

**BEFORE  
THE OHIO POWER SITING BOARD**

<b>In the Matter of the Application of</b>	)	
<b>Kingwood Solar I LLC for a Certificate</b>	)	<b>Case No. 21-117-EL-BGN</b>
<b>of Environmental Compatibility and</b>	)	
<b>Public Need</b>	)	

**INTERLOCUTORY APPEAL AND REQUEST FOR CERTIFICATION OF  
KINGWOOD SOLAR I LLC, OR, IN THE ALTERNATIVE, REQUEST FOR  
CORRECTING ENTRY**

Pursuant to Ohio Adm.Code 4906-2-29, Kingwood Solar I LLC (“Kingwood” or the “Applicant”) submits this interlocutory appeal with regard to the Administrative Law Judge’s (“ALJ”) March 17, 2022 Entry, which inaccurately summarizes an oral ruling issued on March 15, 2022 regarding the filing of rebuttal testimony. During off-the-record discussions, Kingwood requested that it be allowed to submit rebuttal testimony and informed the ALJ regarding the number of witnesses Kingwood would present. No other party requested leave to submit rebuttal testimony. The March 17, 2022 Entry, however, inaccurately stated that Kingwood requested that all parties be allowed to submit rebuttal testimony and the Entry as written allows all parties to submit rebuttal testimony – an obvious error from the discussions had at the conclusion of the March 15, 2022 day of hearing. Absent a clarifying entry, Kingwood submits this interlocutory appeal to correct the error. The March 17, 2022 Entry is attached along with an excerpt of the relevant transcript from the March 15, 2022 hearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE INTERLOCUTORY APPEAL AND  
REQUEST FOR CERTIFICATION OF KINGWOOD SOLAR I LLC, OR, IN THE  
ALTERNATIVE, REQUEST FOR CORRECTING ENTRY**

**I. INTRODUCTION**

On March 15, 2022, at the conclusion of the evidentiary hearing, an off-the-record discussion was held regarding rebuttal witnesses and how many rebuttal witnesses Kingwood would present. During that discussion, dates were set for the presentation of the rebuttal witnesses. After going back on the record, the Administrative Law Judge (“ALJ”) made an oral ruling instructing that rebuttal testimony be filed by no later than April 14, 2022. Although no other party requested that it be allowed to submit rebuttal testimony (which would not make sense as only Kingwood would have the right to submit rebuttal testimony), the oral ruling was inaccurately memorialized in a subsequent ALJ Entry issued on March 17, 2022 allowing all parties, instead of just Kingwood, the opportunity to file rebuttal testimony. Absent a clarifying entry to correct the error, Kingwood submits this interlocutory appeal to the Board because the ALJ Entry mischaracterizes Kingwood’s request to present rebuttal testimony, which was discussed off-the-record, and the consequent oral ruling on March 15, 2022. Based on prior precedent, Kingwood requests that the ALJ certify this interlocutory appeal and that the Board reverse the ALJ’s Entry to accurately reflect that only Kingwood will present rebuttal testimony. To the extent the intervenors and Staff wish to seek leave to file sur-rebuttal testimony, any such request can be made at the conclusion of Kingwood’s rebuttal testimony.

**II. STANDARD OF REVIEW**

Ohio Adm.Code 4906-2-29 provides, in pertinent part, that any party that is adversely affected by a ruling can take an interlocutory appeal of that ruling to the Board if it is one of four specific rulings enumerated in paragraph (A) of the rule or if the appeal is certified to the Board

by the administrative law judge pursuant to paragraph (B) of the rule. The administrative law judge may certify the appeal if “the appeal presents a new or novel question of interpretation, law, or policy” and is “taken from a ruling which represents a departure from past precedent and an immediate determination by the board is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the board ultimately reverse the ruling in question.” Ohio Adm.Code 4906-2-29(B). Absent a clarifying entry by the ALJs to correct the error in the March 17, 2022 Entry, this interlocutory appeal warrants certification and a ruling from the Board given that the Entry as written would give all parties a right of rebuttal – rather than only Kingwood which is the only party that requested rebuttal testimony.

### **III. ARGUMENT**

The March 17, 2022 Entry does not accurately reflect Kingwood’s off-the-record request to provide rebuttal testimony and the related March 15, 2022 oral ruling on this issue. At the close of the March 15, 2022 day of hearing, counsel for Kingwood requested, off-the-record, that Kingwood be allowed to file rebuttal testimony. Kingwood’s case in chief had not closed because of the future appearance of a subpoenaed Staff witness but discussions were had on the future schedule for hearing including that appearance and Kingwood’s rebuttal witnesses. An off-the-record conversation regarding the number of Kingwood’s rebuttal witnesses ensued between Kingwood counsel and the ALJ. During those conversations, Kingwood did not request that other parties submit rebuttal testimony and no other party requested to submit rebuttal testimony. After going back on the record, the ALJ made an oral ruling instructing that rebuttal testimony be filed by no later than April 14, 2022.

The March 17, 2022 Entry, however, does not accurately reflect the discussions or oral ruling that resulted from those discussions. Instead, the March 17, 2022 Entry states that “[a]t the

conclusion of testimony, counsel for Kingwood requested that the parties be granted the opportunity to file rebuttal testimony.” The Entry also states that “[n]o party objected to the request. Accordingly, the ALJ granted the request and instructed that rebuttal testimony be filed by no later than April 14, 2022.” As explained above, the Entry’s summary does not accurately reflect the discussions held and the ruling issued on March 15, 2022. Furthermore, the March 15, 2022 transcript is silent on the issue of whether all parties have the opportunity to file rebuttal testimony (Tr. Vol. VII at 312: 12-25).

Absent a clarifying entry from the ALJ, the Board should reverse the Entry and require a new entry be issued clarifying that only Kingwood will file rebuttal testimony. If not reversed or corrected, the ALJ’s Entry represents a departure from past precedent by allowing all parties, instead of only the Applicant, to file rebuttal testimony. *See, e.g. In re Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Transcript Vol. VII (Nov. 25, 2019) at 1554: 22-25, 1555: 1-10 (allowing the applicant to file rebuttal testimony on the issue of aviation); *In re Alamo Solar I, LLC*, Case No. 18-1579-EL-BGN, Entry (Aug.21, 2019) at ¶ 8 (granting applicant’s request to file rebuttal testimony); *In re Champaign Wind LLC*, Case No. 12-160-EL-BGN, Transcript Vol. XII (Dec. 6, 2012) at 3002: 12-18 (admitting rebuttal testimony about health effects on behalf of the applicant); and *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN, Transcript Vol. IX (Nov. 20, 2009) at 2253: 7-14 (allowing the applicant to file four pieces of rebuttal testimony).

Undue prejudice will also result if the Entry is not corrected or clarified. The Applicant has the right to rebut the direct testimony of the intervenors and Staff in this proceeding – and that was the topic of the off-the-record discussions. Kingwood would suffer prejudice if the Entry is not clarified or corrected because it would be denied a right of true rebuttal to the intervenors and Staff’s direct testimony given the Entry’s allowance for other parties to file additional testimony

on the same day that Kingwood would file its rebuttal testimony. If the Entry is not corrected, Kingwood would not be able to respond to the testimony of the other parties through direct testimony. Failing to provide a right of rebuttal to the testimony of other parties in the proceeding would subject Kingwood to undue prejudice.

Lastly, if a correcting entry is not issued by the ALJs, this interlocutory appeal should be certified because the appeal presents a new and novel question of interpretation, law and policy. An applicant's right to provide rebuttal testimony is regularly provided in both Public Utilities Commission of Ohio and Board proceedings. As to policy, ensuring that a ruling matches off-the-record discussions is just as important, as in this case where the off-the-record discussions focused solely on Kingwood's request and plan to present rebuttal witnesses, culminating in the brief oral ruling setting dates to resume the hearing and a deadline for the filing of the rebuttal testimony. Also supporting certification, if necessary, is the departure from precedent and the undue prejudice that Kingwood will incur if the March 17, 2022 Entry is not corrected to accurately reflect the discussions had and the ruling issued on March 15, 2022.

#### **IV. CONCLUSION**

The ALJ's March 17, 2022 Entry inaccurately memorializes Kingwood's request to file rebuttal testimony and the oral ruling made that day. Additionally, the Entry is a clear departure from past Board precedent and would result in undue prejudice to Kingwood. As such, absent a clarifying entry from the ALJs, the appeal should be certified and the Board should issue a new entry permitting only Kingwood to file rebuttal testimony as was discussed at the March 15, 2022 day of hearing. To the extent the Entry is not clarified, Kingwood reserves the right to object to any rebuttal testimony filed by other parties.

Respectfully submitted,

/s/Michael J. Settineri

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## **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio'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. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being sent via electronic mail on March 22, 2022 to:

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/s/Michael J. Settineri

Michael J. Settineri



**THE OHIO POWER SITING BOARD**

**IN THE MATTER OF THE APPLICATION OF  
KINGWOOD SOLAR I LLC FOR A  
CERTIFICATE OF ENVIRONMENTAL  
COMPATIBILITY AND PUBLIC NEED.**

**CASE NO. 21-117-EL-BGN**

**ENTRY**

Entered in the Journal on March 17, 2022

{¶ 1} Kingwood Solar I LLC (Kingwood) is a person as defined in R.C. 4906.01.

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} On April 16, 2021, Kingwood filed an application with the Board for a certificate of environmental compatibility and public need to construct a 175 megawatt solar powered electric generating facility in Greene County, Ohio.

{¶ 4} On various dates, timely petitions and notices for intervention in this proceeding were filed by the following entities: the Board of Trustees of Cedarville Township, Greene County, Ohio; the Board of Trustees of Xenia Township, Ohio; the Board of Trustees of Miami Township, Greene County, Ohio; In Progress, LLC; the Tecumseh Land Preservation Association, also known as the Tecumseh Land Trust; the Greene County Board of Commissions; the Ohio Farm Bureau Federation; and Citizens for Greene Acres, Inc. and 14 named landowners. Each of these parties were granted intervenor status in subsequent entries issued by the administrative law judge (ALJ).

{¶ 5} On October 29, 2021, Staff filed its report of investigation.

{¶ 6} The public hearing was held on November 15, 2021.

{¶ 7} The adjudicatory hearing scheduled to commence on December 13, 2021, was called and continued.

{¶ 8} The adjudicatory hearing reconvened on March 7, 2022, and continued through March 15, 2022. At the conclusion of testimony, counsel for Kingwood requested that the parties be granted the opportunity to file rebuttal testimony. No party objected to the request. Accordingly, the ALJ granted the request and instructed that rebuttal testimony be filed by no later than April 14, 2022. Additionally, the parties agreed to reconvene for the purpose of taking rebuttal testimony on April 25, 2022, and April 26, 2022.

{¶ 9} The ALJ finds that the hearing shall reconvene for the purpose of taking rebuttal testimony on April 25, 2022, at 10:00 a.m., and shall continue through April 26, 2022, as necessary. The hearing shall take place at the offices of the Public Utilities Commission of Ohio (Commission), Hearing Room 11-A, 11th Floor, 180 East Broad Street, Columbus, Ohio 43215. The parties should register at the lobby desk and then proceed to the 11th Floor in order to participate in the hearing. As COVID-related restrictions are constantly evolving, instructions regarding any safety requirements or accommodations for the hearing room may be forthcoming, either posted on the Commission/Board website or communicated to the parties.

{¶ 10} It is, therefore,

{¶ 11} ORDERED, That the parties file rebuttal testimony by no later than April 14, 2022, as ordered on March 15, 2022, and as restated in Paragraph 8. It is, further,

{¶ 12} ORDERED, That the adjudicatory hearing be scheduled to reconvene on April 25, 2022, at 10:00 a.m., on the terms outlined in Paragraph 9. It is, further,

{¶ 13} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/David M. Hicks

By: David M. Hicks  
Administrative Law Judge

SJP/hac

**This foregoing document was electronically filed with the Public Utilities  
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**in**

**Case No(s). 21-0117-EL-BGN**

Summary: Administrative Law Judge Entry ordering that the parties file rebuttal testimony by no later than April 14, 2022, as ordered on March 15, 2022, and as restated in Paragraph 8 and that the adjudicatory hearing be scheduled to reconvene on April 25, 2022, at 10:00 a.m., on the terms outlined in Paragraph 9 electronically filed by Heather A. Chilcote on behalf of David Hicks, Administrative Law Judge, The Ohio Power Siting Board

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1 itself. I mean, his testimony page 8 was please  
2 summarize the investigation. He discusses the  
3 investigation. And then he is asked what did you  
4 review to rely -- to reach your conclusion. He  
5 indicated the conclusion was ultimately to recommend  
6 denial. And then the question 9 he then tapers  
7 further in terms of, okay, tell me about what  
8 impacted 4906.10(A)(6).

9 MR. SETTINERI: Your Honor, I have to be  
10 a stickler for the record here. I've done a lot of  
11 briefing. And this question is very dangerous,  
12 question 8 answer -- if I am not allowed to fully  
13 walk through it with him because he has said the  
14 conclusion relates to the denial, on brief, and I  
15 know Mr. Margard wouldn't do this, but at some point  
16 on brief, you never know, that could come back and  
17 say, well, Staff not only reviewed what was in answer  
18 9, but they also reviewed what was in answer 8 even  
19 though it's not in the Staff Report. So that's why I  
20 am painstakingly going through it. If Mr. Margard  
21 would want to stipulate to changing the question  
22 maybe, that might work.

23 ALJ WILLIAMS: Here is what we are going  
24 to do, his testimony speaks for itself. If you have  
25 any questions regarding whether there is any error in

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1 MR. SETTINERI: No further questions,  
2 your Honor.

3 ALJ WILLIAMS: Thank you, Mr. Settineri.  
4 Mr. Margard, do you need any time to  
5 contemplate redirect?

6 MR. MARGARD: I do, your Honor. And I  
7 would appreciate 5 minutes if I could, please.

8 ALJ WILLIAMS: That's a lot we went over  
9 so it seems reasonable. We will come back at 6:13.

10 We are off the record.

11 (Discussion off the record.)

12 ALJ WILLIAMS: Back on.

13 Mr. Margard, any redirect?

14 MR. MARGARD: Thank you, your Honor. I  
15 have no redirect for Mr. Zeto and renew my motion to  
16 admit Staff Exhibit 11.

17 ALJ WILLIAMS: Mr. Zeto, thank you for  
18 your testimony today. Have a great evening.

19 THE WITNESS: Thank you.

20 ALJ WILLIAMS: Any objection to the  
21 admission of Staff Exhibit 11?

22 Hearing none, that's admitted.

23 (EXHIBIT ADMITTED INTO EVIDENCE.)

24 ALJ WILLIAMS: Mr. Settineri, you are not  
25 going to move Kingwood 91 in, are you?

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1 that testimony, you are welcome to explore those.  
2 The question was what did you review in arriving at  
3 your conclusion. He has indicated the three sections  
4 or areas that he reviewed. We reviewed this, further  
5 we reviewed that, additionally we reviewed this. So  
6 to the extent what did you review, his answer speaks  
7 for itself. There is no amount of cross-examination  
8 that's going to change that answer.

9 MR. SETTINERI: All right. Let me just  
10 try this a different way.

11 Q. (By Mr. Settineri) Mr. Zeto, in regards  
12 to your answer at 8, that answer addresses the  
13 various items that Mr. Margard -- that you were asked  
14 in question 7 which relates to the overall Staff  
15 Report of Investigation; is that correct?

16 A. Yes, I believe. If I understood your  
17 question, yes.

18 Q. Okay. Thank you. And then question 9,  
19 answer 9, that provides the specific basis for  
20 Staff's recommendation the Board deny a certificate  
21 on the statutory criteria of (A)(6); is that correct?

22 A. Yes.

23 MR. SETTINERI: Thank you, sir.

24 I think we got there, your Honor.

25 ALJ WILLIAMS: Okay.

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1 MR. SETTINERI: No, I am not.

2 ALJ WILLIAMS: I think that concludes our  
3 exhibits, and I believe that concludes our scheduled  
4 witnesses. Let's go off the record briefly.

5 (Discussion off the record.)

6 ALJ WILLIAMS: All right. Karen, we are  
7 back on the record.

8 So we spent a few minutes collecting  
9 information regarding some lingering issues in the  
10 case even after we closed the testimony of all the  
11 scheduled witnesses.

12 We are intending to reconvene in person  
13 on April 25 and 26 at the offices of the Public  
14 Utilities Commission, and the matter will be noticed  
15 via a short published entry to clarify what room,  
16 clarify for time for arrival, et cetera, but the  
17 parties are instructed to plan to participate in two  
18 full days of hearing on April 25 and April 26 with  
19 that hearing time will be dedicated to rebuttal  
20 witnesses in the case.

21 The Bench has declared that the written  
22 testimony for all rebuttal witnesses is due April 14  
23 by the end of business. And this will be the only  
24 indication that the parties receive relative to that  
25 cutoff.

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**in**

**Case No(s). 21-0117-EL-BGN**

Summary: Request Interlocutory Appeal and Request for Certification or, in the  
Alternative, Request for Correcting Entry electronically filed by Mr. Michael J.  
Settineri on behalf of Kingwood Solar I LLC