

**BEFORE THE
OHIO POWER SITING BOARD**

In the Matter of the Application of : Case No. 21-0117-EL-BGN
Kingwood Solar I LLC for a Certificate :
of Environmental Compatibility and :
Public Need :

MEMORANDUM CONTRA INTERLOCUTORY APPEAL

Dave Yost
Ohio Attorney General

John Jones
Section Chief

Jodi J. Bair
Werner L. Margard
Shaun P. Lyons
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3414
614.644.8599 (telephone)
866.849.3176 (fax)
Jodi.Bair@OhioAGO.gov
Werner.Margard@OhioAGO.gov
Shaun.Lyons@OhioAGO.com

**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

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On March 21, 2022, Kingwood Solar I LLC (Applicant) filed an Interlocutory Appeal asking the Ohio Power Siting Board (Board) to overrule the ruling of the administrative law judge (ALJ) denying Applicant’s motion to subpoena certain Board Staff (Staff) members, including Ms. Theresa White, the Executive Director of the Board. Staff submits that the ALJ’s ruling was lawful and should be upheld. The Board’s rules permit interlocutory appeals from rulings by an ALJ in limited circumstances. Those circumstances are not present here. The “critical” information sought by the Applicant is not relevant to the issues in this proceeding. Furthermore, compelling Staff members to answer the questions Applicant seeks to ask would discourage open communication among Staff and diminish the efficiency and efficacy of Staff’s investigatory responsibilities, thereby harming the public interest.

The reasons for Staff’s opposition to OCC’s Interlocutory Appeal are further addressed herein.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John Jones
Section Chief

/s/ Jodi J. Bair

Jodi J. Bair

Werner L. Margard

Shaun P. Lyons

Assistant Attorneys General

Public Utilities Section

30 East Broad Street, 26th Floor

Columbus, Ohio 43215-3414

614.644.8599 (telephone)

866.849.3176 (fax)

Jodi.Bair@OhioAGO.gov

Werner.Margard@OhioAGO.gov

Shaun.Lyons@OhioAGO.com

**On Behalf of the Staff of the
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MEMORANDUM IN SUPPORT

I. LAW AND ARGUMENT

A. The Board's rules permit interlocutory appeals from rulings by an administrative law judge in limited circumstances – this is not one of those circumstances.

The Board's rules permit interlocutory appeals from rulings by an ALJ in limited circumstances. Those circumstances are not present here.

Rule 4906-2-29(B) provides:

Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4906-2-28 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the board by the administrative law judge. The administrative law judge shall not certify such an appeal unless he or she finds that:

- (1) The appeal presents a new or novel question of law, or policy.
- (2) The appeal 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.

Unlike the comparable Public Utilities Commission rule, Ohio Adm.Code 4901-1-15(B), an interlocutory appeal may not be certified to the Board unless *both* conditions are met:

- (1) the appeal presents a new or novel question of interpretation, law, or policy, *and* (2) the ruling represents a departure from past precedent. Neither condition is satisfied by

Applicant's request. Therefore, Applicant's request to certify the interlocutory appeal should be denied.

1. The interlocutory appeal does not present a new or novel question of law or policy.

Applicant has not shown the requisite grounds for an interlocutory appeal under the first prong, which requires the showing of “a new or novel question of law or policy.” Applicant relies on an assertion that “The ALJ’s ruling represents a novel policy of not allowing the Applicant to ask questions about critical sections of the Staff Report and the basis of conclusions contained within the document, and is a departure from past precedent allowing parties to do so.” But that assertion is seriously undermined by Applicant’s memorandum overall and the section at issue, both of which are replete with past precedent covering the issue in detail. To be sure, the *PALMco*¹ case was novel in several respects, discussed *infra*, but *PALMco* is just one among several cases. Recent OVEC cases², the *Black Fork Wind*³ case, and others address the issue of staff subpoenas and the policy against fishing expeditions with regards to staff.

Further undermining the “novelty” of the issue at hand, a strikingly similar question regarding Staff subpoenas arose on the Public Utilities Commission of Ohio (Commission) docket just two weeks ago. In its March 4, 2022 Entry in *In the Matter of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, the

¹ *In re PALMcoPower OH, LLC d/b/a Indra Energy and PALMco Energy OH, LLC d/b/a Indra Energy (PALMco)*, Case No. 19-957-GE-COI.

² See, e.g., *In the Matter of the Review of the PowerPurchase Agreement Rider of Ohio Power Company for 2018 (Ohio Power)*, Case No. 18-1004-EL-RDR, et al.

³ *In re in re Black Fork Wind Energy, L.L.C. (Black Fork)*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173.

Commission addressed the questions of 1) whether a party is “entitled” to subpoenas of Staff, and 2) whether a Staff member who did not contribute to an Audit Report in question could be subpoenaed. The Commission found that there was no such entitlement, and duly blocked a subpoena of a Staff member who did not draft Staff’s report. Commission rulings have precedential effect in front of the Board, and that same reasoning should apply. At minimum, the *Duke Reconciliation Rider* case demonstrates that the issue at hand is not “novel.” As such, an interlocutory appeal is improper.

2. The ruling from which the interlocutory appeal is taken does not represent a departure from past precedent.

The ALJ properly held the Applicant’s motion for subpoena in abeyance until after the examination of Staff witnesses. This is consistent with past practice and precedent. As the ALJ in the *Ohio Power* case relied upon by Applicant noted, “Consistent with past practice in other Commission proceedings, and in the interest of furthering administrative efficiency and conserving limited Staff resources, . . . parties to these proceedings should direct their questions on cross-examination to Staff’s designated witness[es].” *Ohio Power* at ¶14.

The Applicant offers no relevant precedent in arguing that the ALJ’s ruling denying a subpoena for any additional Staff witness other than Ms. Graham-Price is a departure from precedent. Applicant purports to rely on three decisions: *Black Fork*, *PALMco*, and *Ohio Power*. That reliance is plainly misplaced. None of those rulings supports the relief sought by the Applicant.

The *Black Fork* decision is clearly distinguishable from this case. The Applicant seeks an expansive reading of the decision there that “parties in a certificate application case have the ability to subpoena staff members” to mean that any and all staff members are subject to its fishing expedition. That is not what the Court decided. In *Black Fork*, Staff pre-filed “the testimony of eight witnesses . . . seven [of whom] authored sections of the staff’s report, and the eighth . . . managed the staff’s investigation and compiled the final report.” *Black Fork* at ¶5. Staff members who sponsored portions of the Staff Report of Investigation in this case also pre-filed testimony. That, however, is where the similarities end.

Because of a stipulation in *Black Fork*, only one Staff witness was ultimately called to testify at the evidentiary hearing.⁴ The intervenors complained that they were “denied the opportunity to cross-examine the seven board staff members responsible for drafting sections of the staff report” *Id.* at ¶11. The Court noted that there was “nothing in the record, applicable statutes and administrative rules, or our precedents that obligated the seven staff members to appear and testify at the evidentiary hearing.” *Id.* at ¶13.

It was *those* individuals, the seven staff members who pre-filed testimony but did not actually testify, that the Court ruled that appellants could have sought to compel to appear by subpoena. “If appellants desired to examine *the seven staff members*, they also had mechanisms available to compel *their* attendance.” *Id.* at ¶18 (emphasis added). By contrast, all of the staff members who pre-filed testimony in this case were subjected to

⁴ “Even though the staff had prefiled the testimony of eight witnesses, the only staff member who testified was . . . the project manager who had overseen the compilation of the staff report.” *Black Fork* at ¶8.

cross-examination by the Applicant. The fact that the Applicant is unsatisfied with Staff's answers does not give Applicant license to continue its fishing expedition.

Neither is the *PALMco* case availing. The ruling in *PALMco* issued a subpoena to Staff members "to answer any questions about the Staff Report that [the offered witness] is not able to answer." *PALMco*, Transcript Vol. I (Sept. 19, 2019) at 98. The *PALMco* case was, of course, unique. That fact was acknowledged by the Attorney Examiners, who observed that it was "not a typical Commission practice case," and was "out of normal Commission practice." *PALMco*, Transcript Vol. I (Sept. 19, 2019) at 99, 103.

The subpoena in *PALMco* was issued pursuant to a Public Utilities Commission rule that the *Ohio Power* "precedent" relied on by the Applicant plainly noted "does not 'entitle' [a party] to subpoena Staff witnesses to testify at hearings." *Ohio Power* at ¶14. The Office of the Ohio Consumers' Counsel predicated its motion for subpoena in *PALMco* on Ohio Adm.Code 4901-1-28(E), which provides that, "[i]f a hearing is scheduled in the case in which [a written report of investigation] is filed, any person making or contributing to the report *may* be subpoenaed to testify at the hearing." (Emphasis added.) The Applicant simply is not *entitled* to subpoena Staff witnesses to testify at hearing. More significantly for this case, *no comparable provision exists* in the Board's rules.

During the cross-examination of the subpoenaed Staff members in *PALMco*, the Examiners sustained objections to questions about the witness's personal opinions. The Examiners also refused to permit counsel to ask a Director, the same position that Ms. White holds, what Staff members personally may have recommended since Staff

witnesses were testifying “representing Staff.” Counsel was limited to asking what *Staff*, not what any *individual*, may have recommended. *PALMco*, Transcript Vol. I (Sept. 19, 2019) at 99.

That is completely different than what the Applicant is asking for here. Applicant seeks to identify “authors of certain language,” “the specific Staff members who revised [a] section,” and to “know who made the actual decision.” When a Staff member testifies, they testify as to Staff’s position, regardless of who may have “made” that decision. Applicant is not “entitled” to subpoena Staff witnesses.

Nor is Applicant entitled to inquire into matters not relevant to these proceedings. Counsel for the Applicant repeatedly attempted to ask Staff witnesses with whom in Staff management Staff may have spoken about certain matters, or who made what decisions when, all of which were overruled as irrelevant. In one instance, for example, ALJ Williams made abundantly clear that:

The foundation should be, in the Bench's estimation, did anybody make edits or recommended edits to the portion of the report that you prepared, and was anything in the published portion of the report that you prepared inconsistent with your opinions and positions in this case. Who reviewed on behalf of the Power Siting Board management team is not relevant to those inquiries.

* * *

[T]he details of how Staff comes together to prepare its report, again, assuming a witness doesn't find them to be inconsistent with what the witness thought or prepared *are not relevant*.

Tr. Vol. VII (48:3-10; 49:23-50:1, emphasis added).

While counsel may, from time to time, have excepted to those rulings, it is not the ruling on relevance that Applicant now appeals. Rather, Applicant appeals the decision not to require Staff witnesses to answer irrelevant questions.

Equally irrelevant is the matter of who wrote what in the Staff Report. The ALJ made abundantly clear that is immaterial who wrote, or who may have edited, which sentence in the Staff Report. Tr. VII (287:19-22). The mere fact that a Staff witness could not answer a question does not entitle the questioner to pose the same irrelevant question to another Staff member.

Indeed, the Commission declared as recently as this month, “To the extent that Staff’s designated witness is unable or without sufficient knowledge to respond to questions from the parties seeking information *that is relevant to this proceeding*, the attorney examiner *may* direct Staff, at that time, to produce another witness to testify at the hearing.”⁵ The Applicant is not entitled to subpoena Staff witnesses. And it is certainly not entitled to attempt to compel answers from Staff members to questions that are not relevant to the proceedings.

B. Ms. Theresa White should not be ordered to submit to cross-examination.

The Applicant specifically sought to subpoena Ms. Theresa White in its February 25, 2002 motion for subpoena. The only basis given for seeking to examine Ms. White was that she had signed and submitted the Staff Report. Aside from that fact, and the

⁵ *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Entry (Mar. 4 2022), ¶20 (emphasis added).

testimony elicited during the hearing that she had had conversations with her staff about the case, there is no evidence providing any justification for the Board to direct Staff to produce Ms. White to testify.

Furthermore, having Ms. White testify will not lead to any information relevant to this proceeding. The only rationale offered by the Applicant in its appeal is that the authorship of “critical sections” of the Staff Report could not be established through examination of Staff’s proffered witnesses. Ms. White, Applicant claims, is “likely” to “be able to testify regarding [those] sections.” Interlocutory Appeal at 11.

But as noted above, the ALJ has determined that the authorship of specific language in the Staff Report is not relevant, nor is it relevant either who determined the content of those words or by what process that determination was made. The very matters that Applicant claims to be “critical” are simply not relevant to this proceeding.

It is disingenuous for Applicant to claim that it “cannot discover the rationale and basis for Staff’s recommended denial” without questioning Ms. White. Staff’s rationale and bases are stated clearly in the Staff Report:

While some local opposition is common in many siting projects, considering the above opposition filed in the docket and expressed at the local public hearings, Staff recognizes that in this proceeding it has been especially prominent, one-sided, and compelling. Staff believes that the public opposition will create negative impacts on the local community. Board Staff believes that any benefits to the local community are outweighed by this overwhelming public opposition and, therefore, the Project would not serve the public interest, convenience, and necessity.

Staff Ex. 1 at 44. It is Staff's position that local opposition would create negative impacts on the community, impacts that would outweigh any benefits that the project might offer. Staff witness Zeto, and Staff witness Butler to a lesser extent, sponsored that portion of the Staff Report, and offered testimony in support of it.

Whether that support adequately justifies Staff's recommendation is a determination for the Board to make, not the Applicant. It is not, in fact, "critical that Kingwood understand the emphasis Board Staff placed on the intervention notices and resolution in order to conclude that the Application would not satisfy R.C. 4906.10(A)(6)." Interlocutory Appeal at 8. Rather, it is for the Board to determine whether the stated rationale was reasonable, and the extent to which "public interest" should be defined by local support or opposition.

But that's not really what the Applicant wants here. What the Applicant wants is an opportunity to question who it believes to be the "decision-maker." This is clear from its appeal. In it, Applicant claims that "Mr. Zeto did not know *who made the actual decision* to recommend that the Project would not comply with R.C. 4906.10(A)(6)." Interlocutory Appeal at 9 (emphasis added). Further, Applicant complains that "questioning in the manner outlined by the ALJ did not yield the Staff members *responsible for making the decision* that the Application did not satisfy R.C. 4906.10(A)(6)." *Id.* (emphasis added).

But who made the decision, and how that decision was made, is simply not relevant to this proceeding. Moreover, Staff witnesses have made it clear that the

“decision” was a Staff decision, made by the case team, supported by Staff, with which no member of the case team disagreed.

Q [Mr. Settineri]. Let me ask you, in regards to the "Recommended Findings" at page 44, who made the decision, the ultimate decision to recommend – make that recommendation?

A [Mr. Zeto]. I would say Staff as a whole.

Q. All right. And when you say Staff as a whole, are you saying every Staff member was able to contribute and to make that decision?

A. Yes.

Tr. Vol. VII (301:20 – 302:3).

What contributed to that decision? Staff witnesses were clear on this point – many factors contributed to the decision. The township interventions influenced the decision.

Tr. Vol. VII (230:11-13). The public comments of the intervenors influenced the decision. *Id.* (244:8-12). Citizen comments at various public meetings influenced the decision. *Id.* (283:16-284:3). The resolution passed by the Greene County Board of Commissioners influenced the decision. *Id.* (244:5). No one factor was determinative in isolation. Rather, it was the totality of all of these factors that ultimately led Staff to conclude that the public interest standard had not been satisfied.

The process by which that decision was reached is irrelevant, and may be protected by policy considerations comparable to a “deliberative privilege.”⁶ Testimony regarding the decision-making process could reveal advisory opinions, recommendations

⁶ The deliberative process privilege is a form of executive privilege that protects advice, opinions, and recommendations used by a government decision-maker in the process of reaching a decision. *In re Franklin Natl. Bank Securities Litigation*, 478 F. Supp. 577, 582 (E.D.N.Y.1979).

and deliberations comprising part of a process by which governmental decisions and policies are formulated. Forced disclosure of the decision-making process would discourage future open communications among Staff, and diminish the efficiency and validity of Staff decision-making, thereby harming the public interest. The give-and-take of Staff's consultative process should not be compromised, either by assessing the merits of a particular viewpoint, or by articulating the process used to formulate a decision.

The justification for not compelling Ms. White to testify is bolstered by relying on the intersection of relevancy and such policy considerations. The Board Staff's processes are *not* at issue in this case, however much the Applicant may wish that they were. The ultimate issue is whether "the facility will serve the public interest, convenience, and necessity." Ohio Rev. Code 4906.10(A)(6). Subjecting Staff's decision-making process to the scrutiny requested by the Applicant would have a chilling effect, discouraging open communication and diminishing the efficiency and efficacy of Staff's investigatory responsibilities. It is both unnecessary and potentially detrimental to the Board's statutory mandate.

Compelling Ms. White to testify would do nothing more than add needless testimony duplicative of that already elicited. It would be a waste of limited Staff resources, and impair administrative efficiency. Ms. Theresa White should not be ordered to submit to cross-examination.

II. CONCLUSION

For the reasons explained above, Kingwood's Interlocutory Appeal should be denied. The Board's rules permit interlocutory appeals from rulings by an administrative law judge in limited circumstances. Those circumstances are not present here. The Applicant is not entitled to subpoena Staff witnesses. And it is certainly not entitled to attempt to compel answers from Staff members to questions that are not relevant to the proceedings.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

/s/ Jodi J. Bair

Jodi J. Bair
Werner L. Margard
Shaun P. Lyons
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3414
614.644. 8599 (telephone)
866.849.3176 (fax)
Jodi.Bair@OhioAGO.gov
Werner.Margard@OhioAGO.gov
Shaun.Lyons@OhioAGO.com

**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Memorandum Contra Interlocutory Appeal**, on behalf of the Staff of the Ohio Power Siting Board, has been served upon the below-named counsel via electronic mail, this 28th day of March, 2022.

/s/ Jodi Bair

Jodi Bair
Assistant Attorney General

Parties of Record

Michael J. Settineri (0073369)
Anna Sanyal (0089269)
Nathaniel B. Morse (0099768)
Jonathan K. Stock (0065637)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street P.O. Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com
aasanyal@vorys.com
nbmorse@vorys.com
jkstoc@vorys.com

Attorneys for Kingwood Solar I LLC

Daniel A. Brown (0041132)
Brown Law Office LLC
204 South Ludlow Street, Suite 300
Dayton, OH 45402
dbrown@brownlawdayton.com

Attorney for Cedarville Township Trustees

Chad A. Endsley (0080648)
Leah F. Curtis (0086257)
Amy M. Milam (0082375)
Ohio Farm Bureau Federation
280 North High Street
P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org

Attorneys for Ohio Farm Bureau Federation

David Watkins (0059242)
Kevin Dunn (0088333)
Plank Law Firm, LPA
411 E. Town Street, Flr. 2
Columbus, OH 43215
dw@planklaw.com
kdd@planklaw.com

Attorneys for Xenia Township Trustees

Lee A. Slone (0075539)
Dinsmore & Shohl, LLP
Fifth Third Center
One South Main Street, Suite 1300
Dayton, OH 45402
lee.slone@dinsmore.com

Attorney for Miami Township Board of Trustees

John E. Hart (0037279)
251 N. Main St.
Cedarville, OH 45314
jehartlaw@gmail.com

Attorney for In Progress LLC

Thaddeus M. Boggs (0089231)
Jesse Shamp (0097642)
Frost Brown Todd LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
tboggs@fbtlaw.com
jshamp@fbtlaw.com

Attorneys for the Greene County Commissioners

Jack A. Van Kley (0016961)
Van Kley & Walker, LLC
132 Northwoods Blvd., Suite C-1
Columbus, OH 43235
jvankley@vankleywalker.com

Attorney for Citizens for Greene Acres, Inc. And Citizen Intervenors

Charles D. Swaney (0018328)
515 North Fountain Avenue
Springfield, OH 45504
cswaney@woh.rr.com

Attorney for Tecumseh Land Preservation Association

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Kimberly M. Naeder on behalf of OPSB