BEFORE
THE OHIO POWER SITING BOARD

In The Matter of The Application of **Scioto Farms Solar Project, LLC**, for a Certificate of Environmental Compatibility and Public Need For The Construction of a Solar Powered Electric Generation Facility in Wayne Township, Pickaway County, Ohio.	))))))	Case No. 21-868-EL-BGN

APPLICANT SCIOTO FARMS SOLAR PROJECT, LLC'S MOTION TO STRIKE CERTAIN IMPROPER INTERVENOR TESTIMONY AND EXHIBITS

Applicant Scioto Farms Solar Project, LLC's ("Scioto Farms Solar") respectfully moves the Ohio Power Siting Board ("Board") or its Administrative Law Judge ("ALJ"), pursuant to Ohio Administrative Code ("O.A.C.") Rules 4906-2-27 and 4906-2-09(B)(4), to strike from the record portions of the pre-filed direct testimony and exhibits thereto submitted on February 13, 2023 by Intervenors Suzannah Ebenhack, Thomas E. Ebenhack, and Wesley Ebenhack (together, the "Ebenhack Witnesses"), who are offering testimony on behalf of themselves and the other Intervenor Ebenhack family members, Scarlett Y. Ebenhack and Thomas J. Ebenhack (all five individuals together, the "Ebenhack Intervenors"). Specifically, portions of the Ebenhack Witnesses' testimony and exhibits constitute hearsay, are unreliable, prejudicial, and otherwise improper with regard to the issues before the Board in this proceeding and, as a result, should be precluded from introduction at the hearing and admission into the evidentiary record.

As detailed in the attached Memorandum in Support, Ohio law outlines seven specific factors the Board considers when determining whether to grant a certificate for the construction, operation, and maintenance of a solar-powered generation facility ("Certificate"). Portions of the written testimony and accompanying exhibits of the Ebenhack Witnesses contain hearsay that

should be excluded. In addition, portions of their testimony and exhibits contain unsupported and prejudicial information and purport to offer opinions despite lack of qualification as an expert. The Board or ALJ should exclude the improper material contained in the testimony and exhibits of the Ebenhack Witnesses from the evidentiary record and presentation at the hearing.

The reasons and authority in support of this Motion are set forth more fully in the attached Memorandum in Support.

Respectfully submitted on behalf of:
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MEMORANDUM IN SUPPORT

I. LEGAL AUTHORITY

Pursuant to O.A.C. Rule 4906-2-09(B)(4), the Board and ALJ regulate the course of the hearing and rule on procedural motions and other procedural matters.

As discussed further below, because portions of the testimony of the Ebenhack Intervenors' witnesses Suzannah Ebenhack, Thomas E. Ebenhack, and Wesley Ebenhack constitute hearsay, are unreliable, prejudicial, and otherwise improper in relation to the issues before the Board, that testimony and the related exhibits should be stricken from the record and precluded from being presented at the hearing.

In this determination, the Ohio Rules of Evidence may be considered in an advisory capacity in relation to an administrative hearing. *Board of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision,* 74 Ohio St.3d 415, 417 (1996). An administrative agency should not act on evidence that is clearly not admissible, competent, or probative of facts that the agency is to determine. *Haley v. Ohio State Dental Bd.,* 7 Ohio App.3d 1, 6 (2d Dist.1982); *In re Application of Milton Hardware Co.,* 19 Ohio App.2d 157, 162 (10th Dist.1969). Administrative

agencies have a duty to base their conclusions on competent evidence. *State ex rel. Chrysler Plastic Products Corp. v. Industrial Comm.*, 39 Ohio App.3d 15, 16 (10th Dist.1987).

R.C. 4906.10 outlines the permissible grounds for Board decisions granting or denying a Certificate. The Board may grant a Certificate if 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;[1] (2) the nature of the probable environmental impact; (3) that the facility represents the minimum adverse environmental impact . . . (4) . . . that the facility is consistent with regional plans for expansion of the electric power grid and . . . . will serve the interests of the electric system economy and reliability; (5) that the facility will comply with [other sections of Ohio law]; (6) that the facility will serve the public interest, convenience, and necessity; (7) . . . what its impact will be on the viability as agricultural land of any land in an existing agricultural district . . . (8) that the facility incorporates . . . water conservation practices.

II. PORTIONS OF EACH OF THE EBENHACK WITNESSES' TESTIMONY AND CERTAIN EXHIBITS THERETO SHOULD BE STRICKEN.

In their pre-filed direct testimony, each of the Ebenhack Witnesses alleges that Pickaway County (and in some cases, Ross County) residents signed petitions that by virtue of signing "stat[e] their opposition to the Project," attaching these purported petitions as exhibits to their testimony. See Suzannah Ebenhack pre-filed direct testimony at Question 30, Answer to Question 30, and Exhibit A; Thomas E. Ebenhack pre-filed direct testimony at Question 12, Answer to Question 12, and Exhibit A; and Wesley Ebenhack pre-filed direct testimony Question 35, Answer to Question 35, and Exhibit A. Wesley Ebenhack also attaches a petition purporting to contain signatures of Ross County residents, who live "no further than 13 miles from the Project Area." See Wesley Ebenhack pre-filed direct testimony at Question 36, Answer to Question 36, and Exhibit B.

[1] Because the Scioto Farms Solar Project ("Project") is not a gas pipeline and does not include approval of an electric transmission line, the first factor regarding "the basis of the need for the facility" is not applicable.

The Ebenhack Witnesses allege that the information in the listed questions, answers, and exhibits reflects the opinions and positions of numerous other individuals in Pickaway and Ross Counties. Those alleged other people will not be present to give their own testimony at the evidentiary hearing or be subject to cross-examination, and none of the Ebenhack Witnesses can testify and make assertions on their behalf. Their attempt to do so via this testimony and the attached exhibits is barred by the rule against hearsay. *See State v. May,* 2011-Ohio-6637, 970 N.E.2d 1029, ¶ 38 (7th Dist.) ("The purpose of the rule against hearsay is to keep unreliable evidence, particularly evidence that is not subject to cross-examination, away from the jury or trier of fact.").

Furthermore, the statements and exhibits that are the subject of this Motion are unreliable, prejudicial, and inadmissible insofar as there is no way to know what information was provided to the individuals at the time (or if they were even the listed individuals), what statements may have been made, or any other influencing factors if they did sign a petition.

In addition to the fact that the testimony and petitions are unreliable under the circumstances, permitting them to be admitted without opportunity for cross examination is highly prejudicial.

Thus, the above-identified portions of the Ebenhack Witnesses' testimony and exhibits should be stricken. *See Saum ex rel. Saum v. Kelly,* 3rd Dist. Hancock No. 5-04-53, 2005-Ohio-2895, ¶ 22 ("[W]e find that the trial court correctly disregarded . . . testimony . . . because it was not based on personal knowledge and constituted hearsay").

This Board has recently considered a nearly identical Motion to Strike for similar lists of purported opponents and found it must be excluded. In its October 2, 2022 Order, Opinion, and Certificate in *In re: Application of Harvey Solar I, LLC*, 21-164-EL-BGN, at ¶ 158, the Board

ruled that certain petitions created by an opposition group were unreliable and, therefore, were not admissible evidence, stating: "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.*)

Like there, here the testimony and attached petitions purport to express the opinions and views of the included individuals, who will not be present at the hearing for cross examination. The result should be the same, here: to strike and exclude this testimony and exhibits.

II. CONCLUSION

In accordance with the foregoing, Scioto Farms Solar respectfully moves the Board or ALJ to strike from the evidentiary record the portions of the pre-filed direct testimony and exhibits of the Ebenhack Witnesses that are addressed herein, and to preclude that testimony and exhibits from being presented at the hearing on this matter. For ease of reference, the specific portions of the Ebenhack Witnesses' testimony and exhibits that should be stricken in their entirety are:

Suzannah Ebenhack:

- Question 30;
- Answer Question 30; and
- Exhibit A.

Thomas E. Ebenhack:

- Question 12;
- Answer to Question 12; and
- Exhibit A.

Wesley Ebenhack:

- Questions 35-36;
- Answers to Questions 35-36; and
- Exhibits A and B.

Respectfully submitted on behalf of:
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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 24th day of February 2023 via email.

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Summary: Motion to Strike Certain Improper Intervenor Testimony and Exhibits by Scioto Farms Solar Project, LLC electronically filed by Teresa Orahood on behalf of Sommer Sheely