

**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

On May 2, 2022, Kingwood Solar I LLC (Applicant) filed an Interlocutory Appeal once again asking the Ohio Power Siting Board (Board) to overrule the ruling of the administrative law judge (ALJ) denying Applicant's motion to subpoena 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 reasons for Staff's opposition to OCC's Interlocutory Appeal are further addressed herein.

Respectfully submitted,

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

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. 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 "there is no Board rule directing Staff to make [the] types of inquiries"¹ made by Ms. Graham-Price. The Board's rules do not direct its Staff as to how it must, or may, conduct its investigations. While Staff data requests are routine in virtually all cases, there is no provision in the Board's rules "directing" Staff to issue such requests, nor, for example, prescribing the form of such requests or the time in

¹ Kingwood Interlocutory Appeal and Request for Certification at 3

which responses may be demanded. As the Applicant well knows, Staff routinely calls project managers for clarification or additional information, despite the absence of a rule “directing” it to do so. The Board directs its Staff to investigate. It does not direct the manner in which it does so.

Nor is it relevant that Ms. Graham-Price’s communications were “unusual”² at that time. As she testified, she had only just assumed a newly created position, one intended to establish and maintain relations with local public officials, with new responsibilities. This was the first instance in which she had been able to have such contact, a practice that she further testified has become routine in all cases involving renewable generation projects.

There is absolutely no reason why Ms. White “must testify as to why she directed Ms. Graham-Price to make those calls” in order for this record to be complete.³ As a supervisor of a new employee in a new position it was Ms. White’s responsibility to provide direction to her subordinate. The nature of Staff’s investigation in this respect is not unknown to the Applicant. Indeed, it is perfectly clear. Staff neither urged that any action be taken, nor that any particular position be adopted. These were simply queries whether any public action had been taken.

The record is clear. The process by which Staff reached its conclusions was described by Mr. Zeto. The decisions reached were made by the “Staff as a whole,” with input from all team members. Tr. Vol. VII at 1901. There is no evidence that Ms. White

² *Id.*

³ *Id.*

asked Staff to reach any particular conclusion, nor is there any evidence that any Staff member disagreed with the conclusions reached in the Staff Report. The nature of Staff's investigation is sufficiently detailed, and its rationale was sufficiently articulated.

Applicant argues that the nature of the investigation was not adequately set forth in violation of R.C. 4906.07(C) because it "left out of the Staff Report its communications with the three townships and County representatives." Neither did the Report contain any description of numerous communications that Staff had with the Applicant throughout its investigation. The Staff Report does describe the nature of the investigation, both technical and public input. The "nature" of a road trip is adequately set forth by the points of origination and destination, with a description of sights seen along the way. It does not require turn-by-turn directions. Nor does R.C. 4906.07(C) require a description of all actions taken by Staff in conducting its investigation.

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

The ALJ properly denied the Applicant's motion for subpoena to compel Ms. White to testify. 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. There is no precedent that a Director's direction of her Staff's investigation is a relevant area for inquiry. Staff has been compelled to testify on matters relevant to the subject of a matter pending before the Public Utilities Commission. Applicant points to no precedent, nor can it, that a Director, or any Staff

member, has ever been compelled to testify regarding the manner in which the Staff conducted its investigation. The ALJ's decision to deny a subpoena for Ms. White to testify was completely consistent with every case cited by the Applicant in its Interlocutory Appeal.

B. Applicant has not demonstrated that Ms. White's testimony would be relevant in this proceeding.

“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.”⁴ No such situation or circumstances exist here. Staff testified that its investigation included contacts with the Townships and County prior to the filing of the Staff Report to discover their positions on the application and proposed project in this case. This information was relevant to Staff's investigation. What is not relevant to this proceeding is Staff's internal administrative process as to who on Staff is directed to elicit this information, or when. The Applicant is not entitled to subpoena Staff witnesses who have nothing more to add on Staff's position, and nothing more to offer to the evidentiary record. And the Applicant is certainly not entitled to attempt to compel answers from Staff members to questions that are not relevant to the proceedings.

⁴ 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).

Applicant claims that the relevant questions for Ms. White would elicit “why . . . she direct[ed] Ms. Graham-Price to make those calls and what did she do with that information.”⁵ As before, Applicant seeks not to know what Staff recommended, or the rationale for its conclusions, but rather “how Staff arrived at its conclusions.” Staff respectfully submits that that is not relevant information. 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.

⁵ Kingwood Interlocutory Appeal and Request for Certification at 9.

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,

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**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 6th day of May, 2022.

/s/ Jodi Bair

Jodi Bair

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Summary: Memorandum Contra Interlocutory Appeal electronically filed by Mrs.
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