

**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)
for a Solar-Powered Electric Generating Facility)
in Allen and Auglaize Counties, Ohio)

Case No. 20-1605-EL-BGN

**BIRCH SOLAR 1, LLC'S
APPLICATION FOR REHEARING**

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November 21, 2022

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APPLICATION FOR REHEARING**

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Birch Solar 1, LLC ("Birch") requests rehearing of the Opinion and Order issued in this proceeding on October 20, 2022 ("Order"). Birch submits that the Board's Order is unlawful, unjust, unreasonable, unconstitutional, and unwarranted based on the following grounds:

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT.

- 1. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development**
- 2. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide**
- 3. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture**
- 4. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply**

5. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT

1. It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record
2. It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments
3. It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A)

1. The Board unlawfully delegated its sole and plenary power to review the Project's application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions
 - a. The Board's approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance
 - b. The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine
 - c. The Board's approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B)
2. The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE ("SB 52")

Respectfully submitted,

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I. INTRODUCTION

The Ohio Power Siting Board’s (“OPSB”) Order is inconsistent on its face. On one hand, the Board restates the familiar and wide-ranging standard that “the determination of public interest, convenience, and necessity must be examined through a broad lens.” (Order, ¶ 68.) But, on the other hand, the Board admits to only considering *one* factor in making its public interest determination: opposition (or perceived opposition) to the Project by local government entities. (*Id.* at ¶ 72.)

This myopic approach is not just inconsistent, it violates established Board precedent, Ohio Supreme Court precedent, Ohio public policy, Ohio’s Constitution, and Ohio’s laws. The Board holds sole and plenary authority to site utility-scale solar projects, in recognition of important statewide policies that go far beyond the local project area. The Board’s total deference here to baseless opposition by certain local government entities—which is not based on evidence in the record—abrogates its authority and responsibility under Ohio’s system of government. The Board’s Order prioritizes the whims of a few vocal opponents over the best interests of the public.

The Board’s Order, specifically its finding that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6), is unlawful, unjust, unreasonable, unconstitutional, and unwarranted. The Board should reconsider its Order, grant this application for rehearing, and apply the “broad lens” standard as required.

II. STANDARD OF REVIEW

After the Board enters an order, the parties to a proceeding have a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”¹ An application for

¹ R.C. 4903.10. R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23 are applicable to Board proceedings pursuant to R.C. 4906.12.

rehearing must “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” R.C. 4903.10(B). *See also* O.A.C. 4901-1-35(A).

In considering an application for rehearing, R.C. 4903.10 provides that the Board may grant and hold rehearing if there is “sufficient reason” to do so. After such rehearing, the Board may “abrogate or modify” the order in question if it “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted.” R.C. 4903.10(B).

Here, the Order is unlawful, unreasonable, unjust, unconstitutional, and unwarranted under R.C. 4903.10. The Board should grant this application for rehearing and abrogate or modify the Order consistent with this application for rehearing.

III. GROUNDS FOR REHEARING

ASSIGNMENT OF ERROR NUMBER ONE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD FAILED TO CONSIDER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY OF THE PROJECT UNDER R.C. 4906.10(A)(6) THROUGH A BROAD LENS AS REQUIRED BY OHIO SUPREME COURT AND BOARD PRECEDENT

The Board has recently explained that “[t]o determine that projects serve the public interest, convenience, and necessity, that projected benefits of the projects should be balanced against the magnitude of potential negative impacts on the local community.” (Order, *In the Matter of the Application of American Transmission Systems, Inc. for a Certificate of Environmental Compatibility and Public Need to Construct the Lincoln Park-Riverbend Line in Mahoning County*, 19-1871-EL-BTX, ¶ 58, May 19, 2022).

The question here, therefore, is what factors constitute the “projected benefits” of the Project. In past cases, the Board has ruled that a project’s larger benefits to the state, the public, and the grid outweigh local disapproval, even if there are “thousands of comments from members of the general public, local organizations, and local officials” and opposing intervention from

multiple local governments. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, at 82-83, November 21, 2019). Under this same standard, the Board has also ruled that a project benefits the public even where opposing local governments intervened and presented nine witnesses at the adjudicatory hearing. (Order, Opinion, and Certificate, *In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013). In applying this standard, the Board looks to and relies on the *record* – the evidence guides and controls the result. (*Id.* at 72-73.)

Consistent with this long-standing and well-established standard, the Board indicated in its Order that “the determination of public interest, convenience, and necessity must be examined through a broad lens.” (Order, ¶ 68.)

But that is not the standard the Board used here. Ignoring the record and its own prior precedent, the Board failed to consider the evidence before it and the benefits to the public as a whole in making its determination under R.C. 4906.10(A)(6). Similarly, the Board failed to consider the Staff Report’s positive analysis of the Project under R.C. 4906.10(A)(6). (*Id.* at ¶¶ 49-50.) The Board ignored that the Project used design standards which were beyond current Board precedent.² In particular, by way of example, the Board unreasonably disregarded the Project’s uncontested evidence that it would provide significant benefits to:

- 1) local economic development;
- 2) regional and statewide economic development;
- 3) the local agricultural industry and culture;

² The the Project boundary was at least 300 feet from the public rights-of-way/easements of public roads; at least 100 feet from the top of the banks of streams; at least 300 feet from the property lines of nonparticipating landowners and at least 300 feet from the nearest wall of each nonparticipating landowner’s residence as of the filing date of the Application. (Noticed of Enhanced Commitments for Setbacks and Screenings, filed October 19, 2022.)

- 4) the reliability, affordability, and diversification of Ohio’s electrical supply; and
- 5) the beneficial use of a historic oil and gas field.

1. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide an opportunity for local economic development

In prior cases, the Board has recognized the long-term importance of solar development in supporting and growing the local economy. For example, the Board has concluded that “as energy and environment costs rise, and technology advances, solar-powered generation provides a sustainable, long-term, competitive energy solution to both residents and businesses.” (Opinion, Order, and Certificate, *Hardin Solar Center II*, 18-1360, May 16, 2019, at 25.) In over thirty prior cases, the Board and its Staff have acknowledged that a solar facility would have an overall positive impact on the local economy due to the increase in construction spending wages, purchasing of goods and services, annual lease payments to the local landowners, and PILOT revenue.³

³ *Vinton Solar Energy Facility*, 17-0774, Staff Report, entered July 5, 2018, at 22; *Hillcrest Solar Farm*, 17-1152, Opinion, Order, and Certificate, entered February 15, 2018, at ¶44; Staff Report, entered November 15, 2017, at 22; *Willowbrook Solar Farm*, 18-1024, Staff Report, entered February 4, 2019, at 23; *Highland Solar Farm*, 18-1334, Opinion, Order, and Certificate, entered May 16, 2019, at ¶36; Staff Report, entered March 4, 2019, at 19; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶39; Staff Report, entered February 26, 2019, at 20; *Nestlewood Solar Facility*, 18-1546, Opinion, Order, and Certificate, entered April 16, 2020, at ¶49; Staff Report, entered May 15, 2019, at 24; *Alamo Solar Farm*, 18-1578, Opinion, Order, and Certificate, entered June 24, 2021, at ¶70; Staff Report, entered May 28, 2019, at 22; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶52; Staff Report, entered on December 22, 2020, at 23; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶60; Staff Report, entered October 7, 2020, at 26; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶55; Staff Report, entered November 18, 2020, at 25; *Fox Squirrel Solar Farm*, 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶56; Staff Report, entered March 15, 2021, at 23; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶43; Staff Report, entered November 30, 2020, at 24; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶52; Staff Report, entered January 11, 2021, at 23; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶53; Staff Report, entered March 16, 2021, at 24; *New Market Solar*, 20-1288, Opinion, Order, and Certificate, entered March 18, 2021, at ¶48; Staff Report, entered January 4, 2021, at 21; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶73; Staff Report, entered May 24, 2021, at 27; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21, 2021, at ¶85; Staff Report,

Those same benefits are present here. The Project's Application and Socioeconomic Report (Ex. G to the Application) set forth the following economic benefits:

- Approximately 400 to 500 jobs will be created during construction both onsite and with related services and 5-10 jobs during the O&M stage. (Application at 27; Exhibit G at 4.)
- Construction of the Project will result in a payroll of \$32 million to \$39 million during the 12-18 month construction window. (Application at 27; Exhibit G at 4.)
- During the 35-year operational life of the Project, payroll related to operations is expected to total \$350,000 to \$700,000 annually. The present value of the total payroll from operations, assuming a 9% discount rate and 2% escalation rate is between approximately \$4.6 to \$9.2 million. (Application at 27.)
- An additional approximately 225 to 300 jobs could be created within the supply chain and induced job markets during construction, in addition to the 400 to 500 direct construction jobs. Further, during operations, approximately 18 to 25

entered March 22, 2021, at 24; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶67; Staff Report, entered May 19, 2021, at 24; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶60; Staff Report, entered June 22, 2021, at 29; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶52; Staff Report, entered on May 10, 2021, at 23; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶82; Staff Report, entered June 14, 2021, at 26; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶60; Staff Report, entered June 28, 2021, at 27; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 30; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 29; *Union Ridge Solar*, 20-1757, Opinion, Order, and Certificate, entered January 20, 2022, at ¶73; Staff Report, entered August 16, 2021, at 29; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶53; Staff Report, entered August 24, 2021, at 28; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶68; Staff Report, entered July 7, 2021, at 25; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶72; Staff Report, entered October 8, 2021, at 31; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶66; Staff Report, entered September 13, 2021, at 29; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 31; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 30.

supply chain and induced jobs could be created from O&M activities, in addition to the direct on-site jobs. (Application at 28; Exhibit G at 4.)

- Based on direct, indirect, and induced jobs for the Project and associated multiplier effects during construction, the Project will have an economic output of between approximately \$70 million and \$90 million. (Application at 28; Exhibit G at 4.)
- During the O&M phase of the Project, the total annual economic benefit would be approximately \$3.8 to \$5.5 million. (Application at 28; Exhibit G at 4.)

Further, above and beyond these workforce and payroll benefits, Birch anticipates entering into a payment in lieu of taxes (“PILOT”) in Allen and Auglaize Counties, with estimated payments of approximately \$2.1 to \$2.7 million annually and approximately \$73.5 million to \$94.5 million throughout the life of the Project. (Application Exhibit G at 5.) The PILOT will provide funding, which would be available to the Shawnee School District for school improvements, which as seen in the testimony from Frank Caprilla on behalf of Allen Auglaize Coalition for Renewable Energy, is greatly needed and could otherwise be paid for by residents through potential levies.⁴ Likewise, at the local public hearing, the superintendent of the Shawnee School District explained the importance of the PILOT to the district, testifying that the “money would go directly to the school, we wouldn’t lose any of our local state funding, and that money would be able to be allocated for gifted [students], for programs that meet student needs, for additional resources that our kids desperately need.” (Local Public Hearing Tr. at 93, filed Nov. 10, 2021.)

⁴ Testimony of Frank Caprilla on behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022. Mr. Caprilla is the Capital Campaign Manager of the Shawnee Football Parents Association, a member of the Community Advisory Team (CAT) for the Shawnee Local Schools Building Project, and a parent and volunteer at Shawnee Local Schools in Shawnee Township. *Id.* at 9-22.

The Project also has the opportunity to economically benefit neighboring residents of the Project through Birch Solar's Neighboring Landowner Financial Benefit, where any home within 500 feet of the Project will receive a payment ranging from \$10,000 to \$50,000 depending on proximity. (Application Exhibit G at 6.) Birch has also committed to a \$500,000 community development fund to be used at the community's discretion. (*Id.*)

Therefore, the uncontested evidence in record is that the Project would greatly benefit the local economy. But, in an unexplained deviation from many prior cases, the Board did not meaningfully consider the local economy in analyzing public interest under R.C. 4906.10(A)(6). Surely, if the Board is going to consider the potential local negative impacts of a Project, the proven local positive economic impacts also must be part of that analysis.

2. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would provide economic benefits regionally and statewide

Looking outside of the immediate Project locality, the evidence was uncontested and unrefuted that Project would provide significant economic benefits to the region and the State of Ohio as a whole. (Application Exhibit G at 6.) These benefits should have been considered by the Board under R.C. 4906.10(A)(6) in a "broad lens" analysis but were not.

The Ohio Chamber of Commerce noted in this case⁵ that "The Birch Solar Project is consistent with our mission to champion free enterprise, economic competitiveness, and growth for all Ohioans. Specifically, the Ohio Chamber notes the myriad of ways that Birch will serve the public interest and provide local, regional, and statewide economic benefits."⁶ The Ohio Chamber

⁵ Birch does not believe that nonevidentiary Public Comments, including those filed by the Ohio Chamber of Commerce and the Lima/Allen County Chamber of Commerce, should sway the Board. However, in light of the Board's reliance on negative Public Comments in its Order, positive Public Comments from respected economic organizations should at least be given similar consideration.

⁶ Ohio Chamber of Commerce Public Comment, filed September 23, 2022.

also stressed that solar development generally, and the Project specifically, is critical for Ohio to compete: “Ohio is in a constant race against other states to attract business. Those businesses are increasingly demanding renewable energy—especially affordable solar energy—from the states in which they choose to locate.” (*Id.*) Similarly, the Lima/Allen County Chamber of Commerce supports the Project, noting that “Birch Solar project will bring additional investment dollars into the community while helping to power area businesses and the local economy. . . . Projects like Birch Solar allow for energy investment and other economic benefits to remain local.”⁷

Nonetheless, despite the economic importance of the Project to the State as a whole, the Board failed to consider these critical regional and statewide public benefits.

3. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project would positively impact local agriculture

The Board is not faced with a choice between Ohio’s agricultural heritage and a new solar industry. The two go hand-in-hand. In prior cases, the Board has recognized that solar projects are a good fit for agricultural communities. For example, as indicated in numerous other projects, a solar project is “consistent with agricultural industry support, in that the facility would provide supplemental income to farmers and the land could be returned to agricultural production upon decommissioning.”⁸ In many cases, the Board and its Staff have indicated that a solar project’s

⁷ Public Comments concerning the Birch Solar Project filed by Jed E. Metzger, filed December 7, 2020.

⁸ *Hardin Solar Energy Facility*, 17-0773, Staff Report, entered November 21, 2017, at 12; *Willowbrook Solar Farm*, 18-1024, Staff Report, entered February 4, 2019, at 12; *Highland Solar Farm*, 18-1334, Staff Report, entered March 4, 2019, at 10; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶24; Staff Report, entered February 26, 2019, at 11; *Nestlewood Solar Facility*, 18-1546, Opinion, Order, and Certificate, entered April 16, 2020, at ¶28; Staff Report, entered May 15, 2019, at 12; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶34; Staff Report, entered on December 22, 2020, at 10; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶43; Staff Report, entered October 7, 2020, at 12; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶38; Staff Report, entered November 18, 2020, at 12; *Fox Squirrel Solar Farm*, 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶29; Staff Report, entered March 15, 2021, at 9; *Yellowbud Solar*, 20-

creation of pollinator habitat would enhance the visual appeal of the project, enrich local wildlife habitat, benefit the local farming community, increase plant diversity, improve water quality, and discourage invasive species.⁹

0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶25; Staff Report, entered November 30, 2020, at 10; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶29; Staff Report, entered January 11, 2021, at 10; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶33; Staff Report, entered March 16, 2021, at 10; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21, 2021, at ¶73; Staff Report, entered March 22, 2021, at 20; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶41; Staff Report, entered May 19, 2021, at 10; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶36; Staff Report, entered June 22, 2021, at 10; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶79; Staff Report, entered on May 10, 2021, at 10; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶42; Staff Report, entered June 14, 2021, at 10; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶41; Staff Report, entered June 28, 2021, at 10; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 10; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 12; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶33; Staff Report, entered August 24, 2021, at 10; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶38; Staff Report, entered July 7, 2021, at 9-10; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 10; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶30; Staff Report, entered September 13, 2021, at 9; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 28.

⁹ *Hardin Solar Energy Facility*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at ¶36; Staff Report, entered November 21, 2017, at 18; *Hillcrest Solar Farm*, 17-1152, Opinion, Order, and Certificate, entered February 15, 2018, at ¶39; Staff Report, entered November 15, 2017, at 20; *Willowbrook Solar Farm*, 18-1024, Opinion, Order, and Certificate, entered April 4, 2019, at ¶34; Staff Report, entered February 4, 2019, at 20; *Highland Solar Farm*, 18-1334, Opinion, Order, and Certificate, entered May 16, 2019, at ¶31; Staff Report, entered March 4, 2019, at 17; *Hardin Solar Energy II Facility*, 18-1360, Opinion, Order, and Certificate, entered May 16, 2019, at ¶34; Staff Report, entered February 26, 2019, at 17; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶47; Staff Report, entered on December 22, 2020, at 20; *Atlanta Farms Solar Farm*, 19-1880, Opinion, Order, and Certificate, entered December 22, 2020, at ¶55; Staff Report, entered October 7, 2020, at 23; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶50; Staff Report, entered November 18, 2020, at 23; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶38; Staff Report, entered November 30, 2020, at 21; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶46; Staff Report, entered January 11, 2021, at 20; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶47; Staff Report, entered March 16, 2021, at 21; *New Market Solar*, 20-1288, Opinion, Order, and Certificate, entered March 18, 2021, at ¶41; Staff Report, entered January 4, 2021, at 18; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶60; Staff Report, entered May 19, 2021, at 21; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶54; Staff Report, entered June 22, 2021, at 26; *Mark Center Solar Project*, 20-

Here, the Project is likewise consistent with the local agricultural industry. The Project would preserve and enhance farmland over the long-term (something that Shawnee Township has identified as a top priority in their Comprehensive Plan),¹⁰ provide critical income to farmers participating in or contracting with the Project, and diversify the local agricultural opportunities. (Application at 17-18.)

As in the prior solar projects approved by the Board, the Project would protect the local agricultural land and heritage by maintaining “the existing agricultural land’s typical low population densities by physically limiting other types of concurrent land use development on the leased properties.” (Staff Report, at 47.) Further, the land would be restored upon decommissioning in measurably *better* farming condition than it is in today. As the Board and Staff have indicated in other cases, by allowing the land to rest under restorative pollinator-friendly

1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶46; Staff Report, entered on May 10, 2021, at 20; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶72; Staff Report, entered June 14, 2021, at 22; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 29; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 27; *Union Ridge Solar*, 20-1757, Opinion, Order, and Certificate, entered January 20, 2022, at ¶63; Staff Report, entered August 16, 2021, at 25; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶50; Staff Report, entered August 24, 2021, at 26; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶64; Staff Report, entered July 7, 2021, at 24; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶69; Staff Report, entered October 8, 2021, at 29; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶63; Staff Report, entered September 13, 2021, at 28; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 28; *Harvey Solar Project*, 21-0164, Staff Report, entered February 25, 2022, at 27; *Nottingham Solar*, 21-0270, Staff Report, entered May 2, 2022, at 27; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 30; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 29; *Wild Grains Solar*, 21-0823, Staff Report, entered April 18, 2022, at 26; *Fox Squirrel Solar Farm*, 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶48; Staff Report, entered March 15, 2021, at 20; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered June 28, 2021, at 26; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 27.

¹⁰ Response to Fourth Data Request from Staff of the Ohio Power Siting Board, filed April 12, 2021.

groundcover, the soil would be healthier and more productive whenever farming operations resume.¹¹

The Staff Report in this case made this point:

Based upon the Applicant's collective data responses and Staff's examination of existing land uses, Staff opines that the proposed project would reinforce the continued low population density levels in the project area. Solar projects maintain the existing agricultural land's typical low population densities by physically limiting other types of concurrent land use development on the leased properties (with the notable exception of some continuing agricultural activities) and employing very few operations personnel to burden community services. This continuation of low population density also benefits the adjacent higher population density areas as increased high density land uses are not able to be physically adjacent and adverse aesthetic impacts are mitigated by landscape screening.

(Staff Report, at 47.)

Further, within Allen County, the Shawnee Township Comprehensive Plan designates the land within the Project Area as land to be used as agricultural in their Future Conceptual Land Use Map. (Application at 72.) Birch took the Comprehensive Plan into consideration in Project design, and maintained the agricultural aesthetic of the area by incorporating cedar farm fencing and is also working towards allowing sheep grazing within the Project. (*Id.*) The life of the Project corresponds with the long-term goals of the Comprehensive Plan, maintaining long-term agricultural use rather than industrial or residential zoning. (*Id.*)

¹¹ *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶65; Staff Report, entered May 24, 2021, at 24; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21, 2021, at ¶73; Staff Report, entered March 22, 2021, at 20; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶60; Staff Report, entered May 19, 2021, at 22; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶46; Staff Report, entered on May 10, 2021, at 20; *Cadence Solar*, 20-1677, Opinion, Order, and Certificate, entered November 18, 2021, at ¶72; Staff Report, entered June 14, 2021, at 23; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered June 28, 2021, at 26; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 27; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶50; Staff Report, entered August 24, 2021, at 26; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶64; Staff Report, entered July 7, 2021, at 24; *Marion County Solar*, 21-0036, Opinion, Order, and Certificate, entered November 18, 2021, at ¶63; Staff Report, entered September 13, 2021, at 28.

The Project is also partnering with Ohio State University, College of Food, Agricultural and Environmental Sciences on research relating to honey bee foraging in the Ohio agroecosystem. (Application at 63.) To facilitate this study, honey bee colonies (apiaries) will be established on the landscape through The Ohio State University and managed in collaboration with local beekeepers. (*Id.*) Studies have shown that co-locating solar with pollinator friendly groundcover can expand habitat for the dwindling bee population and can also benefit local agriculture. (*Id.*)

In short, the uncontested evidence establishes that the Project will enhance the local agricultural industry and heritage. The Board, despite the Staff Report setting forth the benefit of the Project and its own prior precedent recognizing this important benefit under R.C. 4906.10(A)(6), failed to consider evidence of this benefit here. This is unreasonable error that should be corrected on rehearing.

4. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project benefits Ohio through a diversified, affordable energy supply

Solar projects, including the Project here, benefit the public by providing increased, diversified, and affordable energy generation. In many past cases, the Board and its Staff have recognized this benefit: “the facility would serve the public interest, convenience, and necessity by providing additional electrical generation to the regional transmission grid, would be consistent with plans for expansion of the regional power system, and would serve the interests of electric system economy and reliability.”¹² Similarly, the Board has recognized that an “electric generation

¹² See *Hardin Solar Energy Facility*, 17-0773, Staff Report, entered November 21, 2017, at 25; *Vinton Solar Energy Facility*, 17-0774, Staff Report, entered July 5, 2018, at 25; *Alamo Solar Farm*, 18-1578, Opinion, Order, and Certificate, entered June 24, 2021, at ¶79; Staff Report, entered May 28, 2019, at 25; *Madison Solar Project*, 19-1823, Opinion, Order, and Certificate, entered March 18, 2021, at ¶57; Staff Report, entered on December 22, 2020, at 28; *Madison Fields Solar*, 19-1881, Opinion, Order, and Certificate, entered January 21, 2021, at ¶59; Staff Report, entered November 18, 2020, at 29; *Fox Squirrel Solar Farm*, 20-0931, Opinion, Order, and Certificate, entered July 15, 2021, at ¶61; Staff Report, entered March 15, 2021, at 26; *Yellowbud Solar*, 20-0972, Opinion, Order, and Certificate, entered February 18, 2021, at ¶48;

facility will provide a clean, sustainable source of electricity that will improve the quality and reliability of electric service in the area.”¹³ This is particularly important because, as the unchallenged testimony on behalf of Allen Auglaize Coalition for Reasonable Energy (“AACRE”) set forth, “Allen County has often been classified by the USEPA as one of the top emitters of toxic air pollution among all Ohio’s counties, at times topping the list.”¹⁴

But, again, the Board ignored its prior precedent under R.C. 4906.10(A)(6) and disregarded the evidence regarding this benefit in this case. This was unreasonable and should be corrected on rehearing.

Staff Report, entered November 30, 2020, at 29; *Arche Solar Farm*, 20-0979, Opinion, Order, and Certificate, entered April 15, 2021, at ¶57; Staff Report, entered January 11, 2021, at 25; *Powell Creek Solar Farm*, 20-1084, Opinion, Order, and Certificate, entered July 15, 2021, at ¶58; Staff Report, entered March 16, 2021, at 28; *Clearview Solar Project*, 20-1362, Opinion, Order, and Certificate, entered October 21, 2021, at ¶78; Staff Report, entered May 24, 2021, at 32; *Ross County Solar*, 20-1380, Opinion, Order, and Certificate, entered October 21, 2021, at ¶97; Staff Report, entered March 22, 2021, at 28; *Union Solar*, 20-1405, Opinion, Order, and Certificate, entered February 17, 2022, at ¶72; Staff Report, entered May 19, 2021, at 28; *Wheatsborough Solar*, 20-1529, Opinion, Order, and Certificate, entered September 16, 2020, at ¶64; Staff Report, entered June 22, 2021, at 35; *Mark Center Solar Project*, 20-1612, Opinion, Order, and Certificate, entered September 16, 2021, at ¶57; Staff Report, entered on May 10, 2021, at 28; *Hardin Solar III*, 20-1678, Opinion, Order, and Certificate, entered September 16, 2021, at ¶65; Staff Report, entered June 28, 2021, at 31; *Pleasant Prairie Solar*, 20-1679, Staff Report, entered July 1, 2021, at 35; *Yellow Wood Solar*, 20-1680, Staff Report, entered October 4, 2021, at 34; *Juliet Solar*, 20-1760, Opinion, Order, and Certificate, entered November 18, 2021, at ¶58; Staff Report, entered August 24, 2021, at 33; *Sycamore Creek Solar*, 20-1762, Opinion, Order, and Certificate, entered November 18, 2021, at ¶74; Staff Report, entered July 7, 2021, at 30; *Dodson Creek Solar*, 20-1814, Staff Report, entered October 22, 2021, at 33; *Tymochtee Solar*, 21-0004, Opinion, Order, and Certificate, entered March 17, 2022, at ¶76; Staff Report, entered October 8, 2021, at 36; *Palomino Solar*, 21-0041, Staff Report, entered June 14, 2021, at 34; *Harvey Solar Project*, 21-0164, Staff Report, entered February 25, 2022, at 33; *Nottingham Solar*, 21-0270, Staff Report, entered May 2, 2022, at 31; *Border Basin Solar*, 21-0277, Staff Report, entered March 16, 2022, at 36; *South Branch Solar*, 21-0669, Staff Report, entered April 11, 2022, at 35; *Wild Grains Solar*, 21-0823, Staff Report, entered April 18, 2022, at 32.

¹³ *Hardin Solar Energy Facility*, 17-0773, Opinion, Order, and Certificate, entered February 15, 2018, at ¶31; *Vinton Solar Energy Facility*, 17-0774, Opinion, Order, and Certificate, entered September 20, 2018, at ¶94.

¹⁴ Testimony of T. Rae Neal on Behalf of Allen Auglaize Coalition for Reasonable Energy, filed May 12, 2022, at ¶¶ 20-22.

5. It was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to disregard that the Project provides a beneficial use for property containing abandoned oil and gas wells

The Project is in proximity to a historic oil and gas field. As Staff explained:

This project is partially located within the mapped boundary of the Lima Consolidated Oil Field, which is a portion of . . . Lima Findlay Trenton Field. The project's proximity to this field is of importance due to the many orphan wells associated with the 1800's oil and gas drilling and development which took place during a period of no regulatory oversight

(Staff Report, at 24.)

As a result, the Staff Report recommended that the Project Area could not be safely developed due to an unfortunately common problem in much of Ohio: the potential for unmapped abandoned oil and gas wells. (Staff Report, 23-27.) More specifically, a preliminary investigation of the Project Area suggested that sixty oil and gas wells were potentially within the Project Area. (*Id.* at 27.) In other words, Staff did not find a problem with the Project, but found that the property comprising the Project Area itself was potentially unsuitable for beneficial development.

In response, the Project conducted extensive investigation of the Project Area and, coordinating closely with the Ohio Department of Natural Resources ("ODNR"), created a comprehensive Engineering Constructability Report. (Response to Staff Data Request 10, filed December 30, 2021, at Att. 1.) This Report found that, not only was the Project able to be safely constructed but, "during the 35-year operational life of the Project, the oil and gas wells within the Project area pose less of a human health risk than other potential land uses because of the minimal excavation for construction, minimal need for onsite operations or disruptions and secure nature of the facility with the Project fencing." (*Id.* at 5.) "Solar facilities, in many ways are ideal for historic oil and gas locations which could be harmed if additional more extensive infrastructure was created or a higher population density was established." (*Id.*) "The Birch Solar Project development preserves the land and ensures limited additional development of the site for the next

35 years or more, which can reduce potential impacts that might be associated with other types of development that include more intense excavations, grading of the site and possible disruption of the historic oil and gas features.” (*Id.* at 15.) This Report was supported by the testimony of Thomas Stewart at the adjudicatory hearing. (Direct Testimony of Thomas E. Stewart, filed May 4, 2022.)

Following the Project’s efforts, Staff agreed that the Project had addressed its concerns regarding constructing the arrays in proximity to abandoned wells, as the Board acknowledged in its Order. (Order, at ¶ 49.) (*See also* Prefiled Testimony of James S. O’Dell, filed May 11, 2022, at 4: 9-14) (“Applicant has . . . rectified these issues to Staff’s satisfaction by filing sufficient information and analysis in the docket.”)

Accordingly, the Project submitted evidence that it would provide a uniquely beneficial use for property burdened with abandoned oil and gas wells—property that the Staff originally deemed unsafe for development, and property that is all too common in Ohio. The Board, however, ignored this evidence. This was unreasonable and should be corrected on rehearing.

ASSIGNMENT OF ERROR NUMBER TWO: THE ORDER IS UNREASONABLE, UNLAWFUL, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE BOARD RELIED ON UNSUPPORTED, UNSWORN, AND DISPROVEN CLAIMS OF ADVERSE IMPACT OF THE PROJECT UNDER R.C. 4906.10(A)(6), IN VIOLATION OF OHIO SUPREME COURT AND BOARD PRECEDENT.

The Board acknowledged that “[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.” (Order, at ¶ 45.) The Board did not identify a single concern regarding the technical suitability, safety, or environmental impact of the Project. (*Id.*) In other words, no *evidence* in the record casts any doubt on the suitability on the Project.

Nonetheless, in its Order, the Board blindly accepted opposition from local governments raising nothing more than disproven allegations of potential harm. The Board compounded this error by failing to consider any conditions to mitigate potential impacts to the public interest, despite evidence in the record that such conditions would be appropriate and acceptable to the local governments. These errors were unreasonable and should be corrected on rehearing.

1. It was unreasonable, unlawful for the Board to rely on allegations of harm that were unsupported or disproven in the record

In the face of the many proven public benefits of the Project, the opposition offered little (if any) contrary evidence in the record. For example, the Board noted that “the Auglaize County Board of Commissioners raised *concerns* regarding ‘numerous potential impacts on users and property owners in the vicinity of such developments’ and ‘considered the potential impacts of development as well as the interest of property owners in making their land available for development.’” (Order, ¶ 64.) The Board also pointed to Allen County officials’ *concerns* regarding the “Project’s (1) lack of dedicated local power, (2) impact on land use, (3) impact on property values, (4) decommissioning plan, (5) impact on drinking and groundwater, (6) road maintenance, (7) drainage, and (8) communication regarding negotiations as to distributing PILOT to local governments.” (*Id.* at ¶ 63.)

What Auglaize and Allen County did not do, however, was submit any supporting *evidence* of the truth of these potential impacts or the validity of these concerns. The Auglaize County Commissioners did not submit any pre-filed testimony or enter an appearance at the adjudicatory hearing. In fact, as the Board acknowledged, Auglaize County took “no position on whether the project should be certified by the Board” by the time of the hearing. (Order, at ¶ 39.) The Allen County Commissioners did not intervene and, as such, is not even a party in this case.

This, in itself, should have been enough for the Board to disregard the Counties’ allegations of potential harm. In prior cases, the Board has done just that— holding opponents to their burden of proof and disregarding allegations of harm that had no evidentiary support. In *Ice Breaker Windpower, Inc.*, for example, the Board noted that local opponents argued that the project would cause electricity costs to rise, but “provided no evidence demonstrating that . . . rates would increase as a result of the power purchase agreement, apart from the bare allegations proffered by Dr. Brown.” (Order, *In the Matter of Icebreaker Windpower, Inc. for a Certificate of Environmental Compatibility and Public Need*, 16-1871-EL-BGN, ¶ 189, May 21, 2020.) The Board therefore concluded, “[a]s such, the arguments proffered by the [opponents] to establish that the proposed project will not promote the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6) are misplaced.” (*Id.*)

Here, as the Board itself made clear, there are *no* valid technical concerns with the suitability of the Project. “The 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.” (Order, at ¶ 45.) More granularly, Birch’s Reply Brief laid out examples of the uncontested evidence in the record that directly addressed and resolved each of the Counties’ concerns,¹⁵ now resurrected in the Order. Further, the Ohio Department of Health has analyzed a number of potential negative impacts of a solar facility to public health and convenience – noise, electromagnetic fields, heat, glare, toxicity of materials – and determined that each of these concerns is unsubstantiated.¹⁶

¹⁵ Reply Brief of Birch Solar 1, LLC, filed September 29, 2022, at 12-14.

¹⁶ Health Assessment Section Bureau of Environmental Health and Radiation Protection Ohio Department of Health, Ohio Department of Health Solar and Photovoltaics Summary and Assessment, April 22, 2022. (Available at: https://odh.ohio.gov/wps/wcm/connect/gov/fc124a88-62b4-4e91-b30b-bc1269d0dde5/ODH+Solar+Farm+and+PVs+Summary+Assessments_2022.04.pdf/)

While two Counties may have raised concerns regarding the Project to justify their opposition, the Board was well aware that these concerns were unfounded and disproven – by the Ohio Department of Health, by the uncontroverted evidence in the record, and by the findings in the Order itself. The Board’s reliance on these proven-false concerns in its Order was thus unreasonable and should be corrected on rehearing.

2. It was unreasonable and unlawful for the Board to weigh the quantum of positive and negative Public Comments

In this case, the only party representing local residents that provided pre-filed testimony and participated in the hearing is Allen Auglaize Coalition of Reasonable Energy (“AACRE”), which is in *favor* of the Project.¹⁷ The Auglaize County Commissioners and Logan Township Trustees did not submit any pre-filed testimony—and, as the Board acknowledged, they now “take no position on whether the project should be certified by the Board.” (Order, at ¶ 39.) The Shawnee Township Trustees likewise did not submit any testimony. Against Birch Solar and its members voluntarily withdrew from the case.¹⁸ The Allen County Commissioners did not intervene and, as such, were never even a party.

In its Order, however, the Board did not differentiate between sworn evidence from parties and unsworn Public Comments. In fact, the Board favored the latter. Rather than rely on testimony that was subject to cross-examination, the Board relied on the breakdown of the Public Comments, simply tallying the number of comments for and against the Project. “The Board takes notice of the large number of public comments filed in the case, which disfavor the Project at a ratio of approximately 80 percent to 20 percent.” (Order, ¶ 70.) “While we recognize that public

¹⁷ See Testimony of A. Chappell-Dick, Michael Wildermuth, Everett Lacy, T. Rae Nea, Frank Caprilla on behalf of Allen Auglaize Coalition of Reasonable Energy, filed May 12, 2022.

¹⁸ Notice of Withdrawal from Intervention electronically filed by Mr. Jack A. Van Kley on behalf of Against Birch Solar, LLC and Members, filed May 16, 2022.

comments are not evidence that has been admitted to the case, and thus, are less reliable than the admitted evidence, we nevertheless uphold that they are relevant to our consideration of the matter.” (*Id.*)

This is a departure from past Board precedent and improperly turns a merit-based siting process into a popularly contest divorced from the merits of the Application. Until recently, negative comments have not been reason enough to deny a Certificate. In past cases, the Board has received “thousands of comments from members of the general public, local organizations, and local officials” opposing a project, but nonetheless looked to the underlying merits of the project and relied on the record. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, at 82-83, November 21, 2019).

Further, in a decision issued the very same day as the Order here, the Board stressed the importance of *evidence*, and explained that unverifiable opposition should not be considered. (Order, Opinion, and Certificate, *In re the Application of Harvey Solar I, LLC*, 21-164-EL-BGN, at ¶ 158, October 20, 2022). In *Harvey Solar*, the Board ruled that certain petitions created by an opposition group were unreliable and, therefore, were not admissible evidence: “the Board finds that the reliance on petitions for which the identity of the denoted individuals cannot be confirmed is not appropriate for consideration relative to the ultimate determination in this case.” (*Id.*)

In these other cases, regardless of the number or proportion of negative comments, the Board still undertook its duty to review the actual evidence in the case to and determine the merits of a project. Nonetheless, in this case, the Board simply chose to count hands raised for against and the Project in the Public Comments,¹⁹ none of which were evidence in the record.

¹⁹ Notably, in counting the Public Comments, the Board did not acknowledge that many Public Comments were submitted by the same few individuals. Further, the Board did not acknowledge that members of Against Birch Solar who voluntarily withdrew from the case were among the most frequent commenters and accounted for an outsized proportion of the negative Public Comments. While the Board should not

Here, the Board placed unwarranted weight on the sheer number of unsworn and untested negative Public Comments in reaching its decision that the Project does not serve the public interest. This was unreasonable error, sets dangerous precedent, and incentivize vexatious and false submissions. The Board should correct this error on rehearing.

3. It was unreasonable and unlawful for the Board to refuse to consider Certificate Conditions to mitigate any negative impacts on the local jurisdictions

The Ohio Supreme Court has held that the Board does not need to resolve each and every issue prior to issuing a certificate because R.C. 4906.10(A) “expressly allows the board to issue a certificate subject to such conditions as it considers appropriate.” *In re the Application of Icebreaker Windpower, Inc.*, Slip Opinion, 2022-Ohio-2742, ¶ 40. *See, e.g., In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 16-18); *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 52.

Therefore, in prior cases, the Board has considered the ability of certificate conditions to mitigate potential negative impacts of a project. In the Icebreaker Windpower demonstration project, for example, the Board addressed potential wildlife harm through conditions rather than an outright denial. “Rather than requiring Icebreaker to resolve those matters before issuing the certificate, the board determined that the conditions on its grant of the certificate were sufficient to protect birds and bats and to ensure that the facility represented the minimum adverse environmental impact.” *In re the Application of Icebreaker Windpower, Inc.*, Slip Opinion, 2022-Ohio-2742, ¶ 37. (*See also* Order, Opinion, and Certificate, *In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013, ruling that “[T]he Board finds that,

have granted Public Comments such great weight, it should not have granted these Public Comments any weight at all.

with respect to health and safety concerns, such as setbacks (including blade shear, ice throw, shadow flicker, and noise), these concerns have been thoroughly considered and appropriately addressed in the conditions contained in the Conclusions and Conditions section of this Opinion, Order, and Certificate.”)

More recently, the Board applied this approach to a solar project in order to address concerns related to public opposition – the same and *only* issue identified in the Order here. In *Dodson Creek*, the Board adopted a stipulation approving the project but, noting general opposition and “concerns raised by the public relative to the proposed Project,” imposed conditions incorporating upgraded fencing and enlarged setbacks from non-participating parcels, residences, and paved roads. (Order, Opinion, and Certificate, *In the Matter of Dodson Creek Solar LLC for a Certificate of Environmental Compatibility and Public Need*, 20-1814-EL-BGN, ¶ 114, May 21, 2020.) These conditions, the Board determined, addressed the public’s concerns. (*Id.*)

Here, contrary to this precedent, the Board did not consider any conditions to address its concerns related to public opposition. This failure is especially striking because Auglaize County and Logan Township, two of the four local jurisdictions identified in the Order as opposing the Project, have already agreed to 40 draft conditions. (Order, at ¶ 71.) In so doing, these jurisdictions have made it clear what conditions they want to see put into place if the Project goes forward — but the Board flatly refused to even consider these agreed-to conditions. (*Id.*) (“We reject the conclusion that Partial Stipulating Parties have waived in their opposition to the Project.”) The Board denies the Certificate based entirely on perceived public sentiment of local jurisdictions, but refuses to consider the express sentiment from these same jurisdictions when it comes to conditions.

Again, the Board departed from its prior precedent and ignored the evidence in the record regarding the availability of conditions to mitigate any potential harm in this case, all in order to reject the Certificate. This was unreasonable error.

ASSIGNMENT OF ERROR NUMBER THREE: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD IMPROPERLY ABROGATED ITS SOLE AND PLENARY AUTHORITY TO DETERMINE THE ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED OF THE PROJECT UNDER THE FACTORS SET FORTH IN R.C. 4906.10(A)

- 1. The Board unlawfully delegated its sole and plenary power to review the Project’s application for a Certificate of environmental compatibility and public need under R.C. 4906.10(A) to the public sentiment in the local jurisdictions**

The Board denied the Project’s Certificate for a single reason: “Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project,²⁰ the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).” (Order, ¶ 72.)

As set forth below, this myopic approach is not only an unreasonable departure from past Board precedent, but it violates Ohio public policy, Ohio’s Constitutional nondelegation doctrine, and multiple Ohio laws. These errors must be corrected on rehearing.

- a. The Board’s approach is a violation of Ohio public policy regarding large-scale energy generation and other matters of statewide importance**

The Boards approach in this case runs contrary to the very purpose of the Ohio Power Siting Board. The Board was created so a consortium of Ohio agencies could consider large energy projects on their merits under the diverse criteria set forth in R.C. 4906.10. As the Board states:

Our mission is to support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens,

²⁰ Birch notes that the Board elsewhere acknowledges that opposition is less than “unanimous and consistent,” as Auglaize County and Logan Township “take no position on whether the project should be certified by the Board.” (Order, at ¶ 39.) Allen County did not even intervene.

promoting the state's economic interests, and protecting the environment and land use.

(Ohio Power Siting Board, OPSB Mission.²¹)

This type of holistic state-level review is necessary because *the public as a whole* has a stake in these projects. It not merely the local jurisdictions that touch or neighbor projects that must be considered. If that were the case, any amount of localized NIMBYism could derail large-scale solar generation projects.

Here, for example, in polling conducted in the Lima area, 70% of local voters agreed it is important to bring new sources of clean energy to Ohio and nearly 75% of local voters saw solar farms as beneficial to the economy and environment. (Application Exhibit 30A, Att. SM-3.) The Board acknowledged these results, but disregarded them because these local voters, while strongly supporting solar development *somewhere* in Ohio, did not necessarily support development of the Project in their own backyard. (Order, ¶ 70.) Early local polling support for the Project, despite little information about the Project and its potential benefits being known, was “only 45 percent.” (*Id.*) In short, polling indicated that locals had a kneejerk negative reaction to the Project despite having little information and before looking into the benefits.

That disconnect is precisely why the Board has ruled in other cases that a project’s larger benefits to the state, the public, and the grid outweigh local disapproval. The Board, in *In re Duke Energy Ohio*, approved a project even though there were “thousands of comments from members of the general public, local organizations, and local officials” and opposing intervention from multiple local governments. (Order, Opinion, and Certificate, *In re Duke Energy Ohio, Inc.*, 16-253-GA-BTX, at 82-83, November 21, 2019). Similarly, in *In re Champaign Wind*, the Board

²¹ Available at: <https://storymaps.arcgis.com/stories/9bf2d0fc20214ffdaa3ae83a1fc9faa5>

ruled that a project benefited the public even though multiple opposing local governments intervened and presented nine witnesses at the adjudicatory hearing. (Order, Opinion, and *Certificate, In the Matter of the Application of Champaign Wind, LLC*, 12-160-EL-BGN, at 3, May 28, 2013). In that case, the Board took a broad view and ruled “that, in considering whether the proposed project is in the public interest, convenience, and necessity, we have taken into account that the renewable energy generation by the proposed facility will benefit the environment and consumers.” (*Id.* at 72.)

As in the *Duke Energy Ohio* and *Champaign Wind* cases, the Board in this case is tasked with considering whether the Project furthers the goals embodied in the Board’s overall mission and the goals of its member state agencies. Therefore, the close alignment of the Project with Ohio’s top statewide policy priorities (*i.e.*, water conservation, statewide economic development, pollinator habitat, generation capacity, beneficial use of historic oil and gas fields, etc.) should have been considered by the Board in evaluating the impact on the public interest.

But the Board did not consider any of those things.

Instead, the Board deferred its sole and plenary authority to make a statewide public interest decision to the whims of local jurisdictions. As the Ohio Chamber of Commerce noted in this case:

While legitimate local concerns should be carefully evaluated, local opposition based on hyperbole and allegations without supporting evidence and testimony should not dictate the outcome of the OPSB permitting process. Allowing it to do so undermines the fundamental purpose of the OPSB to balance a variety of interests when siting important energy infrastructure.

(Ohio Chamber of Commerce Public Comment, filed September 23, 2022.)

The Board failed to look beyond baseless local opposition in determining that the Project failed to serve the public interest under R.C. 4906.10(A)(6). There is no reason for a statewide

permitting regime staffed with diverse subject matter experts, like the Ohio Power Siting Board, if untested local prejudices carry the day.

As a result of the Board's abrogation of its authority, the best interests of Ohio and Ohioans as a whole are not represented (or even considered) in the Board's Order. This is unreasonable and unlawful.

b. The Board's dependence on public sentiment is a violation of the Constitutional nondelegation doctrine

In denying the Certificate and preventing the beneficial use of privately-owned property, the Board improperly delegated its regulatory powers to private residents and local jurisdictions: "Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order, ¶ 72.)

Under the Constitutional nondelegation doctrine, it is a violation of due process for the state government to empower "a few citizens to deny an individual the use of his property" – precisely as the Board did here. *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 664 (4th Cir. 1989).

"At least since *Yick Wo v. Hopkins*, 118 U.S. 356 [6 S.Ct. 1064, 30 L.Ed. 220] (1886)," the Supreme Court teaching is that the due process clause "places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself." *McGautha v. California*, 402 U.S. 183, 272 n. 22, 91 S.Ct. 1454, 1473 n. 22, 28 L.Ed.2d 711 (1971) (Brennan, J., dissenting). This is particularly true where the power delegated relates to the ability to develop and use property. See, e.g., *Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) (setting of property line by adjacent owners); *Embree v. Kansas City & Liberty Blvd. Road Dist.*, 240 U.S. 242, 36 S.Ct. 317, 60 L.Ed. 624 (1916)

(determination of boundary for road district by petition of landowners); *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330 (1926) (same as *Embree*); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) (zoning variance only by consent of adjacent owners). “These opinions still stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion.” *Gen. Elec. Co. v. New York State Dep't of Lab.*, 936 F.2d 1448, 1455 (2d Cir. 1991).

In *Geo-Tech*, for example, the court struck down a West Virginia law that permitted a state agency to deny a permit if a project is “significantly adverse to public sentiment,” even though the project in question had inspired hundreds of letters in opposition. *Id.* at 663 (holding that the law “violated due process by impermissibly delegating legislative authority to local citizens.”) Such delegation to public sentiment, the Supreme Court has explained, is repugnant because it empowers neighbors “to withhold consent for selfish reasons or arbitrarily” to block otherwise lawful and beneficial development. *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122, 49 S. Ct. 50, 52, 73 L. Ed. 210 (1928). Further, even if the State remains able to exercise its authority, it is nonetheless a violation of the nondelegation doctrine and unconstitutional if, in fact, the State does not actually exercise that discretion. *Gen. Elec. Co.*, 936 F.2d at 1458.

The nondelegation doctrine is as applicable to the Board as it is to the legislature. *See Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 381 N.W.2d 842, 847 (Minn. 1986) (“The question is not whether the legislature unlawfully delegated its powers to the Commission, but whether the Commission unlawfully delegated its powers to a private entity.”) Under both

situations, “the policy considerations that underlie the delegation doctrine are applicable . . . and the inquiry is the same: whether adequate legislative or administrative safeguards exist to protect against the injustice that results from uncontrolled discretionary power.” *Id.*

Here, the Board has delegated its authority to the local residents and jurisdictions without placing any such safeguards in place. Whether or not the Board nominally retains the authority to exercise its siting power is not the question. The question is whether the Board chose to exercise that power in fact, or whether it has chosen instead to empower a few private citizens and local jurisdictions to make the decision on its behalf. Clearly, it is the latter. The Board, despite being bestowed with plenary authority over the certification process by the Ohio General Assembly, did not exercise *any* independent analysis or fact-finding to test the allegations and complaints made by the local residents and jurisdictions regarding the Project. As set forth above, the Board merely accepted the complaints of the opponents at face value, despite overwhelming contrary evidence in the record, and adopted their opposition wholesale to prevent the development of the Project on private property.

The Ohio General Assembly itself would be unable to establish such a siting standard and pass constitutional muster. Surely, the Board cannot establish such a standard for itself. Accordingly, the Order is unlawful, unreasonable, and unconstitutional. It must be reconsidered.

c. **The Board’s approach is a violation of Chapter 4906 of the Ohio Administrative Code and Chapter 4906 of the Ohio Revised Code, including R.C. 4906.13(B)**

In addition to being a violation of Ohio’s public policy and Constitution, the Board’s total reliance on the opinions of the local jurisdictions violates Ohio law. Ohio law is clear that the Board, and *only* the Board, is authorized to determine the permissibility of a large-scale solar project. Chapter 4906.10(A), for example, speaks only in terms of findings regarding the Certificate that *the Board* must make. No one else.

This exclusive and plenary authority is made explicit under R.C. 4906.13(B), which provides that “[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” The Board, however, did just this. The Board, in denying the Project’s Certificate, required the approval and consent of the local political subdivisions. In fact, the presence or absence of this local subdivision approval is the *only* factor the Board seems to have considered.

Accordingly, the Order is unlawful and must be reconsidered.

2. The Board failed to consider the factors in R.C. 4906.10(A) and instead impermissibly relied on a single criterion not enumerated in or permitted by the statute

The Board, as a creature of statute, may exercise only those powers that the General Assembly confers on it. *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. The General Assembly, in R.C. 4906.10, provides the certification criteria the Board must consider in granting a certificate for the construction, operation, and maintenance of a solar-powered electric generation facility unless it finds and determines all of the following:

- (1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline.²²
- (2) The nature of the probable environmental impact.
- (3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.
- (4) That the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and

²² As this Project is a proposed electric generating facility, this criterion is not applicable.

interconnected utility systems and that the facility will serve the interests of electric system economy and reliability.

- (5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.
- (6) That the facility will serve the public interest, convenience, and necessity.
- (7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929 of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.
- (8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

However, instead of relying on these factors as required by the Ohio Revised Code, the Board invented its own single-factor standard. The Board relied on a single consideration in denying the Project a Certificate: public opposition from local jurisdictions. This single determinative factor appears nowhere in R.C. 4906.10(A). And it is not for good reason. As set forth above, simply because there is local opposition to a project does not mean that a project is not in the public interest.

The Board rewriting the statute to focus solely on local public opposition was unreasonable and unlawful.

ASSIGNMENT OF ERROR NUMBER FOUR: THE ORDER IS UNREASONABLE, UNLAWFUL, AND UNCONSTITUTIONAL BECAUSE THE BOARD VIOLATED AND

PURPORTED TO ADMINISTRATIVELY AMEND THE TEXT AND PUBLIC POLICY OF AMENDED CHAPTER 303 OF THE OHIO REVISED CODE (“SB 52”)

The Board’s Order is unreasonable and unlawful because it attempts to impermissibly legislate in the place of the Ohio General Assembly. In addition to impermissibly modifying R.C. 4906.10(A) as set forth above, the Board’s Order violates and purports to *de facto* amend SB 52 as enacted by the General Assembly. Because this Board action conflicts with the directive of the General Assembly regarding the siting of utility-scale solar projects, it is in violation of the separation of powers in the Ohio Constitution.

“[I]f an administrative policy exceeds the statutory authority granted by the General Assembly, the agency has usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution.” *McFee v. Nursing Care Mgt. of Am., Inc.*, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 24. Policies promulgated by administrative agencies are unenforceable if they are in conflict with statutory enactments covering the same subject matter. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 18. *See, e.g., State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 2002-Ohio-7041, 781 N.E.2d 163, at ¶ 21 (“the General Assembly is the ultimate arbiter of public policy”); *Carroll v. Dept. of Adm. Servs.* (1983), 10 Ohio App.3d 108, 110, 460 N.E.2d 704 (“In the absence of clear legislative authorization, declarations of policy . . . are denied administrative agencies and are reserved to the General Assembly”).

The General Assembly, in enacting SB 52, drastically changed the siting landscape and future of solar development in Ohio. Under this new law, utility-scale solar projects are subject to two levels of permitting approval: county and state. First, at the county level: At least 90 days prior to applying to the Board for a certificate, a project must hold a public meeting in each county where the facility is to be located. Following the public meeting, the county board of

commissioners has 90 days to adopt a resolution prohibiting or reducing the proposed project in size.

Second, at the State level: If the County Commissioners either approve, reduce, or take no action regarding the project, the project may file its application before the Board. S.B. 52 creates two new voting ad hoc members of the Board, the chairperson of the township board of trustees and the president of the county board of commissioners, or their designees.

By design, not every project is subject to SB 52. The General Assembly chose to include a robust two-tiered grandfathering scheme in the law in order to provide certainty to the many projects already pending approval by the Board that this new level of local control would not apply to their applications.²³ It is uncontested that Birch is a fully grandfathered project, meaning it is not subject to any component of SB 52. “The Board acknowledges that this case is not impacted by SB 52, which subjects solar projects that are filed after October 11, 2021 to increased county-level and township-level review and participation in the Board’s certification process.” (Order, ¶ 69, fn. 9.)

However, despite Birch’s status as a fully grandfathered project and the Board’s admission that SB 52 should not apply to this case, the Board in fact fashioned and applied its own version of SB 52 to the Project, relying entirely on the opinion of local political subdivisions in reaching its permitting decision. At multiple points in the Order, the Board made this application explicit. The Board often supported its reasoning that the Project did not serve the public interest by arguing that the Project *would* be barred by the local jurisdictions under SB 52 if not for grandfathering. (Order, ¶¶ 39, 61, 63, 65, 69.) In other words, although the Board acknowledged that SB 52 is not

²³ The grandfathering provisions for solar projects are set forth at sections 4 and 5 of S.B. 52.

supposed to apply to the Project, it nonetheless denied the Certificate based on how it believed SB 52 would have applied. That is just another way of applying the new law to the Project.

As a grandfathered project, Birch is entitled to participate in the prior statewide siting process that explicitly prohibits a local approval requirement. R.C. 4906.13(B). That is the compromise the General Assembly enacted. The Board's imposition of SB 52 on a grandfathered project like Birch is a violation of its mandate from the General Assembly and, as a result, a violation of the Ohio Constitution.

There is an even larger issue, however. The Board's approach in the Order (whether the Board acknowledges its approach as the application of SB 52 or not) is not a faithful application of SB 52. The Order is inconsistent with the spirit and text of the law passed by the General Assembly. The Board took the General Assembly's policy behind SB 52—enhanced local leverage over large-scale solar projects— and stretched it to the extreme. In so doing, the Board denied Birch any of the necessary procedural safeguards that the General Assembly built into SB 52:

- While SB 52 requires that projects receive an official decision from the county before undertaking the expense of filing their application and beginning the state-level siting process, the Board here deferred to unsworn public comments, correspondence, and emails from any political subdivision provided at any point in the proceeding – even after the Staff Report was issued and on the eve of hearing. (Order, ¶¶ 63-66.)
- While SB 52 empowers a single county and township designee to participate in an official capacity as de facto Board members, the Board here gave full deference to unsworn and disproven complaints and emails from any county or township official. (*Id.*)

- While SB 52 requires counties to make a final determination on suitability within 90 days of the county-level meeting, the Board here allowed endless leeway for local governments to change their positions as often as they wished and at any point, inserting uncertainty late into the permitting process. The Board’s Staff itself changed its recommendation regarding the public interest criteria between the issuance of the Staff Report and the adjudicatory hearing due to last-minute local opposition, creating an impossible moving target for the Project and unworkable precedent for future developers. (*Id.* at ¶¶ 48, 49.)

Under the Board’s approach in this case, it was enough that any official from any level of local government expressed dissatisfaction with the Project in any form. SB 52 itself does not go nearly so far. The General Assembly, in enacting SB 52 after much testimony, debate, amendments, and multiple hearings,²⁴ determined the appropriate level and means of control for local jurisdictions over utility-scale solar projects. The Board’s Order here violated that legislative directive. The Board rewrote the General Assembly’s enactment into an unworkable standard.

The Board’s Order is unreasonable, unlawful, and unconstitutional. These errors must be corrected on rehearing.

IV. CONCLUSION

For the foregoing reasons, Birch requests that the Board grant this application for rehearing.

Respectfully submitted,

BRICKER & ECKLER LLP

²⁴Over eight months, the Senate Energy and Public Utilities Committee held six hearings, the House Public Utilities Committee held five hearings, and hundreds of witnesses provided testimony either supporting or opposing the bill. The Ohio Legislature, 134th General Assembly, Senate Bill 52 (details available at: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-52>)



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Case No(s). 20-1605-EL-BGN

Summary: Application for Rehearing of Birch Solar I, LLC electronically filed by
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