

BEFORE 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. 21-0117-EL-BGN

**POST-HEARING BRIEF
OF THE BOARD OF TRUSTEES OF
XENIA TOWNSHIP, OHIO**

Intervenor, Board of Trustees of Xenia Township, Ohio (“Xenia”), hereby submits this Post-Hearing Brief in opposition to the Kingwood Solar I LLC’s (“Kingwood”) application for a Certificate of Environmental Compatibility and Public Need.

I. **Standards for Certification of Kingwood’s Major Utility Facility**

Qualifying as a “major utility facility” as defined by R.C. 4906.01(B)(1)(a), Kingwood’s proposed solar facility project (“Project” or “Facility”) may not be constructed without first obtaining a certificate for construction of a major utility facility pursuant to R.C. 4906.04. To assess the suitability of the Project, the Ohio Power Siting Board (“OPSB”) held a public hearing as required by R.C. 4906.07. R.C. 4906.10(A) provides that:

[t]he power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate.

...

The board [OPSB] 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 the following:

...

(6) That the facility will serve the public interest, convenience, and necessity.

(R.C. 4906.10(A)(6)).

In a recently decided case, *In re Application of American Transmission Systems*, resulting in the denial of an application to construct an overhead electric transmission facility through downtown Youngstown, the OPSB found that “the consideration of public interest, convenience, and necessity requires a balancing analysis as to the public’s interest in energy generation that ensures continued utility services and the prosperity of the state versus the local public’s interest in ensuring a process that allows for local citizen input, and the consideration of impacts to natural resources. 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, we must balance projected benefits against the magnitude of potential negative impacts on the local community.” (Ohio Power Siting Board Case No. 19-1871-EL-BTX at ¶58 (May 19, 2022)).

In that case, the OPSB stated its position that “public interest, convenience, and necessity should be examined through a broad lens” and that that OPSB should “also consider the impact to recreation, cultural resources, regional planning, and the prosperity of the local community and the state of Ohio.” (*Id.* at ¶79). In support of its denial decision, the OPSB noted that the local community “raised universal local opposition to the installation of the proposed aerial transmission line along the preferred route and its impact to the downtown Youngstown area.” (*Id.* at ¶81).

II. Public Opinion Supports the Conclusion that Kingwood has Failed to Prove by the Manifest Weight of Evidence that the Project Serves the Public Interest, Convenience and Necessity as Required by R.C. 4906.10(A)(6).

A. Elected Local Government Representatives Echo the Voice of their Constituents in Opposition to the Project

As elected officials representing the interests of resident voters in Xenia Township, the Xenia Township Board of Trustees is uniquely situated to speak the will of the people in Xenia Township. Inherent in any elected position in a democratic republic is the reliable guarantee that failure to represent the majority interests of the electorate will result in the removal of those officials unresponsive to the will of the people. Considering this, proper weight should be attributed to the unanimous positions taken by all three intervenor township boards of trustees, as well as that of the Greene County Board of Commissioners.

At all times relevant, Xenia, consistent with the communicated position of a majority of Xenia Township residents, has opposed the Project for reasons including, but not limited to, the Project's failure to serve the public interest, convenience and necessity. Trustee Chair of Xenia, L. Stephen Combs ("Combs") stated in his direct testimony presented in this case that "the main basis for Board's opposition is the *overwhelming* opposition to the Application and Facility expressed by Xenia Township residents." (Xenia Exhibit 1, Pg. 2, Lns 18-19, *emphasis added*).

Combs provided the following reasoning for Xenia's opposition to the Project:

The Facility will not be consistent with the comprehensive planning and land-use regulations necessary to balance competing private interests and the public interest. The Facility is not consistent with the Xenia Township zoning ordinances and the Greene County land use plan, "Perspectives 2020: A Future Land Use Plan for Greene County," adopted by the Greene County Board of Commissioners on August 26, 2021 in Resolution No. 21-8-26-10. The Facility is incompatible with the land use policies of Xenia Township.

The Board, along with the Miami Township Board of Trustees and

the Cedarville Township Board of Trustees, hired Eric Sauer, Registered Landscape Architect and Planner, to testify before the OPSB. Consistent with Mr. Sauer's testimony, the Board believes that construction and operation of the Facility will permanently damage prime farmland, the preservation of which is a recognized public good.

Construction and operation of the Facility will negatively impact the value of Xenia Township property.

The Facility will be located in an area that has a history of violent weather events. If the Facility is constructed, a violent weather event, such as a tornado, will have a severe negative impact on Xenia Township property and residents.

...

The Facility will destroy the rural quality of the area. The rural, agricultural nature of the area is a greater public good than any benefits that will allegedly come from the Facility.

The Facility will have a negative impact on local tourism to nearby parks and areas of interest, such as the Little Miami River and watershed with its tributaries; Jacoby Branch, Conner Branch, Old Millrace, Massie Creek, and Old Town Creek, Glen Helen Nature Preserve, John Bryant State Park, Clifton Gorge State Nature Preserve, the Jacoby Road Canoe Launch, with potentially another covered Bridge in Xenia Township, the Village of Yellow Springs and the historic Clifton Mill. There are two developing horse farms, Massie's Creek farms and the former Andrea Chancey Riding Arena. The newest Ohio State Park and Interpretative Center in Old Town that begins construction later this year will be impacted.

As stated by Eric Sauer, construction and operation of the Facility will have a negative impact on soil and topsoil quality and quantity in the area.

It is unlikely that the Facility will be decommissioned in a manner that insures complete land restoration without environmental contamination and blight. There are no guarantees that the funds earmarked for decommissioning will be adequate.

The construction, operation and maintenance of the Facility will increase noise pollution. The construction, operation and maintenance of the Facility will negatively affect local wildlife. The Clifton Road area is already home to a pair of nesting Bald Eagles, as well as a Great Blue Heron heronry that has had in recent years in excess of a dozen nests.

The construction, operation and maintenance of the Facility will stress the area's Fire/EMS response.

(Xenia Exhibit 1, Pg. 2, Ln 21 – Pg. 5, Ln 23).

In addition to Combs' testimony, Xenia publicly stated its opposition to the Project on December 16, 2021, by unanimously adopting Resolution 2021-225 (attached to Xenia Exhibit 1 as internal Exhibit A and incorporated herein by reference).

As indicated by Combs' testimony, the proposed location of the Project is on the doorstep of the Little Miami Watershed, nature preserves, parks, hiking trails and other tourism draws that the area boasts as part of its quaint and rural character. The Ohio Supreme Court has stated that "recreational impact is a criteria [*sic*] which must be considered at some point before the commission issues or denies a certificate pursuant to R.C. 4906.10(A)." (*Ohio Edison Co. v. Power Siting Comm'n*, 56 Ohio St. 2d 212, 215, 383 N.E.2d 588, 590 (1978)). The OPSB has long recognized, and recently reiterating in the case *In re Application of American Transmission Systems*, that the language of R.C. 4906.10(A) is sufficiently broad to include recreational impacts within the purview of review when assessing public interest, convenience and necessity. Combs' testimony, the testimony of other intervenor townships and numerous public comments in the record repeatedly express concern for the potentially negative impact the Project will pose to these recreational resources, and further highlights the need for local voices to be heard in the land use planning process.

The Project's proposed placement of many acres of commercial/industrial solar panel arrays in juxtaposition next to nature preserves and parks, serving to break up the view shed and charming appeal of the area, is exactly the type of land use that is inconsistent with the natural scenic beauty that is the hallmark that attracts agro/nature tourists to the area. Despite the intervenor townships and local population raising concerns regarding the negative impact on recreational resources and tourism in place in the area, Kingwood proffered no meaningful evidence to address such concerns.

Consistent with Xenia's opposition to Kingwood's application for a certificate, the boards of trustees for Cedarville Township and Miami Township both passed resolutions citing similar concerns reflecting the Project's failure to serve the public interest, convenience and necessity. The Greene County Board of Commissioners also unanimously adopted Resolution 21-10-28-8 in opposition to proposed construction of the Project. (Greene County Exhibit 2). No local government body affected by the Project has voiced support for Kingwood's application.¹

B. Kingwood's Opinion Poll Survey Lacks Probative Value and Should Be Given Little Weight

In response to strong public opposition to the Project voiced in public meetings, echoed by local government elected officials and filed for record as public comment on the docket in this case, Kingwood made a late effort to sponsor a public opinion poll ("Opinion Poll"), conducted by phone on March 2, 2022 through March 3, 2022. (Citizen's Exhibit 16). It is common knowledge that the wording, order of presentation and manner of delivery when presenting survey questions to survey participants can greatly influence the answers obtained. Creation of a truly unbiased and neutral survey is a difficult matter when no ulterior motive or desired result is

¹ The Village of Clifton also provided a public comment by email "expressing the village's opposition to the project." Staff Report, Pg 42.

sought. A review of the questions posed in the Opinion Poll, as well as the positive/supportive operative facts coupled with these questions, makes it clear that the Opinion Poll was crafted in a biased manner tailored to create the appearance of public support for the Project. (*See generally* Citizens Exhibits 16 & 20).

Given the flaws in the authoring and administration of the Opinion Poll, little weight should be afforded the Opinion Poll in refuting the sworn testimony of the locally elected officials regarding public feedback on the issue of public interest, convenience and necessity. “The finder of fact has the power to make reasonable rulings as to the competency, admissibility and scope of expert testimony and to determine the weight to be accorded that testimony. . . . This rule is especially applicable to an R.C. Chapter 4906 proceeding because the General Assembly has granted the commission discretion, in its fact-finding role, to require such information, conduct such studies and adopt such rules of evidence as it deems necessary.” (*Chester Twp. v. Power Siting Comm'n*, 49 Ohio St. 2d 231, 237, 361 N.E.2d 436, 440 (1977), *citations omitted*). The Opinion Poll was admitted as evidence in these proceedings and shall be assigned the probative value and evidentiary weight that the administrative law judges deem fit. In this instance, given the format of the language and format of the survey as it was conducted, the Opinion Poll should be relegated to a minimal evidentiary value.

II. Staff Does Not Recommend Approval

The Staff Report of Investigation (“Staff Report”), filed in the record on October 29, 2021, provides that “Staff recommends the Board find that the Applicant has failed to establish whether the facility will serve the public interest, convenience, and necessity as required under R.C. 4906.10(A)(6).” (Staff Report, Staff Exhibit 1, Pg. 1). Based upon Staff’s investigation, “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.” (*Id.* at Pg. 44).

Staff concludes that “[w]ith respect to R.C. 4906.10(A)(6), Staff finds that the project will not serve the public interest, convenience, and necessity. Public interest, convenience, and necessity should be examined through a broad lens. At the same time, this statutory criterion regarding public interest convenience, and necessity, must also encompass the local public interest, ensuring a process that allows for local citizen input, taking into account local government perspective.” (*Id.* at Pg. 1).

While the boards of trustees of Xenia Township, Cedarville Township, and Miami Township, in unison with the Board of County Commissioners of Greene County, Ohio, all unanimously passed resolutions voicing opposition to the Project based upon, amongst other reasons, the Project’s failure to serve the public interest, convenience and necessity, Kingwood failed to meet its burden to establish that the Project will serve such interests. Although not controlling on the issue as to whether the OPSB should approve or deny the application for a certificate, Staff also recommended that the OPSB deny Kingwood’s application as failing to establish whether the facility will serve the public interest, convenience, and necessity as required under R.C. 4906.10(A)(6).

Respectfully submitted,

/s/ Kevin Dunn

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CERTIFICATE OF SERVICE

The docketing system will electronically notify counsel of record in this proceeding. Additionally, the undersigned hereby certifies that a courtesy copy of the foregoing Post-Hearing Brief was served via email to the counsel indicated below on this 13th day of June 2022.

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TOWNSHIP OHIO TRUSTEES