

**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.	:	

**REPLY BRIEF
SUBMITTED ON BEHALF OF THE OHIO POWER SITING BOARD**

David Yost (0056290)
Attorney General

John H. Jones (0051913)
Section Chief

Robert A. Eubanks
(Counsel of Record)
Shaun Lyons
Werner L. Margard
Assistant Attorneys General
30 E. Broad St., 26th Floor
Columbus, OH 43215
Tel.: 614.466.4395
Fax: 614.644.8764
Robert.Eubanks@OhioAGO.gov
Shaun.Lyons@OhioAGO.gov
Werner.Margard@OhioAGO.gov

*Counsel for the Staff of the
Ohio Power Siting Board*

May 12, 2023

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
A. Senate Bill 52	2
B. Public Comments	2
C. Case History	4
ARGUMENT.....	4
A. Standard of Review	4
B. Staff’s recommendation that the Project be denied, as stipulated, is completely in keeping with Board precedent.	5
1. Overwhelming local governmental opposition to a project by the governmental entities whose constituents are impacted by the project can cause the Board to deny a project.	5
2. Staff simply applied Board precedent to reach its recommendation for the Board to deny the Stipulation.	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

**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.	:	

**INITIAL BRIEF
SUBMITTED ON BEHALF OF THE OHIO POWER SITING BOARD**

INTRODUCTION

For the reasons asserted in its Initial Brief and further explained in this Reply, Staff maintains its recommendation for denial of the subject Scioto Farms Project, as stipulated, for failure to meet the criteria to benefit public interest, as outlined in R.C. 4906.10(A)(10). The Signatory Parties do not contest Staff’s recommendation that, in the event the stipulation is approved, that the stipulation be modified – if necessary – to include all of the conditions in the Staff Report.

Additionally, Staff asserts in this Reply that the Signatory Parties are wrong when they assert that Staff’s recommendation is not lawful. Staff’s recommendation is completely based on Board precedent. Board precedent requires a project to be denied when there is overwhelming local governmental opposition – as is the case in the Scioto Farms Solar Project (hereinafter “Project”). Staff is simply recommending that the Board follow its own precedent.

BACKGROUND

A. Senate Bill 52

The passage of Ohio Senate Bill 52 provides new opportunities for county commissioners and township trustees to participate in the siting of solar projects in their community.¹ The Scioto Farms Solar Project is partially impacted by the new legislation; it is grandfathered under S.B. 52 except for the ad hoc board member provision. County commissioners may choose one commissioner, or a designee, to serve as an ad hoc board member.² In addition, township trustees may choose one trustee, or a designee, to serve as their ad hoc board member representative.³ Local government boards must designate ad hoc members within 30 days of notice of application completion.⁴

The Board of Pickaway County Commissioners appointed Commissioner Jay Wippel, and the Board of Trustees of Wayne Township appointed Chris Mullins, as the ad hoc board members for this project.⁵

B. Public Comments

As of the filing date of the Staff Report, 49 document records were filed in the public comments of the case record. Each document record may include one or more public comments.⁶ Public comments include:

¹ Staff Report at p. 43.
² *Id.* at 43.
³ *Id.* at 44.
⁴ *Id.*
⁵ *Id.*
⁶ *Id.*

- A resolution from the Pickaway County Board of Commissioners expressing the County's opposition to the project.⁷
- A memorandum from the Pickaway County Emergency Management Agency Director to the Pickaway County Board of Commissioners sharing concerns regarding the development of solar projects in the county.⁸
- A letter from the Pickaway County Parks District expressing concerns with potential impacts to waterfowl migration, the historic Ohio-Erie Canal, and road traffic and wildlife crossings.⁹
- Letters from local residents in opposition to and in support of the project.¹⁰

Commenters opposed to the proposed project expressed concerns about issues including impacts to agricultural land use, farmland preservation, and agricultural production and livestock; fire hazard; impacts to wildlife; impacts to drinking water; erosion and flooding; runoff and drainage; construction traffic, noise, and dust; operational noise; property values; cultural resources; decommissioning; public health; aesthetics; recreation; and fencing.¹¹ Those supportive of the project emphasized the benefits of additional tax revenue for local government and schools, economic investment in the community, job creation, and renewable energy.¹²

Since the filing of the Staff Report, Wayne Township passed a resolution against the Project.¹³ Wayne Township's resolution recounts that the trustees had "heard from a large group of residents in objection to the project."¹⁴

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Wayne Twp. Exh. 1.

¹⁴ *Id.*, also see Direct Testimony of Brenna Gibson ("Gibson Testimony"), Exh. B.

C. Case History

On May 10, 2022, Staff filed its Staff Report recommending denial of the application and, in the event that the Board approved the application, recommending conditions to be adopted by the Board.

On February 23, 2023, a stipulation was filed including the Applicant Scioto Farms Solar Project, LLC (“Scioto Farms” or “Applicant”), the Ohio Farm Bureau Federation (“OFBF”), Ohio Partners for Affordable Energy (“OPAE”), and the International Brotherhood of Electrical Workers, Local Union 575 (“IBEW”) (hereinafter “Signatory Parties”). As a part of the stipulation, the Signatory Parties assert in their initial briefs that all of the recommended conditions in the Staff Report, as modified by Staff testimony, have been adopted into the Stipulation.

On March 1 & 2 of 2023, the evidentiary hearing was held. Reply Briefs were ordered to be filed on May 12, 2023. Staff filed this Reply with the Board on May 12, 2023.

ARGUMENT

A. Standard of Review

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 criteria listed in R.C. 4906.10 (A). The criteria relevant to Staff’s recommendation for denial of the application is found in R.C. 4906.10

(A)(6), which states, “that the facility will serve the public interest, convenience, and necessity.”

The ultimate issue for the Board’s consideration when presented a stipulation is whether the agreement is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Board has followed its long-standing test comprised of the three following prongs: 1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? 2) Does the settlement, as a package, benefit customers and the public interest? and 3) Does the settlement package violate any important regulatory principle or practice? *Consumers’ Counsel v. Pub. Util. Comm’n.* (1992), 64 Ohio St.3d 123, 126.

Accordingly, R.C. 4906.10 (A)(6) is determinative as to whether the stipulation meets prongs 2 and 3 of the aforementioned test.

B. Staff’s recommendation that the Project be denied, as stipulated, is completely in keeping with Board precedent.

1. Overwhelming local governmental opposition to a project by the governmental entities whose constituents are impacted by the project can cause the Board to deny a project.

In general, the Board reviews projects for compliance with R.C. 4906.10(A)(6) (which requires the project to serve the public interest) from a “broad lens” approach considering the statewide benefits of a project.¹⁵ “At the same time, this statutory criterion regarding public interest, convenience, and necessity, must also encompass the

¹⁵ In the Matter of the Application of Republic Wind, LLC, No. 17-2295, Opinion and Order (June 24, 2021) at ¶91.

local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion and impact to natural resources.”¹⁶ “As part of the Board’s responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, the Board balances projected benefits against the magnitude of potential negative impacts on the local community.”¹⁷

In analyzing the benefits against the negative local impacts, if there is unanimous and consistent¹⁸ or majority¹⁹ (hereinafter “overwhelming”) local opposition to a project by the government entities whose constituents are impacted by the Project, the Board has denied the project application for failure to comply with R.C. 4906.10(A)(6). For this same reason, the Board has denied a stipulation for a project for failure to meet the second prong of the stipulation test (which requires the stipulation to benefit the public interest) and the third prong (which requires the stipulation not violate any important regulatory principle or practice).²⁰ It is axiomatic that the Board decides each matter that comes before it on a case by case basis, but there are examples where overwhelming local governmental opposition is decisive of whether or not a project is approved.²¹

Board precedent has already established some of the kinds of actions that demonstrate overwhelming opposition by local governmental entities.²² One way it can

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *In re Birch Solar 1*, No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) at ¶72.

¹⁹ *In the Matter of the Application of Republic Wind, LLC*, No. 22-2295, Opinion and Order (June 24, 2021) at ¶3. It should be noted the *Republic Wind* involved a facility that was not impacted by House Bill 32.

²⁰ *In re Birch Solar 1*, No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) at ¶78

²¹ *Id.*, and also see *In the Matter of the Application of Republic Wind, LLC*, No. 22-2295.

²² *Id.* at ¶64

be demonstrated is through the passage of resolutions by an overwhelming amount of the townships and counties that have citizens impacted by a project.²³ A second way is through local governmental entities filing notices with the Board opposing a project.²⁴

Once overwhelming opposition by local governmental entities is established, it is possible that even substantial project related benefits to the public will be outweighed by the overwhelming governmental opposition.²⁵ The balancing of statewide benefits against negative local impacts is only tilted more in the favor of local governmental opposition for a facility impacted by House Bill 32 (i.e. projects partially grandfathered or not grandfathered at all from the provisions of House Bill 32).²⁶

2. Staff simply applied Board precedent to reach its recommendation for the Board to deny the Stipulation.

Staff's recommendation for denial of the Stipulation is partially based on overwhelming local governmental opposition. The only county and township affected by this project are Pickaway County and Wayne Township. Both have passed resolutions against the project.²⁷ A memorandum was docketed with the Board from the Pickaway

²³ *Id.* at ¶65

²⁴ *Id.* at ¶65

²⁵ *Id.* at ¶53 – In the Birch Solar 1 matter, substantial benefits to the public such as, increased funding to schools and local governments; the benefits of renewable energy and energy independence; increased investment in the local economy through job creation and lease payments; increasing the state's ability to attract business investments; and protecting the rights of individual landowners were not enough to overcome unanimous and consistent local governmental opposition for a facility not impacted by House Bill 32.

²⁶ *Id.* at ¶69, footnote 9.

²⁷ The Signatory Parties argue that Staff should factor in the due process afforded the Applicant before and after the passing of the resolutions without citing any precedent that places the onus or authority on Staff or the Commission to conduct such a review. The Signatory Parties

County Emergency Management Agency Director to the Pickaway County Board of Commissioners sharing concerns regarding the development of solar projects in the county. Also, a letter was docketed with the Commission from the Pickaway County Parks District expressing concerns with potential impacts to waterfowl migration, the historic Ohio-Erie Canal, and road traffic and wildlife crossings. Staff also considered the public comments by individuals that were docketed with the Commission. In Staff's opinion, the local governmental opposition is overwhelming.

Staff also reviewed and categorized the various kinds of concerns docketed with the Commission. Specifically, Staff noted some of the concerns of the public including impacts to agricultural land use, farmland preservation, and agricultural production and livestock; fire hazard; impacts to wildlife; impacts to drinking water; erosion and flooding; runoff and drainage; construction traffic, noise, and dust; operational noise; property values; cultural resources; decommissioning; public health; aesthetics; recreation; and fencing.²⁸ The Staff considered the public opposition to the Project at the local public informational meetings.²⁹ So the concerns of the public and governmental entities were legitimate concerns about a variety of potential impacts to the local community.

also cite no case law that required Wayne Township to intervene before Staff could consider the resolution passed by the Township.

²⁸ Staff Report at p. 44.

²⁹ *Id.* at 45.

Staff also considered that those supportive of the project emphasized the benefits of additional tax revenue for local government and schools, economic investment in the community, job creation, and renewable energy.³⁰

After considering the level of local governmental opposition, verifying that the public opposition had legitimate concerns, and considering the benefits of the project, Staff appropriately weighed the benefits against the overwhelming governmental opposition and concluded that the project should be denied.

Since Staff reached its recommendation for denial in the Staff Report, the Signatory Parties entered into a stipulation in which they adopted the Staff Report's recommended conditions - conditions that were offered by Staff to the Board in the event that the Project was approved despite Staff's finding that the Project does not serve the public interest. The adoption of Staff's recommendations in the Stipulation does not change Staff recommendation for denial. If such were the case, then Staff would have simply recommended in its Staff Report for the Project to be approved subject to Staff's recommended conditions. The recommended conditions were not designed to address all of the concerns of the local opposition; the recommendations were designed to address the concerns that Staff had with the Project.³¹

³⁰ *Id.* at 44.

³¹ Though the Staff Report would naturally address some concerns that are relevant to the health, safety, and public welfare of the local opposition, Staff did not necessarily document all such concerns of the local opposition in the Staff Report. Crawford Cross Examination Tr. at p. 706.

Frankly, a stipulation might also be denied, even if the stipulation adopts conditions to address, with the help of the local governmental opposition, some of the negative local impacts that concerns opposing local governmental entities, but does not gain the support of such entities.³² The ultimate question of concern for the Board can still be, and has been, whether or not a significant percentage of the local governmental opposition has signed onto the stipulation backing the position that the project serves the public interest – so as to make the local governmental opposition no longer overwhelming.³³ None of the local governmental entities that opposed the application subsequently signed onto the stipulation. The local governmental opposition remains the same as at the time of the Staff Report. Accordingly, Staff’s recommendation that the Stipulation be denied, despite its adoption of Staff’s recommended conditions, is in keeping with Board precedent.

CONCLUSION

Staff’s recommendation for the denial of the Stipulation is in keeping with Board precedent.³⁴

³² *Id.* at ¶64.

³³ *Id.* at ¶64.

³⁴ The Applicant points to Staff’s recommendation in *Oak Run* as being inconsistent with the matter at hand. As already pointed out herein, all matters that come before the Commission are reviewed on a case by case basis. The record in *Oak Run* has not been fully developed, as the hearing is scheduled to begin on the due date of this Reply. Appellant cannot cite to *Oak Run* for precedent until the record is fully established and the Commission has issued a determination on the matter.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief**, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail upon the following parties of record, this 12th day of May 2023.

/s/ Robert Eubanks

Assistant Attorney General

Robert Eubanks

Parties of Record:

Jack A. Van Kley

Van Kley Law, LLC

132 Northwoods Blvd., Suite C-1

Columbus, Ohio 43235

jvankley@vankley.com

Counsel for Thomas E. and Scarlett Ebenhack

Wesley and Suzannah M. Ebenhack and Thomas J. Ebenhack

Robert A. Chamberlain

Assistant Prosecuting Attorney

P.O. Box 910

Circleville, Ohio 43113

tchamberlain@pickawaycountyohio.gov

Counsel for the Board of Trustees of

Wayne Township Pickaway County, Ohio

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

5/12/2023 5:15:39 PM

in

Case No(s). 21-0868-EL-BGN

Summary: Brief Reply Brief Submitted on Behalf of the Ohio Power Siting Board
electronically filed by Mrs. Kimberly M. Naeder on behalf of OPSB.