

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Scioto	)	
Farms Solar Project, LLC For a	)	Case No. 21-868-EL-BGN
Certificate of Environmental Compatibility	)	
And Public Need.	)	

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**JOINT INITIAL POST HEARING BRIEF OF THE INTERNATIONAL  
BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 575 AND OHIO  
PARTNERS FOR AFFORDABLE ENERGY**

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**I. Procedural History**

On August 30, 2021, Scioto Solar Farms Project, LLC (“Scioto” or the “Applicant”) filed a Pre-Application Notification Letter proposing a 110 MW solar electric generating facility (the “Project”) in Wayne Township, Pickaway County, Ohio. On April 13, 2022, Scioto filed its first Proof of Publication of Notice, and it filed its second on May 13, 2022. On February 23, 2023, a Joint Stipulation was filed by Scioto, the Ohio Farm Bureau Federation (“OFBF”), Ohio Partners for Affordable Energy (“OPAE”), and the International Brotherhood of Electrical Workers, Local Union 575 (“IBEW”) (collectively, the “Signatory Parties”).

The Signatory Parties presented the Joint Stipulation with conditions that addressed the concerns expressed in the Staff Report as well as the concerns of the Signatory Parties and non-signatory parties. The Signatory Parties recommend the Board adopt the conditions listed in the Joint Stipulation if the Board determines that a Certificate of Environmental Compatibility and Public Need (“Certificate”) should be issued for the Project.

An evidentiary hearing began on February 27, 2023, and concluded March 2, 2023. In the interest of administrative efficiency, IBEW and OPAE are submitting this Joint Initial Brief. IBEW and OPAE respectfully request that the Ohio Power Siting Board (the “Board”) adopt the

Joint Stipulation and issue a Certificate to the Applicant for this project subject to the conditions set forth in the Joint Stipulation.

## **II. Legal Standard**

### **A. Statutory Criteria**

Pursuant to R.C. 4906.10(A), “The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, 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;
- (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) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and 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.

The evidentiary record in this matter supports a Board finding that the criteria under R.C. 4906.10(A) are either satisfied or, in certain cases, not applicable.

### **B. Stipulation Criteria**

Ohio Adm.Code 4906-2-24 authorizes parties to Board proceedings to enter into stipulations. Although not binding on the Board, pursuant to Ohio Adm.Code 4906-2-24(D), the terms of such an agreement are accorded substantial weight. The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Board proceedings. See, e.g., *In re Hardin Wind LLC*, Case No. 13-1177-EL-BGN (Mar. 17, 2014). The ultimate issue for the Board's consideration is whether the stipulation, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Board has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The evidentiary record in this matter supports a Board finding that this three-prong test has been satisfied.

### III. Law and Argument

**A. The Board should determine that the Project, with the conditions recommended in the Staff Report and adopted by the Joint Stipulation, satisfies the criteria of R.C. 4906.10(A).**

There is ample support in the record of this proceeding for the Board to find that all applicable statutory criteria under R.C. 4906.10(A) have been met. The Staff Report found that, subject to the conditions recommended in the Staff Report, all of which were substantially incorporated into the Joint Stipulation<sup>1</sup>, the Project satisfied all the criteria of R.C. 4906.10 except R.C. 4906.10(A)(6). However, the record reflects, as will be discussed below, that the Project satisfies R.C. 4906.10(A)(6). The record also includes sufficient evidence for the Board to find that the Joint Stipulation satisfies the Board's three-pronged test in that it (1) is the product of serious bargaining among capable parties; (2) is in the public interest; and (3) does not violate any important regulatory principle or practice.

**B. The Project is not an electric transmission line or gas pipeline, and therefore the Board is not required to determine the basis for need pursuant to R.C. 4906.10(A)(1).**

The Project is an electric generation facility, not an electric transmission line or gas pipeline. Therefore, this statutory criterion is inapplicable.

**C. The Project represents the minimum adverse environmental impact as required by R.C. 4906.10(A)(2) and (A)(3).**

The Applicant considered community and Staff concerns and the Applicant has agreed to install perimeter fence, subject to the Staff's pre-approval, which is both small wildlife permeable and aesthetically fitting for the community. (Joint Ex. 1 Condition 21.)

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<sup>1</sup> The Staff Report contained a 39<sup>th</sup> condition that was not incorporated as a recommended condition in the Joint Stipulation but only because the Applicant implemented the substance of the 39<sup>th</sup> proposed condition thereby satisfying it. Additionally, the Joint Stipulation substantially incorporates grading concerns Staff raised in its testimony in Condition 10.

The Staff Report found no significant impacts are proposed to stream or wetlands. (Staff Ex. 1 p. 33.) The Staff Report found that neither the state nor federal agency overseeing threatened and endangered species had concerns regarding impacts of the Project on any identified endangered or threatened plant species. (Staff Ex. 1 p. 31.) A portion of the Project is located in area suitable as habitat for the lark sparrow, but the Staff Report found that the Applicant has agreed to avoid construction in the area during ODNR's recognized nesting period for the lark sparrow and additional coordination with ODNR for preconstruction nest identification. (Staff Ex. 1 p. 31. Joint Ex. 1, Condition 35.)

The Project is also located within the range of several state and federally endangered bat species. The Ohio Department of Natural Resources and the United States Fish and Wildlife Service found that the Project can avoid negative impacts to these species' habitats by following the agencies' recommended tree clearing schedule which the Applicant has agreed to do. (Staff Ex. 1 p. 31.) Staff recommended that if tree clearing is necessary the Applicant should coordinate with ODNR and USFWS. (Id.) While Applicant does not anticipate any tree clearing, should it be necessary, Applicant has adopted Staff's recommendation. (Joint Ex. 1, Condition 33.) Further, the Applicant committed to having a Staff-approved environmental specialist on site during construction activities that may impact sensitive areas including wetlands and streams, and the locations of threatened or endangered species. (Joint Ex. 1 Condition 37.) The specialist will have the authority to halt construction to assure unforeseen environmental impacts do not progress and to resolve any unforeseen negative impacts. (Id.)

The Applicant has agreed to plant a minimum of 70% of the project area with beneficial vegetation and to take steps to prevent the establishment or propagation of noxious weeds. (Joint Ex. 1 Condition 36.)

The Applicant has agreed to limit construction activities to a time frame consistent with the work hours of the surrounding community, which is a farming community. (Join Ex. 1 Condition 23). Further, any adverse noise impacts related to construction noise would be temporary and intermittent and would occur away from most residential buildings. (Staff Ex. 1 p. 20.)

Staff determined that subject to its proposed conditions, which have been adopted in the Joint Stipulation, the Applicant has determined the nature of the probable environmental impact for the Project and therefore satisfied the requirements of R.C. 4906.10(A)(2). (Staff Exhibit 1 p. 32.) Additionally, Staff determined that subject to its proposed conditions, which have been adopted in the Joint Stipulation, the Project represents the minimum adverse environmental impact and therefore complies with the requirements of R.C. 4906.10(A)(3).

IBEW and OPAE respectfully request the Board adopt Staff's findings that, subject to the conditions proposed by Staff and adopted by the Applicant, the Applicant has satisfied the requirements of R.C. 4906.10(A)(2) and (3).

**D. The Project is consistent with regional plans for expansion of the electric power grid and will serve the interests of electric system economy and reliability as required by R.C. 4906.10(A)(4).**

Staff found that the Project, subject to Staff's proposed conditions, is consistent with the regional plans for expansion of the electric power grid and will serve the interests of electric system economy and reliability. (Staff Ex. 1 p. 38.) No evidence to the contrary was introduced in the proceeding and the Applicant adopted all of Staff's proposed conditions. (Joint Ex. 1.)

IBEW and OPAE respectfully request that the Board adopt Staff's findings as they pertain to the requirements of R.C. 4906.10(A)(4).

**E. The Project 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 as required by R.C. 4906.10(A)(5).**

Staff recommended that the Board find that the Project complies with the requirements of R.C. 4906.10(A)(5) subject to Staff proposed conditions. (Staff Ex. 1 p. 41.) The Applicant adopted all of Staff's proposed conditions. (Joint Ex. 1.) IBEW and OPAE respectfully request that the Board adopt Staff's findings as they pertain to the requirements of R.C. 4906.10(A)(5).

**F. The Project will serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).**

The Ohio Supreme Court has stated that R.C. 4906.10(A)(6) requires the Board to consider the interests of the general public under the public interest, convenience, and necessity criterion. *Waltz v. Power Siting Bd. (In re Duke Energy Ohio, Inc.)*, 2021-Ohio-3301, ¶ 30 (Sept. 22, 2021) (citing *Power Siting Bd. No. 16-0253-GA-BTX*, Rehearing entry, at ¶ 35 (Feb. 20, 2020)). This Project benefits both the local community and the general public in Ohio. For this Project, the Staff Report found that the Project will result in a payments ranging between \$7,000-\$9,000 per megawatt annually for Pickaway County taxing districts. (Staff Ex. 1 p. 16.) This will generate between \$770,000 and \$990,00 million for those taxing districts which will be used to support local schools and public services. Those payments represent millions of dollars benefiting the community over the life of the project without resulting in a significant increase in residents in the community putting a corresponding strain on the services funded by the project.

The Applicant has committed to building and operating the Project safely and in a manner designed to minimize its impact on the community both during the construction and operation phases. (Staff Ex. 1 p. 42.) Further, the Project will generate approximately 477 construction related jobs for the state and four long-term operational jobs. (Staff Ex. 1 p. 15.)

These jobs will benefit both local and statewide trades alike. IBEW Witness Shirey explained that these jobs are excellent opportunities for new workers to enter the electrical industry and start lifelong careers. (IBEW Ex. 1 p. 4 lines 14-17.) The temporary nature of these jobs does not diminish their importance or necessity. IBEW members build careers from working themselves out of a job and moving from one project to the next. These temporary jobs combine to create permanent careers which provide good wages and benefits to support growing families and retirement plans which provide security for those who have spent their lives committed to their craft.

Additionally, the Project, if approved, will provide benefits and jobs beyond those employed to construct the Project. As OPAE Witness Svets testified, the project presents the opportunity for indirect benefits through supply chain spending and induced benefits through the spending by the Applicant and those constructing the project within the community which created additional jobs and economic benefits. (OPAE Ex. 1 p. 5 lines 1-13.) Induced benefits, such as additional service industry jobs within the community to service the facility and construction, often inure to the benefit of lower income residents in the area which represents a significant positive impact on their lives. (Id. lines 10-13.)

The Staff Report estimates the direct and indirect local earnings during the construction phase to be between \$28.7 and \$29.9 million. (Staff Ex. 1. P. 15.) The PILOT payments to the community will increase local resources available to provide services to lower income residents in the area, including school age children. Approximately 31% of public-school students, grades K-12, receive free or reduced lunches. (OPAE Ex. 1 p. 7 lines 1-2.) PILOT funds provide significant resources for local schools and other community agencies to service the needs of these children and their families. Finally, as noted by Witness Svets, the Project will generate



further economic benefits for Ohioans by acting as a price suppressor for statewide energy prices and provide health and environmental benefits through avoiding the need to build traditional fossil fuel forms of generation.

Despite all these benefits, the Staff Report recommends that the Board find the Project is not in the public interest, necessity, and convenience, required by R.C. 4906.10(A)(6). Staff's stated rationale for recommending denial is that this criterion must encompass the concerns of the local public interest which allows for local citizen input and local government input. (Staff Ex. p. 44.). Staff then referenced public comments from the Pickaway County Board of Commissioners and the Pickaway County director of Emergency Management. (Id. pp. 44-45.)

It must be noted that public comments are not part of the record and do not carry the weight of sworn testimony per the Board's own website.<sup>2</sup> An example of the weight given filed public comments can be found in Case Nos. 21-0972-EL-BLN and 21-0973-EL-BLN. In those proceedings, which were recently decided, the Board approved two transmission lines, in spite of the opposing public comments of local residents and a State Representative, which the Board acknowledged represented "a large majority of the comments received." Ohio Power Siting Board Case Nos. 21-0972-EL-BLN & 21-0973-EL-BLN, Opinion and Order, ¶¶12 & 26 (April 21, 2022).

Finally, Ohio common law has routinely held that in other administrative adjudicatory hearings, such as Zoning Board Appeals,

The rights of specific persons are determined based upon the direct evidence presented, not public opinion. *Adelman Real Estate Co. v. Gabanic*, 109 Ohio App.3d 689, 694-695, 672 N.E.2d 1087 (11th Dist.1996). Consequently, witnesses must testify about relevant facts, not their subjective and unsubstantiated opinions. Such witnesses must also be subject to cross-examination. *Id.* The unsworn testimony of a witness is not evidence that the board may consider. *Heiney v. Bd. of Zoning Appeals*, 126 Ohio App.3d 391, 396,

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

710 N.E.2d 725 (6th Dist.1998), citing *Arcaro Bros. Builders, Inc. v. N. College Hill Zoning Bd. of Appeals*, 7 Ohio St.2d 32, 218 N.E.2d 179 (1966).

*Warren Family Funeral Homes, Inc. v. City of Toledo*, 6th Dist. Lucas No. L-15-1325, 2016-Ohio-5076.

Though the Board is not bound by the decision of any court other than the Ohio Supreme Court, the concepts discussed in reviewing similar administrative adjudicatory hearings are nonetheless instructive. It is clear, Ohio common law does not treat public comment, not subject to cross-examination, as probative evidence. For Staff to rely upon public comments, without parties having the ability to cross examine the filer is prejudicial. Further, as has been noted by House Majority Leader Representative Seitz in letters to the Board in multiple proceedings, including another proceeding related to a project in Pickaway County earlier this very month, “localized opposition to grandfathered projects may be of some relevance, **it is by no means determinative as it would otherwise be if the project had not been protected by the grandfathering clauses of SB 52.**”<sup>3</sup> The Staff Report acknowledges that this Project is grandfathered under Senate Bill 52. (Staff Ex. 1 p. 43.)

The only evidence in the record Staff cites to supports its contention that the local opposition is especially compelling are the comments made at the local public hearing and opposition of Wayne Township evidenced through the testimony of Witness Gibson. When Witness Gibson was questioned as to how the township developed its position the Wayne Township Trustees held a public meeting where nine people spoke, only six of whom were

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<sup>3</sup> Ohio. Power Siting Board Case No. 21-1090-EL-BGN, Public Comment of Majority Floor Leader Bill Seitz, The Ohio House of Representatives (April 6, 2023). (Emphasis added.) See also, Ohio. Power Siting Board Case No. 22-0549-EL-BGN, Public Comment of Majority Floor Leader Bill Seitz, The Ohio House of Representatives (March 7, 2023); Ohio. Power Siting Board Case No. 21-1231-EL-BGN, Public Comment of Majority Floor Leader Bill Seitz, The Ohio House of Representatives (April 18, 2023).

actually residents of the township, and based on the opposition of those six individuals and with no discussion with the Applicant, the Wayne Township Trustees chose to oppose the project. (Transcript V. I pp. 17-21.) A review of the cross-examination of Witness Gibson reveals that the Township did no due diligence beyond listening to those six residents and ignored the Applicant or refused to talk to Applicant representatives.

The local public hearing transcript reveals that of the non-parties that spoke, the majority of them either opposed or expressed concerns with the project. However, only twenty-five people spoke in total, not all of whom live or work in the community. Taken together with the six who spoke in opposition at the Wayne Township Trustee meeting, Staff's position in the Staff Report, that the opposition outweighs all of the benefits discussed above, is based on the concerns or opposition of fewer than thirty individuals in the record. The Board simply cannot forgo all of the benefits discussed above based on the concerns of thirty individuals. Especially considering that the Applicant has incorporated the conditions sought by Staff in the event the Board approves the Project.

Finally, if the Board intends to rely on the same non-record evidence Staff relies upon in its Staff Report, namely public comments opposing the projects from both individuals and county officials, the Board must similarly acknowledge the guidance from Senate Bill 52 sponsor, Representative Seitz, and his statement that public opposition **is not determinative for grandfathered projects**. The only reason Staff offered in the Staff Report for finding the project is not in the public interest pursuant to R.C. 4906.10(A)(6) is public opposition. Per Representative Seitz's letters that is not determinative as it would be for a project not protected by the grandfathering provision of Senate Bill 52 and therefore it cannot be used as the sole criteria to deny the Project in this case.

IBEW and OPAE respectfully request that the Board find that the Project, subject to the condition in the Joint Stipulation, is in the public interest, necessity, and convenience as required by R.C. 4906.10(A)(6).

**G. The Applicant has a plan to protect and restore the agricultural districts and agricultural land impacted by the Projects as required by R.C. 4906.10(A)(7).**

The Project will impact approximately 723 acres of agricultural land, 277 of which are currently enrolled in the Agricultural District program. (Staff Ex. 1 p. 46.) The Applicant has worked to identify existing drain tiles in the area and supplied the Board with a Drain Tile Mitigation Plan covering avoidance, repair, and mitigation details of all known tile locations. (Id.) The Applicant has committed to repairing any drain tile found to be damaged by the Project to at a minimum original condition or the modern equivalent. (Join Ex. 1 Condition 25.) Finally, the Staff Report notes the land can be restored to agricultural use once the Project is decommissioned. (Staff Ex. 1 p. 41.)

The Staff Report recommended that the Board find the impact of the Project, subject to the proposed conditions which have been adopted in the Joint Stipulation, on the viability of existing agricultural land in an agricultural district has been determined, and therefore complies with the requirements specified in R.C. 4906.10(A)(7). (Staff Ex. 1 p. 41.) IBEW and OPAE respectfully request that the Board find that the Project satisfies the requirements of R.C. 4906.10(A)(7) subject to the conditions in the Joint Stipulation.

**H. The Project incorporates maximum feasible water conservation practices as required by R.C. 4906.10(A)(8).**

The Project is not expected to use significant amounts of water. Water may be used as needed for dust control during construction. (Staff Ex. 1 p. 47.) When in operation, the Project will rely on natural precipitation to clean panels but in the rare event that is insufficient less than

a pint of water will be needed to clean per module. (Id.) The Staff Report found that subject to the proposed conditions the Project will incorporate maximum feasible water conservation practices, and therefore complies with the requirements specified in R.C. 4906.10(A)(8). (Staff Ex. 1 p. 47.) IBEW and OPAE respectfully request that the Board adopt the Joint Stipulation and find that the Project satisfies the requirements of R.C. 4906.10(A)(8).

**I. The Board should determine that the Joint Stipulation meets the three-part test for reasonableness.**

In addition to the statutory requirements set forth in R.C. 4906.10, the Joint Stipulation satisfies the Board's three-pronged test as it (1) is the product of serious bargaining among capable parties; (2) is in the public interest; and (3) does not violate any important regulatory principle or practice. In this case, the Joint Stipulation is a partial Stipulation meant to adopt certain conditions for the Certificate as opposed to a traditional stipulation which seeks to resolve all the issues in the case. Nonetheless, the Joint Stipulation is instructive to the determination that R.C. 4906.10(A) has been satisfied.

**(1) The Joint Stipulation is the product of serious bargaining among capable, knowledgeable parties.**

The Joint Stipulation is the product of an ongoing process in which parties, through their counsel, were provided the opportunity to collaborate with the Applicant. Even certain parties that are not signatories still had their voice heard. IBEW and OPAE respectfully request that the Board find that the Joint Stipulation is the product of serious bargaining among capable, knowledgeable parties.

**(2) The Joint Stipulation is in the public interest.**

The Joint Stipulation is in the public interest. The record reflects that the Project will bring major investment into the community, generate clean renewable energy during peak

periods of demand; and will bring jobs to the area and the state. The Joint Stipulation provides conditions which address Staff and community concerns and therefore is in the public interest. IBEW and OPAC respectfully request that the Board find that the Joint Stipulation is in the public interest.

**(3) The Joint Stipulation does not violate any important regulatory principle or practice.**

There is no evidence in the record suggesting the Joint Stipulation violated any important regulatory principle or practice. The Joint Stipulation adopted all of the recommendations made in the Staff Report. IBEW and OPAC respectfully request that the Board find that the Joint Stipulation does not violate any important regulatory principle or practice.

**IV. Conclusion**

For the foregoing reasons, IBEW and OPAC respectfully requests respectfully request that the Board issue a certificate of environmental compatibility to the Applicant for the Project, subject to the conditions in the Joint Stipulation.

/s/Robert Dove  
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### **CERTIFICATE OF SERVICE**

I certify that The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. An electronic courtesy copy will be sent to the parties listed below on this 20<sup>th</sup> day of April 2023.

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Summary: Text Joint Initial Brief electronically filed by Mr. Robert Dove on behalf of International Brotherhood of Electrical Workers Local 575 and Ohio Partners for Affordable Energy.