

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of
Fountain Point Solar Energy LLC for a
Certification of Environmental
Compatibility and Public Need to
Construct a Solar-Powered Electric
Generation Facility in Logan County, Ohio

Case No. **21-1231-EL-BGN**

**INTERVENORS, CITIZENS AGAINST FOUNTAIN
POINT LLC, BRENT VERMILLION, JIM CULP,
JOCELYN KAVANAGH, ALYSSA RICE, CLIFF
CRONKELTON, ANTHONY COGOSSI, PAUL
SCHALLER, KARA SLONECKER, AND JENY
HAMMER MEMORANDUM CONTRA APPLICANT'S
MOTION TO STRIKE**

Pursuant to Ohio Administrative Code (“O.A.C.”) Rule 4906-2-27(B)(1), the above-named Intervenor (“Citizens”) hereby submit this Memorandum Contra Motion to Strike Portions of Reply Brief of the Citizens Against Fountain Point LLC (“Motion to Strike”), filed by Applicant Fountain Point Solar Energy LLC (“Fountain Point” or “Applicant”) with the Ohio Power Siting Board (“Board” or “OPSB”) on December 12, 2023. For all of the reasons set forth in the attached Memorandum Contra, Citizens request that the Board deny Applicant’s Motion to Strike.

Respectfully submitted,

PLANK LAW FIRM, LPA

/s/ Kevin Dunn

Kevin Dunn (0088333)
411 E. Town Street, Flr 2
Columbus, Ohio 43215

614-947-8600
614-228-1790 (Facsimile)
kdd@planklaw.com

MEMORANDUM CONTRA

Applicant's Motion to Strike requests the Board strike certain portions of Citizens' Post-Hearing Reply Brief and attached Exhibits A, B, C, D, and E on the basis that such information is not contained in the record in this matter and that such statements should be excluded as hearsay and therefore, should "have no bearing on the Board's deliberations in this case."¹

Applicant's position is contrary to O.A.C. Rule 4906-2-30 and Board precedent in considering public comments filed on the OPSB's Docketing Information System.

A. The Board is Empowered to Exercise Discretion in Considering and Weighing Evidence Outside the Record

O.A.C. Rule 4906-2-30 states "the [B]oard shall issue a final decision based on the record, *including such additional evidence as it shall order admitted*" (*emphasis added*). The Board has directly addressed this issue as it pertains to the issue of public interest, convenience, and necessity in stating in part that:

While we recognize that public 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. In so finding, we note that the opposition public comments reinforce issues raised in both the local public hearing and the local government communications that oppose the Project. Hence, the public comments reinforce, rather than contradict, the conclusions of government bodies that were formally considered at the local level.²

The Board's review of public comment is an integral part of assessing public sentiment,

¹ Applicant's Motion to Strike, p. 4

² *In re Application of Birch Solar, LLC*, Case. No. 20-1605-EL-BGN, Opinion and Order (October 20, 2022), p. 20, ¶70.

echoed and further evidenced by respective, representative, governmental bodies taking official action to document positions of the government entity. Assessing the level of public support or opposition to a proposed project in light the public interest, convenience and necessity test is uniquely suited to the sound discretion of the Board in attributing the proper weight given to public comments on file in a given matter and documented through the OPSB's docketing information system. Contrary to Applicant's claim that consideration of public comment outside of the record is against Board precedent,³ when considering the issue of public interest, convenience, and necessity, the OPSB has previously stated in another matter that "the Board did not depart from precedent by considering the public commentary in making its decision with respect to the public interest, convenience, and necessity."⁴

Citizens have not introduced outside evidence of questionable authenticity or veracity. Instead, Citizens have drawn attention to official government action that was taken by duly elected government officials and published for public review and consumption by filing as public comment upon the docket in this matter. The Board is afforded deference to use a broad lens in deciding whether a proposed project supports the public interest, convenience, and necessity. Rather than exclude such evidence from consideration, the Board's practice reflects that it considers public commentary relevant to its deliberations with respect to public interest, convenience, and necessity, and uses its authority to assign the appropriate evidentiary weight due such comments.

Applicant also attributes a nefarious motive to Citizens' timing in referencing the public commentary that exists as a part of the case file in this matter. However, Citizens pre-filed direct

³See Applicant's Motion to Strike, p. 4

⁴ *In re Application of Birch Solar, LLC*, Case. No. 20-1605-EL-BGN, Order on Rehearing (June 15, 2023), p. 9., ¶ 22.

testimony specifically referenced a lack of official governmental support for the proposed facility,⁵ and Applicant opted not cross examine any of Citizens witnesses at the evidentiary hearing regarding witnesses' foundation for those opinions. Moreover, Citizens Reply Brief remained within the scope of a response to Applicant's Initial Brief in that, the proposition that the Project enjoyed widespread public support or that a split in public opinion resulted in a lively debate, was patently false. The position of Citizens has always been clear throughout these proceedings, there is overwhelming public opposition and a clear lack of governmental support to Applicant's proposed project. Applicant's efforts here appear to be aimed at silencing the voice of government bodies that formally acted to publicly voice opposition to the project. Silencing these representative bodies and prohibiting consideration of their respective positions would only serve to support Applicant's efforts to misconstrue public sentiment and perpetrate an injustice in the deliberation process. The Board is well within its purview and abilities to consider public commentary, both in support and opposition, through a broad lens, and assign the proper probative weight to the various public comments that are a part of the case file in this matter.

B. Citizens' Exhibits Qualify as a Public Record Hearsay Exception

Ohio Rule of Evidence 803(8) provides that public records or reports shall not be excluded from evidence by the hearsay rule, even if the declarant is available as a witness, by stating in part, "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law." Citizens' Reply Brief Exhibits A, B, C, D, and E, all qualify as a statements of public office by clarifying the position of Benjamin Logan Local School District, stating

⁵ See Direct Testimony of Paul Schaller (Filed August 3, 2023), P. 4, Lns. 84-85; Direct Testimony of Cliff Cronkelton (Filed August 3, 2023), P. 3, Lns. 55-56; Direct Testimony of Alyssa Rice (Filed August 3, 2023), P. 3, Lns. 53-54; Direct Testimony of Kara Slonecker (Filed August 3, 2023), P. 4-5, Lns. 94-98, and attached Exhibit C.

opposition of Ohio State Representative Nino Vitale, Ohio State Senate President Matt Huffman and Senate Majority Whip Rob McColley, recording Bokescreek Township Trustees' resolution in opposition, and referencing letters of opposition from thirteen additional Townships. These statements serve as an exception to the general rule against hearsay and the Board would be justified in taking notice of the records.

In addition, these public position statements have never been challenged or contested. Citizens' witnesses submitted pre-filed direct testimony that all referenced government opposition and a complete lack of government support for the proposed project. Citizens' efforts to avoid duplicative, cumulative evidence does not negate the existence of the public statements in the case file. Applicant chose not to cross examine any of Citizens' witnesses regarding their statements identifying a lack of any government support for the Project. None of Citizens' witnesses personally authored any of the exhibits in question and would serve no function in the authentication of the public records published and filed in the case file in this matter beyond observation that the public records were filed for reference through the OPSB docketing information system.

C. Conclusion

The Board is afforded broad discretion in assessing a proposed project's public interest, convenience, and necessity through a broad lens. Making such an assessment would necessarily include reviewing and weighing the evidentiary value of all public commentary, both in favor and against, existing in the case file by virtue of submission through the OPSB docketing information system. When assessing a project's public interest, convenience, and necessity, universally excluding public comment, especially those submitted by government entities or officials, that is not specifically introduced as an exhibit at an evidentiary hearing would only serve to deprive the

public and its representative officials from the ability to properly inform the Board in preparation for the Board's final deliberation. The Board is fully capable of using its sound discretion to assign the weight properly attributable to all public comment submitted to the case file.

For all of the foregoing reasons, Citizens respectfully request the Board deny Applicant's Motion to Strike.

Respectfully submitted,

PLANK LAW FIRM, LPA

/s/ Kevin Dunn

Kevin Dunn (0088333)

411 E. Town Street, Flr 2

Columbus, Ohio 43215

614-947-8600

614-228-1790 (Facsimile)

kdd@planklaw.com

CERTIFICATE OF SERVICE

I certify that on December 27, 2023, the foregoing was filed with the Ohio Power Siting Board and that all parties referenced on the service list of the docket card who have electronically subscribed to the case will be electronically served notice through the Ohio Power Siting Board's e-filing system, and by electronic mail upon the following: estewart@logancountyohio.gov; lslone@mdllp.net; dw@planklaw.com; cendsley@ofbf.org; lcurtis@ofbf.org; greta.see@puco.ohio.gov; jacqueline.St.John@puco.ohio.gov; isabel.marcelletti@puco.ohio.gov; bparcels@logancountyohio.gov; CPirik@dickinson-wright.com; MMcDonnell@dickinson-wright.com; JSecrest@dickinson-wright.com; DLockshaw@dickinson-wright.com; BSmith@dickinson-wright.com; robert.Eubanks@OhioAGO.gov; janet.gregory@OhioAGO.gov; amy.botschnerobrien@ohioAGO.gov

/s/ Kevin Dunn
Kevin Dunn (0088333)

**This foregoing document was electronically filed with the Public Utilities
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Case No(s). 21-1231-EL-BGN

Summary: Memorandum Intervenors, Citizens Against Fountain Point, LLC, Brent Vermillion, Jim Culp, Jocelyn Kavanagh, Alyssa Rice, Cliff Cronkelton, Anthony Cogossi, Paul Schaller, Kara Sloneker, and Jeny Hammer Memorandum Contra Applicant's Motion to Strike electronically filed by David Watkins on behalf of Schaller, Paul and Slonecker, Kara and Hammer, Jeny and Citizens Against Fountain Point LLC and Vermillion, Brent and Culp, Jim and Kavanagh, Jocelyn and Rice, Alyssa and Conkelton, Cliff and Cogossi, Anthony .