even participate in the evidentiary hearing.

Because the local government opposition, relied upon by the Board, lacks any substantiation of the concerns expressed, *Republic Wind* fails to support the Board’s conclusion. In fact, unlike the county governments in *Republic Wind*, Auglaize County and Logan Township have entered into a Drainage and Road Use Maintenance Agreement (DRUMA), with Allen County having executed an MOU confirming their intent to execute a DRUMA, and *Republic Wind* is therefore distinguishable on this additional ground.

The Board’s reliance on *In re American Transmission Systems, Inc.*, Case No. 19-1871, Opinion, Order and Certificate (May 19, 2022), is equally without merit. To start with, the Board in that case concluded that the applicant failed to demonstrate that its proposed project would have minimal environmental impacts in accordance with R.C. 4906.10(A)(2) & (3), but the Board acknowledges that Birch Solar made those showings here. Further, *American Transmission* makes clear that, “[a]s part of the Board’s responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, [the Board] must balance projected benefits against the magnitude of potential negative impacts

on the local community.” *Id.* ¶ 58. The decision here is devoid of any such balancing. Rather, the Board here concludes that alleged “unanimous” local opposition trumps any benefits the Project may provide and the Board fails to balance the multitude of Project benefits demonstrated in the record against the purported local opposition.

The Board falls woefully short of the evidentiary standards upon which it must make its determinations. Because the Board failed to provide any evidence substantiating local government concerns, it has unlawfully and unreasonably deferred to the mere opposition of a single local government (Auglaize County and Logan Township were expressly neutral, and Allen County has signed an MOU with Birch Solar) in denying the application in violation of R.C. 4906.09 and failed to engage in the balancing analysis its own precedents require.

C. The Board’s Reliance on Public Comment Metrics is Erroneous.

The Board relies almost exclusively on the number of public comments and testimony at public hearings – but not in the evidentiary hearing – as a metric to measure supposedly “unanimous and consistent public opposition” to the Project. This is a false metric. There were a litany of repeat commenters copying and pasting form opposition language or offering a cursory “Opposed.” For example, Shawnee Township’s comment submitting local signatures, which the Board credits with demonstrating 884 signatures in opposition,¹¹ collapses under even mild scrutiny. There are no signatures, duplicates, missing information, numerous entries with question marks for the signatory’s names, and following the submission, multiple individuals filed comments stating they were included “without...knowledge or permission” and to remove their names from the Shawnee Township letter. See Public Comment Regarding the Project,

¹¹ Oct. 20 Opinion at ¶ 65.

filed August 31, 2022; Public Comment of Roger Buzard and Patricia Buzard, filed August 31, 2022; Public Comment of Allyshia and Kyle Kuhbander, filed September 20, 2022.

Others, specifically groups like IBEW and the Coalition, actively participated in the proceeding, entering testimony and evidence into the record in support of the Project and providing more than 250 signatures of local residents supporting the Project. These grassroots entities representing broad coalitions demonstrate significant public support for the Project that must be accorded greater weight than the form public comments relied upon by the Board. Moreover, the Board failed to include the over 250 signatures in support of the Project, which the Coalition properly submitted into evidence, in sharp contrast to the petitions purportedly demonstrating opposition, none of which were submitted into evidence or subject to cross-examination or other scrutiny that might have uncovered the sort of flaws discussed above. The Board erroneously equates both petitions as “purport[ing] to represent” signatures despite the numerous issues with Shawnee Township’s petition, and despite the Coalition’s petition being officially entered into evidence during the Board’s hearing after being subject to cross-examination. One of these things is not like the other.

Nevertheless, by elevating mere public comment over substantive participation, in contravention to the Board’s own stated policy¹², the Board has undermined its administrative procedure rendering intervenor actions and efforts effectively void. It is important to note that all of the Coalition’s testimony in support of the Project, and all of the Coalition’s evidence entered into the record after subject to cross-examination at the Board’s evidentiary hearing,

¹² <https://opsb.ohio.gov/processes/public-participation> (The Board’s website on public participation encourages informal comments but notes “These comments inform the Board, as well as the staff during its investigation, but do not carry the same weight as the sworn testimony presented at the local public hearing.”)

remains uncontested. The Board has simply ignored the manifest weight of the evidence in favor of unsubstantiated public comments.

While it fails to subject the evidence supposedly demonstrating opposition to any similar scrutiny, the Board finds no issue in summarily rejecting the scientific polling Birch Solar submitted into the record on the ground that only a subset of those polled were aware of the Birch Solar Project.¹³ The Board is missing the forest for the trees. Regardless of whether individuals were acutely aware of the Project, the polling clearly finds that there is broad support for solar power generally in the area relevant to this proceeding. The Board again offers no evidence as to why this support would suddenly become “unanimously” opposed to the Project if the specifics of the Project were known to survey respondents.

Worse, the Board fails to subject the opposition statements it relies on to similar scrutiny. In fact, the Board fails to even ask whether those expressing opposition to the Project were aware of the Project specifics, including dozens of conditions designed to mitigate the impacts of the Project, or of any other legitimate ground upon which their opposition might have been based. The polling submitted into the record by Birch Solar is far superior to the opposition statements relied on by the Board because it includes specific polling methodologies that guarantee that opinions of a broad and representative sample of Ohio citizens were included in the survey, including citizens in the locally-affected area. By contrast, the Board relies on comments of a self-selected group of opponents where there is no evidence whatsoever that these opponents represent a fair sample of relevant public opinion. Therefore, there is no basis for the Board’s conclusion that opposition to the Project was “unanimous,” or even that a simple majority of affected citizens opposed the Project.

¹³ Oct. 20 Opinion at ¶70.

ASSIGNMENT OF ERROR NO. 2:

THE BOARD UNLAWFULLY AND UNREASONABLY DEFERRED TO THE OPINION AND OPPOSITION OF LOCAL GOVERNMENTS IN DENYING THE APPLICATION IN VIOLATION OF R.C. 4906.13(B).

Under R.C. 4906.13(B), as applicable to Birch Solar,¹⁴ “[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction and operation of a major utility facility...authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” Additionally, the Board’s “authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.” *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St. 3d 333, 337 (2010). Therefore, the Board, not local governments, is the final arbiter, and the Board may not delegate certificate approval to local governments.

Here, the Board relies on local government opposition as the basis for its decision. This flatly violates both R.C. 4906.13(B) and R.C. 4906.10 by giving these local governments what amounts to veto power over Board decisions. As the Ohio Supreme Court concluded in *State ex rel. Ohio Edison Co. v. Parrott*, in enacting R.C. Chapter 4906, “the General Assembly created a comprehensive scheme addressing the process for applying for and granting certificates” to major power projects. 73 Ohio St.3d 705, 707 (1995). The General Assembly intended that “such powers are vested exclusively in the board,” which means that “power siting projects are exempt from local regulation.” *Id.* The Board in this case illegally abdicates its exclusive jurisdiction by deferring to local governmental entities who are without authority under the plain terms of the statute to regulate power siting projects like the Birch Solar Project.

¹⁴ S.B. 52, enacted on Oct. 21, 2021, well after Birch Solar submitted the application at issue here, added R.C. 4906.30, which bars certification of projects that are not consistent with local use designations for unincorporated areas. As noted below, the Board cannot properly apply S.B. 52 retroactively to Birch Solar and R.C. 4906.13(B) as it existed at the time of Birch Solar’s application is therefore the statute applicable in this case.

ASSIGNMENT OF ERROR NO. 3:

THE BOARD UNLAWFULLY AND UNREASONABLY APPLIED S.B. 52 RETROACTIVELY IN VIOLATION OF THE OHIO CONSTITUTION.

The Board cannot apply S.B. 52 to Birch Solar. The Ohio Constitution Article II, Section 28 explicitly prohibits the General Assembly from passing laws with a retroactive effect. Here, the Board states that it “must consider, independent of SB 52, the manner and degree of opposition of the local governments impacted by the Project.” Opinion, fn. 9. In applying this analysis, the Board gave weight to Allen County’s Resolution No. 238-22 which states “if it were not for the grandfather provisions of SB 52, the Birch Solar 1 project would not be eligible for consideration.” Opinion, at 17. This is a clear plea by Allen County to apply S.B. 52 retroactively. By acceding to the County’s request, the Board violates the Ohio Constitution and fails to apply the applicable statute as it existed prior to S.B. 52. Therefore, the Board impermissibly applies S.B. 52 retroactively through the public interest requirement of R.C. 4906.10(A)(6).

II. CONCLUSION

Based on all the evidence in the record, Birch Solar has satisfied the statutory requirements of R.C. 4906.10(A). The Board fails to identify any evidence to support claims from local government or public opposition. The Board must reconsider its denial, and, based on the uncontroverted evidence, grant Birch Solar’s application subject to the recommended conditions contained in the Joint Stipulation, without modification.

Respectfully Submitted, this 21st day of November, 2022.

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CERTIFICATE OF SERVICE

In accordance with OAR 4906-2-02(D)(6), this document has been filed electronically and OPSB'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 who have electronically subscribed to this case. Such notice constitutes service of this document

/s/Eric L. Christensen

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Summary: Petition Joint Petition for Rehearing electronically filed by Mr. Jonas Reagan on behalf of Allen Auglaize Coalition for Reasonable Energy