

**BEFORE
THE OHIO POWER SITING BOARD**

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

**REPLY BRIEF SUBMITTED ON BEHALF OF
THE OHIO POWER SITING BOARD**

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**On Behalf of the Staff of the
Ohio Power Siting Board**

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INTRODUCTION

On April 16, 2021, Kingwood Solar I LLC (“Applicant” or “Kingwood”) filed an Application for a certificate of environmental compatibility and public need for construction of the Kingwood Solar 175 MW solar electric generation facility in Greene County, Ohio. Staff filed its report of investigation regarding the Application on October 29, 2021. The Ohio Farm Bureau and the Applicant filed a Stipulation and Recommendation (“Stipulation”) on March 4, 2022 and the adjudicatory hearing on Kingwood’s Application began on March 7, 2022. Staff, along with many of the intervening parties provided testimony in opposition to the Kingwood project. Initial briefs were filed on June 13, 2022. Staff recommends that the Board reject Kingwood’s Application because it does not satisfy the necessary statutory criteria of R.C. 4906.10. Staff timely files this Reply Brief responding to issues raised in the Initial Briefs.

ARGUMENTS

- A. It is proper and appropriate for the Board to consider local opposition, especially where the local elected officials are unanimous in their opposition, in considering whether the Project would serve the public interest, convenience, and necessity.**

R.C. 4906.10(A)(6) directs that the Board shall not grant a certificate unless it finds and determines that “the facility will serve the public interest, convenience, and necessity.” While commonly referred to as the “public interest” standard, the statutory standard contains all three elements – public interest, convenience, and necessity.

None of those elements, however, is defined anywhere in the Board’s statutory scheme. Nor has the Ohio Supreme Court provided any guidance on how the Board is to define those terms. What the Applicant claims to be the “express statutory language” is anything but clear without interpretation.

Over the years the Board has pointed to various factors as indicia that this standard has been satisfied. But, as Staff noted in its initial post-hearing brief, there is no litmus test, no single factor or set of factors, essentially no “checklist,” that dictates a finding that the standard has been satisfied. Applicant’s allusion to a “traditional review” test are specious. There simply is no “test.” Each application must be evaluated on its own merits, and whether the standard has been satisfied depends on the facts and circumstances in each instance.

Increasingly, local governing bodies, and not merely affected landowners, have voiced concern and opposition to developments that have sparked deep divisions in their communities. That opposition has no doubt been emboldened by the enactment of Sub.

S.B. 52 granting county commissioners the authority to prohibit the construction of certain facilities. Even though many projects, including this one, have been proposed before the effective date of Sub. S.B. 52, and are therefore “grandfathered” in, it is perfectly appropriate that the Board would understand that local opposition should be a factor to be considered, through a “broad lens,” in determining whether a facility will serve the public interest, convenience, and necessity.

The Board, as the Applicant has correctly observed, has done precisely that. In now a series of decisions the Board has recognized that concerns raised by local residents, both collectively and through their elected officials, opposing applications such as this one must be considered. The Board has been very clear that R.C. 4906.10(A)(6) “must also encompass the local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion.”

But Applicant argues that the “term ‘public interest’ is not synonymous to ‘public opinion.’ Interpreting R.C. 4906.10(A)(6) to include consideration of ‘local government opinion’ and the broader ‘public opinion’ is unreasonable given the plain language of the statute.” Kingwood brief at 19-20. The plain language, as noted above, is “public interest, convenience, and necessity.” Black’s Law Dictionary defines “public interest” as “[t]he welfare of the public as compared to the welfare of a private individual or company. All of society has a stake in this interest and the government recognizes the promotion of and protection of the general public.”¹ Indeed, it is the seminal role of government, and

¹ <https://thelawdictionary.org/public-interest/>.

specifically the resolution opposing the Project adopted by the Greene County Commissioners, in promoting and protecting the general public, “as compared to the welfare of a private individual or company,” that was the “determining factor” that led Staff to recommend denial in this case.²

Recently, the Board has found such governmental concerns to be sufficiently weighty to warrant denying a certificate. That was the case in the *Republic* case.³ In that case, the Board stated that it “considered the evidence presented by Local Government Entities and all other parties. . . . [and] highlight[ed] that there were no governmental entities participating as a party in th[at] case who stated their support for the Project.”⁴ Similarly, the Board has found “universal local opposition,” such as that found regarding this Project, in conjunction with other factors, justified denying a certificate in the American Transmission Systems, Incorporated (ATSI) case.⁵ Staff respectfully submits that such is also the case in this instance, and therefore recommends that the Board deny a certificate to Kingwood Solar.

While the Board has stated that it “must balance projected benefits against the magnitude of potential negative impacts on the local community,” there is not a strict “weighing” of public benefits and negative impacts that determine whether the criterion has been satisfied. Just as there is no checklist to determine whether R.C. 4906.10(A)(6)

² Tr. Vol. VII:1843-1844.

³ *In the Matter of the Application of Republic Wind, LLC for a Certificate to Site WindPowered Electric Generation Facilities in Seneca and Sandusky Counties, Ohio*, Case No. 17-2295-EL-BGN, Opinion, Order & Certificate (24 Jun 2021).

⁴ *Id.*, Order on Rehearing (17 March 2022) at ¶68.

⁵ *In the Matter of the Application of American Transmission Systems, Incorporated for a Certificate of Environmental Compatibility and Public Need to Construct the Lincoln ParkRiverbend Transmission Line in Mahoning County, Ohio*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (19 May 2022).

has been met, neither is there some “cost-benefit analysis” that determines whether it has been satisfied. It is not a simple matter of numbers or dollars or opinion polls. Where the local officials elected by the citizenry believe that a project should not be built in their community, particularly where that opposition is unanimous, the Board has been willing to find that the “public interest standard” has not been met.

Applicant urges that “[u]nfounded opinions about a project’s impact, however, are not sufficient to be considered as being adverse to the public interest.”⁶ In noting that the Board rejected “township concerns” about property values in the *Ross County Solar* case, Applicant improperly suggests that this was because of “unfounded opinion.” Rather, the Board’s decision in that case was not based on opinion, but on the township only identifying “a very small sample size” of property in the project area that sold for less than the list price.⁷ By contrast, Applicant’s reliance on the *Alamo Solar* case does not relate to concerns expressed by elected officials, but only by affected landowners.⁸ It is a bridge too far for Applicant to then conclude that “strong local opposition alone against a proposed project will not outweigh the benefits a project will generate.”⁹ In neither of these cases was there the widespread opposition from elected local officials that exists in this case. Indeed, the township trustees and county commissioners in the *Alamo* case were actually signatory parties supporting approval of that project.

⁶ Kingwood Brief at 18.

⁷ *In the Matter of the Application of Ross County Solar LLC for a Certificate of Environmental Compatibility ad Public Need*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (21 Oct. 2021) at ¶136.

⁸ *In the Matter of the Application of Alamo Solar I, LLC for a Certificate of Environmental Compatibility ad Public Need*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (24 Jun 2021) at ¶ 293.

⁹ Kingwood Brief at 18.

That is not the case here. All of the local governmental entities in this case, three townships and the county, all opposed this project, and unanimously so. This is not mere “public opinion.” The local governmental entities have argued forcefully and persuasively about their role and function in their post-hearing briefs.¹⁰ While Staff and the Board seriously consider all public comments, the “strong local opposition,” in conjunction with the unanimous opposition of the citizens’ elected officials, is a fundamentally different matter.

All emphasized that their opposition was primarily to protect and maintain the quality of life and general rural character of the affected area. The County Commissioners stressed their “local knowledge and experience.”¹¹ The Cedarville Township Trustees likewise stressed its “intimate knowledge of the community, its needs, and its citizens,” enabling them “to offer more personal service than any other unit of government.”¹² The Xenia Township Trustees averred that they were “uniquely situated to speak to the will of the people” in their township, and that it was their responsibility “to represent the majority interests of the electorate.”¹³ The Applicant argues that the Project meets the public interest, convenience and necessity standard whether considered under the pre-*Republic* lines of cases, or under the Board’s “broader lens” approach. With respect to the so-called “traditional review,” the Applicant recites

¹⁰ “Elected township officials’] intimate knowledge of the community, its needs, and its citizens enables township elected officials to offer more personal service than any other unit of government. It has been said that ‘local government is the foundation of democracy, if it fails, democracy will fail.’” Cedarville Township brief at 4.

¹¹ Greene County Brief at 10.

¹² Cedarville Township Brief at 4.

¹³ Xenia Township Brief at 3.

what it considers to be the many benefits of the Project. Staff acknowledges that many of these benefits may inure to the general public, and even the local citizens. As detailed elsewhere in this brief, Staff recommended that any certificate issued in this case, should one be issued, must, at a minimum, be conditioned as proposed in the Staff Report. Those conditions are intended both to ensure these putative benefits and to minimize many of the potential negative impacts that the Project may have. But it is also important to recognize, as the governmental entities all did in their post-hearing briefs, that the Project will still have negative impacts, however minimized.

Considering the totality of the impacts, both those minimized by its proposed conditions and those relied upon by the local elected officials in their opposition to the Project, Staff continues to believe that the Board should deny a certificate in this case. From Staff's perspective, Applicant confuses "public opinion" with the unanimous opposition of the elected officials. While Staff was certainly concerned about the extent of local opposition, and those opinions were a factor in Staff's recommendation, the positions expressed by the elected representatives of the affected communities, unanimously opposed to the Project, weighed particularly heavily.

Applicant refutes the claims of concern from the elected officials as vague and unconnected to any "actual, demonstrated impact on the local community."¹⁴ Staff submits that allegations of tensions in the community are evidence of actual harm, and

¹⁴ Kingwood Brief at 43.

not mere “politically motivated opposition.”¹⁵ Elected officials are charged, in part, with maintaining peace and tranquility among their citizens. In our modern society where such tensions are often highly charged, that responsibility is particularly important.

Maintaining the general health, safety, and welfare of their citizens is no more vague a standard than the “public interest, convenience, and necessity” standard that those officials found to be unmet.

The intervening governmental bodies have demonstrated that Applicant’s claims that the Project has “broad public support” are little more than a shell game. Cedarville Township Trustees observed that Applicant’s witness admitted that it was “not feasible” to survey the rural areas that would be most affected by the project, and that the vast majority of individuals polled lived in cities far removed from the Project area.¹⁶ Miami Township Trustees noted that 60% of those polled by the Applicant’s consultant knew absolutely nothing about the Project. Noting the rather one-sided nature of the poll questions, the Trustees properly noted that, “[t]o oppose the Project based on the poll’s questions a person would need to feel unsupportive of local communities and schools, unsupportive of farmland preservation and clean energy, and unsupportive of landowner rights and freedom from government interference.”¹⁷ Xenia Township Trustees similarly

¹⁵ While Staff notes that local governmental bodies are partisan in nature, there is absolutely no evidence of partisanship in the record. Indeed, the very unanimity of all of these elected officials suggest, Staff submits, that their opposition was anything but politically motivated.

¹⁶ Cedarville Township Brief at 15.

¹⁷ Miami Township Brief at 5-6.

found the poll questions, as would any casual observer, to have been “crafted in a biased manner tailored to create the appearance of public support for the Project.”¹⁸

In contrast, those intervening governmental bodies have all testified about their efforts to gather input from their electorates. The Greene County Commissioners held town hall meetings even before the Application was filed.¹⁹ They held public meetings during the development of their amendment to the Perspectives 2020 Land Use Plan, gathering input specifically relating, among other things, to potential renewal energy facility projects, fully aware of this Project.²⁰ This input was considered in conjunction with its own evaluation of the financial and economic impacts in expressing the will of its electorate in opposition to the Project.

Cedarville Trustees witness Ewry explained in some detail how they collected input from their residents leading to a conclusion that there was a “groundswell of opposition” to the Project. This included both board meetings and special meetings to specifically address the Project. They tracked comments at the local public hearing ordered by the Board, and specifically reached out to residents who would be residing close to the Project area. Based on their interactions with their constituents, the Trustees concluded that the opposition in their jurisdiction was “overwhelming.” Cedarville Brief at 12.

¹⁸ Xenia Trustees Brief at 7.

¹⁹ Huddleson Direct Testimony, Greene County Ex. 1 at 3.

²⁰ Greene County Brief at 4, Tr. VII:1715.

Similarly, the Xenia Township Trustees opposed the Project “consistent with the communicated position of a majority of Xenia Township residents.”²¹ Like Cedarville witness Ewry, Xenia witness Combs testified that “the main basis for Board’s opposition is the overwhelming opposition to the [Project] expressed by Xenia Township residents.”²² Likewise, Miami Township Trustee Hollister discussed the Project with residents and received input through public meetings.²³ Like Messrs. Ewry and Combs, Miami witness Hollister testified that most township residents opposed the Project, and that the Board was fulfilling its responsibility to its citizens by doing the same.²⁴

The Board has interpreted its mandate to include an evaluation of public attitudes, recognizing the unique responsibility the local elected officials have to represent the views of their electorate. In applying that guidance to the facts in this case, Staff has concluded that public opposition, especially as expressed by the unanimous opposition of the elected officials of both the county and its affected townships, was “especially prominent, one-sided, and compelling.”²⁵ Because Staff believes that any benefits to the local community are outweighed by this overwhelming public opposition, it respectfully submits that the Project would not serve the public interest, convenience, and necessity. Staff therefore recommends that the Board deny the Application and decline to issue a certificate in this case.

²¹ Xenia Brief at 3.

²² Combs Direct Testimony, Xenia Exhibit 1 at 2.

²³ Miami Brief at 4.

²⁴ Hollister Direct Testimony, Miami Ex. 3, at 3-4.

²⁵ Staff Report, Staff Ex. 1 at 44.

Ohio Revised Code 4906.10(A) provides that the Board shall not grant a certificate unless it finds and determines that “the facility will serve the public interest, convenience, and necessity.” The Kingwood project does not meet these statutory requirements of R.C. 4906.10(A)(6). The Board of Trustees of all three affected townships, and the Board of Commissioners for the affected county all intervened in this case and expressed opposition to the project. Staff respectfully submits that the Board any benefits to the local communities are outweighed by the public opposition, and would therefore not serve the public interest, convenience, and necessity. Kingwood’s Application should be denied.

In the alternative, if the Board grants a certificate to Kingwood, Staff recommends that the certificate be subject to the condition set forth in the Staff Report and as modified in this Reply Brief.

B. The ALJ properly determined that compelling testimony from OPSB Executive Director Theresa White was not required.

The ALJs properly declined to grant a subpoena for OPSB Executive Director Theresa White to appear and testify. Testimony from Ms. White would simply not have been relevant to the Staff’s investigation or this proceeding. Aside from wasting limited Staff resources, compelling Ms. White to testify would do nothing more than add needless testimony duplicative of that already elicited. Applicant’s persistence on eliciting irrelevant testimony from Staff management would not only impair administrative efficiency, but hinder Staff investigations.

During the course of the hearing, the ALJs correctly ruled that communications among Staff members, “the details of who talked to whom at what date . . . the details of how Staff comes together to prepare its report . . . are not relevant.”²⁶ Because Staff witness Juliana Graham-Price had communications with outside entities, engaged in some level of investigation, the bench granted Applicant’s subpoena for her to submit to cross-examination. The ALJs declined to grant a subpoena for Ms. Theresa White to appear and testify, however. It did so because they were

satisfied that with the questions that were asked, that the testimony in sponsorship of the Staff report did come through. The witnesses were candid. The witnesses were thorough in response to the questions they received and the—again, the salient issue is sponsorship of aspects of that Staff Report.

Therefore, the Bench finds that the remaining portions of the subpoena have been satisfied and there’s no remaining outstanding issue that the Bench would find need of any further witnesses.²⁷

The ALJs 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. Staff submitted testimony in support of each section of the Staff reports and offered witnesses supporting each of those sections for cross-examination by the Applicant and intervenors. These Staff witnesses answered all relevant questions, including why Staff contacted local governments in and around the project area to determine whether they supported or opposed the project. The very

²⁶ Tr. VII 1649:4-13.

²⁷ Tr. VII 1913:5-15.

matters that Applicant claims to be “critical” were either already answered or are simply not relevant to this proceeding.

Applicant’s continued demand to cross-examine Ms. White are unnecessary, and unreasonable. In attempting to justify its demand, Applicant significantly misstates the facts as shown in the record. Ms. White’s involvement was not, contrary to Applicant’s assertion, “central” to Staff’s investigation.²⁸ As the Director of the department, Ms. White is obviously ultimately responsible for the work of her employees, and has a supervisory oversight role. However, there is absolutely no evidence, and Applicant cites none, that Ms. White had any other involvement in the investigation of this application.

Moreover, the Board Staff’s processes are *not* at issue in this case, however much the Applicant may wish that they were. 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.

It is true that Ms. White, in her role as a supervisor, did instruct Juliana Graham-Price to contact the intervening governmental entities to solicit their position regarding the Project.²⁹ This is hardly surprising. As the Community Liaison, Ms. Graham-Price works “almost exclusively (with) Township Trustees and County Commissioners” to guide them through the siting process.³⁰ It is only reasonable that Ms. White would

²⁸ Kingwood Brief at 99.

²⁹ Kingwood Brief at 46.

³⁰ Tr. VIII 1944:1-12.

provide instruction to Ms. Price under these circumstances. It was Ms. Graham-Price's first month on the job and Staff needed to find out whether the intervening County Commissioners and/or Township Trustees had taken a position regarding the project.³¹

This was nothing more than the first instance, as part of defining the role of a new employee in a new position, implementing what has become standard practice for all renewable generation applications. It was not Ms. White's action in directing her new employee, but the action taken by the Greene County Commissioners, already well underway before any contact from Ms. Graham-Price, that "resulted" in Staff's recommendation in this case. While the "involvement" of Ms. White, and, for that matter, Ms. Graham-Price, is not "detailed" in the Staff Report, nor are the actions of any other individual member of the Power Siting Department Staff. Staff's role in the investigation, as Staff, its recommendations and rationale for its conclusions, are more than adequately set forth.

There is simply no violation of R.C. 4906.07(C). That section does require that the Staff Report "set forth the nature of the investigation." As it has, and does, with every application that comes before it, the Power Siting Staff investigated the application and prepared a report. That report described the nature of its investigation, in the same manner and to the same extent as every other report that Staff has prepared. In every other instance, as it should in this instance, the Board has accepted those reports as having sufficiently complied with this statutory requirement.

³¹ Tr. VIII 1945:17-21.

What was the nature of the Staff's investigation? According to the Report, Staff reviewed the application and evaluated the information provided to determine whether the Project satisfied the requisite statutory criteria. It did so relying on its own career professionals and their expertise, in coordination with those of other agencies represented on the Board and with other interested agencies.³² What Applicant apparently wants is a detailed explanation of actions taken by individual Staff members and their consultants. That, however, is not what the statute requires. The Staff Report set forth the nature of Staff's investigation. There is simply no violation of 4906.07(C).

Applicant argues further that "the reasons for why [Ms. Graham-Price's] outreach was conducted and how the results of that outreach were used in developing Staff's recommendations should similarly be included in the record." Counsel for the Applicant asked Ms. Graham-Price directly why the outreach was conducted, and she responded directly:

- Q. [Mr. Settineri]: Am I correct that sitting here today, you don't know why Ms. White asked you to make those calls?
- A. [Ms. Graham-Price]: Well, we had not received their views whether they were for or against the project, and we would have included those had we known them.
- Q. Okay. And is that your belief as to why Ms. White asked you to make the calls?
- A. Yes.³³

³² Staff Report at 2.
³³ Tr. Vol. VIII, 1942:17-25.

It is equally clear how the results of that outreach “were used in developing Staff’s recommendation.” At the time that Ms. Graham-Price reached out to the Greene County Commissioners, they were already in the process of drafting and considering a resolution, ultimately filed in the case on October 29, 2021.³⁴ No other “result” of her outreach is identifiable in the record. As Staff witness Zeto testified, that resolution, in conjunction with other public comments, both in the docket and at various meetings, and the interventions of the county and townships were all included in the determination to recommend that the application be denied.³⁵

The record is clear. There are no “gaps” that require filling, whether by compelling Ms. White testimony or otherwise. Staff fulfilled its statutory duty. The nature of its investigation is adequately set forth in its Staff Report. There is no violation of R.C. 4906.07(C).

C. The Board should accord significant weight to Staff’s recommendation.

Staff admits that its Staff Report contains some imprecision. But it is preposterous for Applicant to suggest that Staff’s recommendation regarding public interest, convenience and necessity should be given no weight.

Statewide benefits of projects should be considered. Staff witness Zeto, as Applicant noted, acknowledged as much. The Staff Report contains evidence of statewide benefits that the Project would likely produce, notably in economic terms, and the record

³⁴ Tr. Vol. IV, 775:4-9; 797:18-798:23.

³⁵ Tr. VII 1898:18-19.

clearly demonstrates that Mr. Zeto was aware of those benefits.³⁶ The Staff Report does not, however, again as Applicant noted, specifically mention statewide benefits as part of its analysis of R.C. 4906.10(A)(6). Applicant seizes upon this fact to erroneously conclude that Staff did not consider statewide benefits in evaluating R.C. 4906.10(A)(6).

In the very portion of the cross examination quoted in Applicant's post-hearing brief Staff witness Zeto acknowledged that Staff should consider statewide impacts, and not local impacts only. He also acknowledged that that portion of the Staff Report did not describe the statewide impacts. But he also testified that he was aware that there would be statewide benefits, as well as negative impacts.³⁷ While the weight given to statewide benefits as part of Staff's analysis was not specifically described, there is no evidence in the record that such benefits were not considered. Rather, Staff concluded that the negative impact on the local community, supported by the unanimous opposition of its elected representatives, were sufficiently significant to justify recommending that the Board deny a certificate in this case. It is Applicant's inference, and not Staff's analysis, that should be disregarded.

Similarly, Applicant points to what it considers to be "irregularities" to justify rejecting Staff's recommendation. Again, Applicant misrepresents the record in this case.

Staff witness Juliana Graham-Price, who had only recently been hired to engage in outreach with local officials in response to the enactment of Sub. S.B. 52, was directed to contact the intervening governmental entities to ascertain their position in the case. There

³⁶ Tr. VII:1894, 13-14.

³⁷ Tr. VII:1894, 13-14.

is nothing to indicate that this action was improper. Applicant suggests that “this aspect of Staff’s investigation is nowhere to be found in the Staff Report.”³⁸ That, however, is not entirely accurate. While the specific investigative actions of this specific Staff member were not delineated, the results of her inquiries are contained in the Staff Report. Specifically, that the local governmental entities opposed the Project. This was nothing more than part of Staff’s investigation, the nature of which was fully described even if the methods were not.

Applicant also takes liberties in suggesting that “Staff reversed its recommendation from approval to denial based solely on the Greene County Board of County Commissioner’s resolution being passed and filed.”³⁹ While Staff witness Zeto certainly indicated that Staff determined to recommend denial following receipt of the resolution passed by the Greene County Commissioners, he was very clear that that was but one factor in Staff’s decision.

- Q. [Mr. Settineri]: And the one fact that changed that recommendation -- the initial recommendation was the Greene County Board of Commissioners' resolution, correct?
- A. [Mr. Zeto]: That was a factor within the decision.
- Q. Okay. What other factors went into that decision?
- A. I would say it's all the details within the case on the docket here, the Intervenors’ public comments, the kind of information that we had been receiving from the public on it, to name – amongst others.⁴⁰

³⁸ Kingwood Brief at 46.

³⁹ Kingwood Brief at 46.

⁴⁰ Tr. VII:1843, 3-14.

Nor is it relevant who penned the words in the Staff Report stating the conclusion that the Project did not satisfy R.C.4906.10(A)(6). Numerous Staff witnesses testified that the Staff Report is a collaborative process, with all team members having access to the document that was to become the Staff Report, all with the ability to contribute to and edit it. It has long been understood by parties practicing before the Board that Staff witnesses testify on behalf of the Board Staff, and not in their individual capacity. Similarly, the Staff Report reflects the investigation results and recommendations of the Staff, and not the case team lead, or any other individual. If this is not abundantly clear, then the Board should take the opportunity in this case to make it so.

Staff considered the expressions of opposition from the local elected officials. Those expressions came in many forms, including resolutions, interventions, and other contacts. That all such expressions may have been characterized as “resolutions” in the Staff Report does not minimize the view expressed.

Furthermore, it is disingenuous for counsel to criticize Staff’s reliance on “notices of intervention written by counsel as if notices were resolutions.” Views expressed by counsel represent those of their clients. This is equally true at the Public Utilities Commission. Pleadings filed in federal administrative and judicial dockets on behalf of the Commission, for example, are approved or authorized by the Commission, but written by its counsel. No less is true of the interventions filed by the local governmental bodies with this Board.

Counsel for Applicant essentially acknowledged as much. In describing a letter sent by counsel to the Board Director, Ms. Theresa White, counsel stated that it was “on

behalf of Kingwood Solar,”⁴¹ and that “Kingwood Solar requested that [a] corrected Staff Report be issued,”⁴² While the actual resolutions passed by the Trustees may have been limited to expressions of opposition, Staff cannot be expected to disregard interventions filed on their behalf in the docket merely because they were written by counsel. The characterization of such expressions as “resolutions” may have been imprecise, but Staff’s reliance on them is not thereby diminished.

The same is true of the references to “local public hearings.” While those words are commonly understood as terms of art, any meeting open to the public and conducted locally, whether in person or virtually, is a local public hearing. The fact that a local public hearing was required to be conducted and noticed by publication after the issuance of the Staff Report does not render that the only one that can be understood to have been a “local public hearing.”

Applicant is critical that Staff included language about the local public hearing in the Staff Report that was “very similar to [a] sentence from the Republic Wind decision.”⁴³ It should come as no surprise that Staff makes use of boilerplate language from time to time, as do all parties. It should also come as no surprise that Staff would recite language from prior Board orders in subsequent Staff Reports. After, it is Staff’s responsibility to note and abide by the pronouncements of the Board in managing its affairs.

⁴¹ Tr. VII:1796, 22-23

⁴² Tr. VII:1797, 8-9.

⁴³ Tr. VII:1885, 3-5.

Applicant asks the Board to expressly “not consider the section of the Staff Report titled ‘Consideration for R.C. 4906.10(A)(6),’” and afford no weight to the testimony of Staff’s witnesses. Kingwood Brief at 48. Staff acknowledges that there was imprecision in the drafting of the Staff Report. But the underlying explanation of Staff’s investigation, and the bases for Staff’s recommendations, are valid and well documented in the record. Staff submits that Applicant’s criticisms improperly trivialize Staff’s work, and respectfully requests that those criticisms be disregarded.

D. If the Board grants Kingwood’s Application to construct a solar generation facility, the project should be subject to the conditions of the Staff Report and modifications discussed in this Brief.

Staff recommends that the Board deny the Kingwood Application; however, if the Board approves the Application, the project should be subject to the conditions of the Staff Report and modifications discussed in this Brief. These modifications are discussed in response to the issues raised by the Appellant and Intervenors in their initial briefs. The Staff recommends that the Board adopt the Staff Report (Staff Ex. 1) conditions; however, there are Staff Report conditions that have been enhanced in the Stipulation and those enhanced conditions should be adopted. There are also new conditions in the Stipulation that Staff recommends the Board approve as part of the Kingwood certificate, if granted.⁴⁴ The Stipulation also failed to include several conditions from the Staff Report that should be included in the certificate if the Board wants to ensure that the

⁴⁴ Please see Attachment A that provides a chart that shows the comparison of the Staff Report conditions to the Stipulation conditions.

Kingwood project complies with R.C. 4906.10 and represents the minimum adverse environmental impact.

Again, Staff recommends that the Board adopt all of the conditions in the October 29, 2021-filed Staff Report. In addition, conditions 2, 15, 18, 22, 23, 24, 34, 37, 38, and 39 of the **Stipulation** are either improved upon or new conditions that should be adopted as part of the certificate. These conditions may be numbered differently than those contained in the Staff Report, but are derived from conditions in the Staff Report.

An example of an improved upon condition is found in condition 2 of the Staff Report and the Stipulation. Condition 2 discusses the requirement that the Applicant conduct a preconstruction conference prior to the commencement of construction activities. The **Staff Report** condition requires that the Applicant provide a proposed conference agenda for Staff review and that the Applicant file a copy of the agenda in the case docket.⁴⁵ Whereas, **Stipulation** condition 2 requires that, in addition to providing a copy to Staff and docketing the agenda, the Applicant provide notice to the Greene County Board of County Commissioners, the Cedarville Township Board of Trustees, the Xenia Township Board of Trustees, the Miami Township Board of Trustees, the Greene County Engineer, In Progress, LLC and the Green Soil & Water Conservation District.⁴⁶ Because this creates an improved communication with the local community, Staff considers this additional requirement to be beneficial and recommends that the Board approve this Stipulation condition.

⁴⁵ Staff Report at 47.

⁴⁶ Stipulation at 3.

As noted above, conditions 2 (2 of Staff Report), 15 (15 of Staff Report), 18 (18 of Staff Report), 22 (22 of Staff Report), 23 (new condition), 24 (23 of Staff Report), 34 (32 of Staff Report) , 37 (37 of Staff Report), 38 (new condition), and 39 (new condition) of the **Stipulation** are either improved upon or new conditions and should be adopted as part of the certificate.

However, there are many conditions that were changed in the Stipulation and are not beneficial to the project. For the following conditions in the **Stipulation**, the Staff recommends that changes be made to these Stipulation conditions: 12, 17, 19, and 27.⁴⁷

Stipulation condition number 12 (Staff Report condition 12): Condition 12 as written in the Stipulation adds the following language to the beginning of the sentence: “Subject to the application of R.C. 4906.13(B).” Adding this statutory reference adds no meaning to the condition and, the law is what the law is, and operates as the law does. There is no need to alter a condition to recognize that fact. Staff recommends adoption of the Staff Report condition 12.

Stipulation condition number 17 (Staff Report condition 17): The Stipulation eliminates the Staff Report’s condition that the Applicant annually report all wildlife mortality, injury, or entrapment that is discovered at the facility to OPSB Staff and ODNR DOW. This is an important condition that allows OPSB and ODNR Staff to track and analyze the Kingwood facility’s impact on the local wildlife. This provision, if the Board grants a certificate, should be maintained as a condition to the certificate.

⁴⁷ Staff Report conditions 34 and 36 are not included in the Stipulation and do not need to be a part of a certificate if issued. Staff Report condition 34 has been completed by the Applicant and Staff Report condition 36 is a duplicate of Staff Report condition 15 and Stipulation condition 15. Bellamy Testimony at 4, lines 10 -19.

Stipulation condition number 19 (Staff Report 19): The Stipulation’s condition number 19 should be adopted; however, an additional phrase should be added to obligate the Applicant to provide Staff with construction drawings detailing any stormwater control measures no less than seven days prior to the applicable construction activities. In the Stipulation, the Applicant agrees to provide these drawings to the local officials, but does not commit to providing a copy to the Board Staff.

Condition 27 of the Stipulation should not be adopted. Instead, condition 26 of the Staff Report should be made a condition of the certificate, if issued. Condition 26 of the Staff Report reads, “[A]t least 30 days prior to the preconstruction conference, the Applicant shall demonstrate that its *solar and* substation equipment are outside the inner management protection zone(s) for the Camp Clifton Day Camp source water protection area.”⁴⁸ Whereas, Stipulation condition 27 provides that “[A]t least 30 days prior to the preconstruction conference, the Applicant shall demonstrate that the substation equipment are outside the inner management protection zones(s) for the Camp Clifton Day Camp source water protection area.”⁴⁹ The Staff Report makes it clear that all equipment related to the Kingwood project should be outside the inner management protection; while the Stipulation condition 27 eliminates the word “solar.” Staff recommends that the Board adopt the Staff’s condition 26 in order to ensure the safety of the camp’s water source.

⁴⁸ Staff Report, Staff Ex. 1 at 51 (emphasis added) (October 29, 2021).

⁴⁹ Stipulation, Joint Ex. 1 at 8 (March 4, 2022).

Stipulation condition number 31 (Staff Report 30) should not be adopted because it could allow for less stringent sound conditions. In the Stipulation, the condition has no time limitations when the noise test must be performed. The Staff Report requires that the sound test be performed on a sunny day between the months of May through August. This is a time when the sun will be shining; thereby, the test will provide a full picture of the solar generation at its peak; whereas, the Stipulation sound test could be performed on a day when there is no sun and no generation at all. In addition, the Stipulation condition 31 loosens the noise requirements if a new inverter is chosen and its noise exceeds, by 2 dBA, the sound power level is raised according to the Stipulation. However, the Staff Report condition 30 ensures that if noise data is not available from the inverter manufacturer, then an operational noise test may be performed and if the test shows that the operational noise level is greater than project area ambient Leq level plus five dBA, noise mitigation is a requirement. There is no such requirement in the Stipulation and therefore, the Staff Report condition 30 should be used to ensure the least environmental impact.

Staff respectfully re-iterates that Kingwood's Application should be denied, because this project does not serve the public interest, convenience, and necessity. But, in the event that the Board grants Kingwood's Application to construct a solar generation facility, the project should be subject to the conditions of the Staff Report and modifications discussed in this Brief. Particularly, Staff recommends all the conditions from the **Staff Report**. Staff would not object to conditions 2, 15, 18, 22, 23, 24, 34, 37, 38, and 39 of the **Stipulation** which are either improved upon or new conditions that

should be adopted as part of any certificate. And lastly, Staff recommends that changes be made to these **Stipulation** conditions: 12, 17, 19, and 27 as previously discussed in this Brief.

CONCLUSION

Staff respectfully submits that this project does not serve the public interest, convenience, and necessity. Kingwood's Application should be denied.

Respectfully submitted,

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**On Behalf of the Staff of the
Ohio Power Siting Board**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Reply Brief**, on behalf of the Staff of the Ohio Power Siting Board, has been served upon the below-named counsel via electronic mail, this 22nd day of July, 2022.

/s/ Jodi J. Bair

Jodi J. Bair

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ATTACHMENT A

Conditions	Staff Report	Stipulation
	1 – 22	1 - 22
	None	New 23
	23	24
	24	25
	25	26
	26	27
	27	28
	28	29
	29	30
	30	31
	31	32
	32	33
	None	New 34
	33	35
	34	Missing from Stipulation
	35	36
	36	Missing from Stipulation
	37	37
	None	New 38
	None	New 39

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