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. 21-117-EL-BGN**

APPLICATION FOR REHEARING OF KINGWOOD SOLAR I LLC

Pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Rule 4906-2-32, Kingwood Solar I LLC ("Kingwood") respectfully submits this Application for Rehearing of the December 15, 2022 Opinion and Order ("Order") issued by the Ohio Power Siting Board ("Board") in this proceeding. Kingwood sets forth the following specific grounds for rehearing as to why the Order is unlawful and unreasonable:

1. The Board's consideration of the local governmental authorities' positions on the project to determine whether the project is in the public interest, convenience and necessity (R.C. 4906.10(A)(6)) exceeded the Board's statutory authority and therefore was unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

2. The Board's delegation of its decision-making authority to the local governing body of Greene County and the three intervening townships was impermissible, unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

3. The Board's change of its interpretation for what is required to meet the "public interest, convenience, and necessity" criterion of R.C. 4906.10(A)(6) to now allow unanimous opposition by local governmental authorities within the project area to control the Board's decision without a reasonable basis for doing so is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

4. The Board's reliance on public comments that are not a part of the record in these proceedings violates R.C. 4906.10(A), and is therefore unlawful and unreasonable. (*See* Order ¶ 151.)

5. Because the record, including hundreds of pages of exhibits and days of expert testimony, before the Board established that the proposed solar-powered electric generation facility meets all of the statutory criteria of 4906.10(A), including that the project will be in the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6), the Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

6. The Board's finding that the Joint Stipulation was not the product of serious bargaining among capable, knowledgeable parties is not supported by the record and therefore is unreasonable and unlawful. (*See* Order ¶¶ 163–70.)

7. The Board's finding that its determination as to the Project's non-compliance with R.C. 4906.10(A)(6) necessitates findings that (1) the Joint Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Joint Stipulation would violate an important regulatory principle or practice is not supported by the record or law, and therefore is unreasonable and unlawful. (*See* Order ¶ 169.)

8. The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have complete information on the nature of Staff's investigation in violation of R.C. 4906.07(C). (*See* Order ¶¶ 76–79.)

9. The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have sufficient information on why the OPSB Staff was soliciting the local governmental authorities positions on the project on the eve of the date the Staff's Report and Recommendation was due and after the Staff had already recommended approval of the project in the current draft of the Staff Report and Recommendation. (*See* Order ¶¶ 76–79.)

10. The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because the denial of the subpoena requests constitutes a violation of due process as Kingwood was unable to put on evidence that the Staff's Report and Recommendation, which set the tone for the remainder of the proceeding, was outcome determinative and not based on an analysis of Kingwood's application. (*See* Order ¶¶ 76–79.)

For these reasons, and as further explained in the Memorandum in Support attached hereto,

Kingwood respectfully requests that the Board grant its Application for Rehearing.

Respectfully submitted,

/s/ Michael J. Settineri

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MEMORANDUM IN SUPPORT

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I. INTRODUCTION

The Board has the opportunity with this case to redirect its current position and come back into compliance with the statutory directives set forth by the General Assembly. Instead of giving undue weight to the unsubstantiated opinions of local governmental entities and a vocal "not in my backyard" minority, the Board should appropriately weigh and consider whether the Kingwood Solar Project (the "Project") is in the public interest, convenience and necessity pursuant to the plain language of the R.C. 4906.10(A)(6).

The Project meets all of the statutory requirements that have been approved for similar projects several times before. Indeed, the Board explicitly determined that the Project meets all technical requirements for approval. Despite this compliance, the Board denied Kingwood's application and rejected the Joint Stipulation on the sole ground that the Board perceived "unanimous" public opposition against the Project. In so doing, the Board relied on the vague opinions expressed in the intervening local governmental entities' resolutions and unsubstantiated comments from a very small fraction of the local population of Greene County, Ohio which totals nearly 170,000. Such a determination is unreasonable and unlawful and warrants rehearing and reversal.

Surely, this is not what the statute intended when it required the Board to ensure projects serve the "public interest, convenience, and necessity." Nowhere in the statute does it reference public opinion, political motivations, or local perception. The Board cannot look to the opinions of a few elected governmental officials, call those opinions the public welfare, and give it the majority weight over the many public interest benefits that the Board attributed to the Project. But unfortunately, the Board impermissibly delegated its decision-making authority to those local officials—a delegation which is explicitly prohibited by statute and which offends the General

Assembly's intention to place the approval and siting of major utility facilities in the hands of the Board and insulated from local politics. The Board must correct its unreasonable departure from the statute's plain meaning and from its prior precedent. Without correction, the Board walks the dangerous path of letting personal and political opinion govern development—which does not always benefit the public good.

Many of the problems in this case arose when, just a few days before the Staff Report and Recommendation was due to be filed, Staff solicited last minute input from the intervening county and three townships and changed its recommendation—the sole reason being "strong local government opposition." While Staff's solicitation was not included in its Staff Report, Kingwood doggedly pursued information about that solicitation, with each stone overturned leading to a new question and new person being involved. Yet, when the path led back to the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, Kingwood was blocked from questioning her on whether that solicitation was for reasons other than investigating the project, i.e., finding a reason to reverse the pending recommendation by Staff that the Board approve the Project.

As all will agree, an administrative agency must follow its guiding statutes and be open to transparency in its investigations, especially an agency like the Ohio Power Siting Board. The Board's Order, however, failed to follow the express language of R.C. 4906.10(A)(6) and also failed to provide full transparency as to what happened just before the Staff Report issued. Now is the time for the Board to right the course by reversing the Order, approving the Joint Stipulation and issuing a certificate of environmental compatibility and public need for the Project. Doing so will not require further testimony from Ms. White unless the Board wishes to have that testimony on the record to ensure complete transparency to the public.

II. ARGUMENT

Despite the determination that the Project was technically compliant, the Board denied Kingwood's application based on its finding that "the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order ¶ 152.) The Board based this determination on the sole fact that the elected officials from Greene County, and the three intervening townships—Miami, Cedarville, and Xenia Townships—as well as a very vocal minority, opposed certification by passing resolutions against the Project and submitting comments, many of which were not admitted as evidence in the record. (*Id.* at ¶¶ 146–51.) In doing so, the Board bypassed the significant evidence in the record that the Project will positively impact the local community, and the State of Ohio as a whole, by creating new jobs, increasing tax benefits, providing increased access to clean energy, reducing the dependency on fossil fuels, and preserving agricultural land.

Ultimately, the Board held that because the governing bodies of the localities adjacent to and within the Project area "unanimously" opposed Kingwood's application, the Project must fail. (*Id.* at ¶ 145.) By denying Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio, rejecting the Joint Stipulation, and denying Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. White, the Board acted unlawfully and unreasonably. For the following reasons—each of which warrants rehearing on its own—the Board should grant rehearing and reverse these decisions.

A. First Ground for Rehearing: The Board's consideration of the local governmental authorities' positions on the project to determine whether the project is in the public interest, convenience and necessity (R.C. 4906.10(A)(6)) exceeded the Board's statutory authority and therefore was unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

"[T]he [B]oard is a creature of statute, it can exercise only those powers the legislature confers on it." *In re Black Fork Wind Energy, LLC*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. As such, "[t]he relevant requirements [to obtain a certificate of environmental compatibility and public need] are set by the General Assembly, not by the Board." *Accord TWISM*, 2022-Ohio-4677, at ¶ 50. The key question in these proceedings, then, is whether the General Assembly through its enactment of R.C. 4906.10(A)(6) allows the Board to consider the opinions of the local governmental authorities to determine whether the project is in the "public interest, convenience and necessity." Ultimately, as the Supreme Court of Ohio has recently clarified, the determination as to what statutory authority the Board has will be for the Court to determine without mandatory deference to the Board's own interpretation. *See TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 3 ("[T]he judicial branch is never required to defer to an agency's interpretation of the law.").

When interpreting a statute, the Board must begin with the plain text of the provision. *See Elliot v. Durrani*, 2022-Ohio-4190, ¶ 8. "If 'the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation,' because 'an unambiguous statute is to be applied, not interpreted.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8 (quoting *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus). Ambiguity exists only if the statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16. In interpreting the statutory text, words should

be given their customary meaning. *Weiss v. Pub. Util. Comm'n of Ohio*, 90 Ohio St.3d 15, 17, 2000-Ohio-5, 734 N.E.2d 775. The Board "may not add words to a statute to achieve a desired construction." *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 49. Indeed, where the statute is silent, the Board cannot add requirements for certification. *See TWISM*, 2022-Ohio-4677, at ¶ 19.

Here, the language of R.C. 4906.10(A)(6) is plain and unambiguous. R.C. 4906.10(A)(6) states, in relevant part, that the Board "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 . . . [t]hat the facility will ***serve the public interest, convenience, and necessity***[.]" (emphasis added). The terms "public interest, convenience, and necessity" are not defined in the statute. However, dictionaries define "public interest" as "the general welfare and rights of the public that are to be recognized, protected, and advanced" and as "the welfare or well-being of the general public." *Public Interest*, Dictionary.com, https://www.dictionary.com /browse/public-interest (last visited Jan. 11, 2023); *Public interest*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/interest (last accessed Jan. 11, 2023). Similarly, Black's Law Dictionary defines the term as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question."

Courts have likewise defined "public interest" to mean for the benefit or protection of the public at large. When contrasting R.C. 4906.10(A)(3) with 4906.10(A)(6), the Supreme Court held that section 4906.10(A)(6) "require[s] the [Board] to answer . . . how much [a project] will ***benefit the public***." *Ohio Edison Co. v. Power Siting Com.*, 56 Ohio St.2d 212, 215, 383 N.E.2d

588 (1978) (emphasis added). Courts have similarly defined "public interest" as including the "protection" of the public, "support of the poor," "[r]elief of the unemployed," and levying of taxes "to provide funds for the maintenance" law enforcement and other welfare activities. *See State ex rel. Ross v. Guion*, 161 N.E.2d 800 (Ohio 8th Dist. 1959) (collecting cases).

Additionally, the fact that prior projects—that similarly faced "unanimous opposition" from affected local governmental entities—have been approved, issued a certificate of environmental compatibility and public need, and affirmed by the Supreme Court is further evidence that R.C. 4906.10(A)(6) does not contain any language that allows the Board to rely on such opposition to deny a project. *See, e.g., In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 5; *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 8. And it is probative that the General Assembly amended the Revised Code to expressly grant county board of commissioners the authority to prohibit the construction of large wind or solar facilities in certain areas of their counties. R.C. 303.58(A).[1] Had the Code, prior to amendment, already permitted local governments to have this say in where future solar facilities may be located, there would have been no reason for Senate Bill 52. *See State ex rel. Corrigan v. Barnes*, 3 Ohio App.3d 40, 49, 443 N.E.2d 1034 (8th Dist. 1982) (Markus, J. concurring) ("If the former law already so provided, there would have been no reason for that amendment.").

Finally, although the General Assembly did not provide a definition for "public interest," other states have done so, and those definitions uniformly align with the plain meaning outlined above. *See, e.g.*, D.C. Code 16-5501 (defining "[i]ssue of public interest" to mean "an issue related

[1] This Project is explicitly grandfathered under that legislation. *See* 2021 Sub. S.B. No 52, Section 4(A); Kingwood Ex. 1 at Appendix C (system impact study issued December 2018); *and see* Tr. Vol I at 142-144 (noting facility study payment made prior to SB 52 effective date).

to health or safety; environmental, economic, or community well-being . . ."); 70 Ill.Comp.Stat. 1863/2 ("'Public interest' means the protection, furtherance, and advancement of the general welfare and of public health and safety and public necessity and convenience."); Okla.Stat. tit. 59, 15.1A ("'Public interest' means the collective well-being of the community of people and institutions the profession serves[.]"). In sum, the plain and ordinary meaning of "public interest" means for the public good or for the public's benefit. This meaning does not include public opinion or perception.

Instead of looking at the "public interest, convenience, and necessity," the Board added the additional requirement that a project must be supported, or at a minimum not opposed, by the opinions of local governments where the project area is located. Indeed, the Board explicitly stated that it considered "the local *perception* of the Project." (Order ¶ 151 (emphasis added).) Yet, as the plain and unambiguous language of the statute provides, **there is no textual basis** in the statute for the Board to add in this requirement. There is no language in R.C. 4906.10(A)(6), or any other part of R.C. 4906.10, that authorizes the Board to take into account local governmental (and political) opinions. Indeed, the term "public interest" is not synonymous to "public opinion" or "local perception." As commonly defined, "public opinion" means "the collective opinion of many people on some issue, problem, etc., especially as a guide to action, decision, or the like." *Public Opinion*, Dictionary.com, https://www.dictionary.com/browse/public-opinion (last visited Jan. 11, 2023). An "opinion" is merely "a belief or judgment that rests on grounds insufficient to produce complete certainty" or "a personal view, attitude, or appraisal." *Opinion*, Dictionary.com, https://www.dictionary.com/browse/opinion (last visited Jan. 11, 2023). Likewise, "perception" means the "result of perceiving" or an "observation." *Perception*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/perception (last accessed Jan. 11, 2023).

By their plain meaning, "public opinion" or "perception" do not include what is "the welfare or well-being of the general public." Indeed, what benefits the "public interest" is often time not the popular view among a community. *See, e.g.*, *Wildwest Inst. & Friends of v. Bull*, No. CV 06-66-M-DWM, 2006 U.S. Dist. LEXIS 111495, at *25 (D. Mont. June 30, 2006) (finding two problems with reliance on public comments to show "public interest": (1) "the concepts of public opinion and the public interest [] are not necessarily the same," and (2) ascertaining actual "public opinion" is extremely difficult).

Of significance, the Board took it a step further—it not only considered these unsubstantiated opinions, but it also determined that those opinions **alone** are enough to defeat an entirely compliant project. The Board "acknowledge[d]" that the Project offers many public benefits, including "(1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels, (4) protecting landowner rights, and (5) preserving long-term agricultural land use." (Order ¶ 149.) Despite these numerous benefits, the Board held that "the unanimous opposition of every local government entity that borders the Project ***is controlling*** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 145.) As such, the Board not only disregarded the significant benefits that the Project will bring to the public, it also impermissibly focused on singular local issues rather than the statewide implications of the Project. Even locally, however, there was not "unanimous opposition" as only three of the twelve townships of Greene County voiced opposition to the Project. The Board therefore also ignored the countywide implications of the Project in favor of a vocal local minority.

Interpreting R.C. 4906.10(A)(6) to include consideration of "local government opinion" and the broader "public opinion" is unlawful and unreasonable given the plain language of the statute. In other words, **relying upon unfounded opinions by local government officials and a vocal minority**, and allowing those opinions to outweigh the vast evidence of how the Project serves the actual public interest, convenience, and necessity falls far beyond the express statutory criterion. Accordingly, by including the additional requirement that the Project must be supported by some amount of the public, the Board exceeded its statutory grant of authority. Its denial of Kingwood's application for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio on the sole ground that the Project was opposed by some vocal minority and the local government entities is therefore unlawful and unreasonable.

B. Second Ground for Rehearing: The Board's delegation of its decision-making authority to the local governing body of Greene County and the three intervening townships was impermissible, unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

Expanding what may be considered as serving the public interest, convenience, and necessity to include public opinion and perception not only exceeds the Board's statutory authority, it also impermissibly delegates the Board's decision-making authority to local governing bodies or a vocal minority. The enabling statute is again clear that "the [B]oard's authority to grant certificates under section 4906.10 of the Revised Code ***shall not be exercised*** by any officer, employee, ***or body other than the board itself***." R.C. 4906.02(C) (emphasis added); *see also In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010 Ohio 1841, 928 N.E.2d 427, ¶¶ 20–21; *In re Buckeye Wind*, 2012-Ohio-878, at ¶ 13. As such, the power to oversee the construction and operation of major utility facilities, including solar facilities, has been given to one entity alone—the Power Siting Board. Local government entities, including elected

representatives, zoning commissions, and county courts, have no say over whether, where, or how major utility projects may be built and run. *See* R.C. 4906.13(B).

In these proceedings, the Board went to great lengths to outline how Kingwood's Project met every technical criteria. (*See generally* Order ¶¶ 87–132, 153–62.) The Board further outlined the significant benefits that the Project would provide to the public good. (*See id.* at ¶ 149.) Despite this technical compliance and the Project's established benefits to the public interest, the Board denied Kingwood's application for the sole reason that the intervening local governmental entities passed "uniform" resolutions opposing the Project. (*Id.* at ¶¶ 150, 152.) In effect, the Board abdicated its exclusive decision-making authority to these local entities. Because the Board has the exclusive authority to grant certificates, its decision to defer to the opinions of local government entities in denying Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio is unlawful and unreasonable.

Of note, Kingwood is not suggesting that local governing bodies and members of the public cannot engage in the certification process. To the contrary, the Board has specific procedures that allow for an entity or individual to intervene in the proceedings and present evidence. *See* O.A.C. 4906-2-12. Admissible evidence presented by intervening parties may properly be considered by the Board. *See* O.A.C. 4906-2-13. However, unsubstantiated and inadmissible opinions from the public and the passage of resolutions by local governing bodies outlining vague opinions related to the Project or solar energy generally is not sufficient to establish whether the Project serves the public interest. To allow otherwise walks a dangerous path that leads to energy development in this State being determined not by Board—the body tasked by the General Assembly to do so—but rather by the whims of politics at the local governmental entity level.

The General Assembly expressly delegated the authority to grant certificates of environmental compatibility and public need to the Board, thereby allowing the Board's expertise to drive energy development in Ohio and insulating, in part, the decision-making process from outside political motivations. The Board's decision in these proceedings abdicated the certification process from the Board's expertise and placed it in the hands of politically-motivated local bodies. That is unlawful and unreasonable and requires rehearing and reversal.

C. Third Ground for Rehearing: The Board's change of its interpretation for what is required to meet the "public interest, convenience, and necessity" criterion of R.C. 4906.10(A)(6) to now allow unanimous opposition by local governmental authorities within the project area to control the Board's decision without a reasonable basis for doing so is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

Even assuming *arguendo* that the "public interest, necessity, and convenience" criterion of R.C. 4906.10(A)(6) included a requirement for local and public support of a project or even was ambiguous as to such a requirement, the Board's long-standing precedent establishes that no such requirement exists. The Supreme Court of Ohio has made clear that administrative agencies **must respect their prior precedent**. *Bernard v. Unemp. Comp. Rev. Comm.*, 136 Ohio St.3d 264, 2013-Ohio-3121, ¶ 12, 994 N.E.2d 437; *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16. Although the Board is allowed to change its prior interpretations, it may only do so with a reasonable basis. *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶¶ 16, 28.

For years, the Supreme Court of Ohio and the Board have evaluated R.C. 4906.10(A)(6) broadly by considering whether a proposed project benefits the general public—as the plain language of the statute directs. *In re Application of Duke Energy Ohio, Inc.*, 158 Ohio St. 3d 1501, 2020-Ohio-2803, 144 N.E.3d 438, at ¶ 30 (noting that division (A)(6) requires the Board to account for the "public"); *see also In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-

BTX, Entry on Rehearing (Feb. 20, 2022), at ¶ 35 ("[t]he interests of the general public are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6)"). In making this determination, the Board has considered various factors, including public interaction, economic benefits, public safety, energy generation, noise, electrical interference, aesthetic impacts, and local natural resources. *See, e.g., In re Big Plain Solar, LLC*, Case No. 19-1823-EL-BGN, Opinion, Order, and Certificate (Mar. 18, 2021), at ¶¶ 65–67 (noting applicant's interaction with public and analyzing public safety); *In re Aquila Fulton Cty. Power, LLC*, Case No. 01-1022-EL-BGN, Opinion, Order, and Certificate (May 20, 2002), at 12-13 (public need, economic impact, public safety, noise, aesthetic impact, electrical interference, and impact to natural resources); and *In re Duke Energy Madison, LLC*, Case No. 98-1603-EL-BGN, Opinion, Order, and Certificate (May 24, 1999), at 10-11 (public need, public safety, noise, and aesthetic impact).[2]

Indeed, the Board has made clear that local and/or political opposition, even strong "unanimous" opposition, is not sufficient to **outweigh the benefits a project will generate for the public interest**. *See e.g., In re Champaign Wind, LLC*, PUCO Case No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013) (issuing certificate even though the county and townships in the project area unanimously opposed the project); *In re Buckeye Wind, LLC*, PUCO Case No. No. 08-666-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010) (same); *see also, In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21,

[2] The Board also applied a similar analysis in these cases: *In re The Ohio State University*, Case No. 19-1641-EL-BGN, Opinion, Order, and Certificate (Sep. 17, 2020), at ¶¶ 90–93 (noting applicant's public interaction and analyzing economic impacts and safety); *In re Willowbrook Solar I, LLC*, Case No. 18-1024-EL-BGN, Opinion, Order, and Certificate (Apr. 4, 2019), at ¶¶ 51–53 (public interaction and public safety); *In re Guernsey Power Station, LLC*, Case No. 16-2443-EL-BGN, Opinion, Order, and Certificate (Oct. 5, 2017), at ¶¶ 43–45 (public interaction and public safety); and *In re Clean Energy Future-Lordstown, LLC*, Case No. 14-2322-EL-BGN, Opinion, Order, and Certificate (Sep. 17, 2015), at 21- 22 (public interaction, economic impact, and public safety).

2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area); *In re Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (June 24, 2021), at ¶ 293 (holding that despite local citizens' testimony, the project would not create more opportunity for crime in the locality and the applicant had proposed adequate safety measures and setbacks, risk mitigation plans, and that the amended joint stipulation benefited the public);

Recently, however, the Board has shifted course to now allow local governmental entities the ability to effectively veto a project through their opposition to a project. Specifically, the Board **changed its interpretation of R.C. 4906.10(A)(6) to take into account local government opinion** when deciding whether the Project is in the public interest, convenience and necessity. *See In re Birch Solar I, LLC*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) at ¶ 72 ("Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)."); *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021), at ¶ 91 ("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**."); *In re American Transmission Systems, Inc. (ATSI)*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022), at ¶ 81 (**expanding its interpretation of R.C. 4906.10(A)(6) to include local public opinion**).

The Board has not provided any reasonable basis for this departure from its prior precedent—indeed, no reasonable basis exists. As outlined above, there is no statutory hook for

this new interpretation. And the enabling statute explicitly forbids the Board from delegating its decision-making authority to local governmental entities. The Board has no justification for why one renewable energy facility that faced uniform opposition from the local governments in the project area was approved and issued a certificate, *see In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN, while Kingwood's proposed facility that faced similar uniform opposition from the intervening county and townships was denied. **Strong local opposition alone against a proposed project cannot outweigh the benefits it will generate for the general public or overshadow a fully compliant project.** Indeed, public opinion is often just that—opinion, not probative or admissible evidence. Because the Board unreasonably departed from precedent and its prior interpretation of R.C. 4906.10(A)(6), the Board should grant rehearing, approve the Joint Stipulation and issue a certificate to Kingwood Solar for the Project pursuant to the Board's prior long-standing precedent.

D. Fourth Ground for Rehearing: The Board's reliance on public comments that are not a part of the record in these proceedings violates R.C. 4906.10(A), and is therefore unlawful and unreasonable. (*See* Order ¶ 151.)

Even if the Board could consider public opinion and comments, it may only do so if those opinions and comments are in the record. In its Order, the Board gave substantial weight to "the overwhelming number of public comments filed in the case, which largely disfavor the Project." (Order ¶ 151.) Despite acknowledging that these comments "fall short of being admitted evidence in the case," the Board "affirm[ed] that they add value to the Board's consideration of the local perception of the Project." (*Id.*) Based on this supposed opposition and the opposition from the local government entities, the Board determined that the Project "fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 152.)

By its own admission, the public comments relied on by the Board are not in the evidentiary record of these proceedings. (*Id.* at ¶ 151.) R.C. 4906.09 states that "[a] record shall be made of the hearing and of all testimony taken[.]" R.C. 4906.10(A) provides that the 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." (emphasis added). The rules governing the Board procedures further clarifies that "[w]ithin a reasonable time after the conclusion of the hearing, the board shall issue a final decision ***based only on the record***[.]" O.A.C. 4906-2-30 (emphasis added); *see also In re Champaign Wind,* 2016-Ohio-1513, at ¶ 24 ("The board must base its decisions in each case on the factual record before it."). Yet, the Board reviewed the public comments received, counted the comments, and relied on the comments in making its decision. (Order ¶¶ 38–43, 148, 150, 151.)

Because the Board relied on public comments that are outside of the record in these proceedings, it violated R.C. 4906.10(A) and O.A.C. 4906-2-30. Accordingly, its decision that the Project fails to serve the public interest based on these public comments is unlawful and unreasonable.

E. Fifth Ground for Rehearing: Because the record, including hundreds of pages of exhibits and days of expert testimony, before the Board established that the proposed solar-powered electric generation facility meets all of the statutory criteria of 4906.10(A), including that the project will be in the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6), the Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

The Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need was manifestly against the weight of the evidence and is unsupported by the record. As such, the Board's decision is unlawful and unreasonable.

1. The record contains overwhelming evidence that the Project is compliant with all statutory requirements and serves the public interest, convenience, and necessity.

The Board determined that the Project complied with all but one of the statutory requirements. Pursuant to the evidence submitted on the record, the Board found that the Project met and complied with each of the technical requirements outlined in R.C. 4906.10(A):

- The Project's "probable environmental impacts were properly evaluated and determined," and the Project, "subject to the conditions described in the Joint Stipulation, represents the minimum adverse environmental impact" in compliance with R.C. 4906.10(A)(2) and (3) (Order ¶ 106);

- "[T]he Project will serve the interest of electric system economy and reliability and is consistent with regional plans for expansion of the electric power grid of the electric systems serving the state of Ohio and interconnected utility systems" in compliance with R.C. 4906.10(A)(4) (*id.* at ¶ 118);

- The Project "will comply with the air emission regulations in R.C. Chapter 3704, and the rules and laws adopted thereunder," "will comply with Ohio law regarding water pollution control," "will comply with R.C. Chapter 3734 and all rules and standards adopted thereunder," and "will not unreasonably impair aviation" in compliance with R.C. 4906.10(A)(5) (*id.* at ¶¶ 122, 125, 128, 131, 132);

- The Project's impact on agricultural viability of any land in an existing agricultural district within the project area was properly evaluated and determined in compliance with R.C. 4906.10(A)(7) (*id.* at ¶ 156); and

- The Project "incorporates the maximum feasible water conservation practices, and, therefore, satisfies the requirements of R.C. 4906.10(A)(8)" (*id.* at ¶ 162).

As to R.C. 4906.10(A)(6), Kingwood presented significant evidence, including **12 expert witnesses**, showing that the Project will "serve the public interest, convenience, and necessity". The following is a summary of the record evidence that shows the Project serves the public interest, convenience, and necessity based on the plain meaning of that term:

- Creation of construction jobs and economic activity: The Project will create 180 full-time construction jobs, 152 indirect jobs, and 112 induced jobs, for a total of 444 Ohio jobs during the 16-month construction period that are projected to generate $33.01 million of labor income and would sustain an estimated 299 Ohio households. (Kingwood Ex. 107, Ex. A at 2.) During this construction time period, approximately $58.90 million is expected to be spent on Ohio-sourced goods and services, and construction activity will directly and indirectly support $112.93 million of economic activity in Ohio. (*Id.*)

- Creation of permanent jobs and economic activity: Ultimately, the Project will create 15 permanent jobs and approximately $6.75 million in new economic output annually in Ohio, most of which will be generated in Greene County, including $2 million in state and local annual taxes and approximately $1.5 million of annual PILOT payments. (*Id.*, Ex. A at 3.)

- Increased tax revenue: The Project is estimated to create between $55 million to $61 million over the course of the Project's 35-year operating life in new tax revenue for Greene County and local taxing jurisdictions. (Kingwood Ex. 108 at 3, Kingwood Ex. 108, Ex. A at 3.) Specifically, local school districts alone are anticipated to gain between $28 million to $40 million in new tax revenues over the Project's 35-year operating life. (Kingwood Ex. 108, Ex. A at 3.)

- No decrease in property values: As Kingwood's expert appraiser testified, the Project will not negatively impact adjacent property values. (Kingwood Ex. 9 at 1, 8; Kingwood Ex. 1, Appx. F; Kingwood Ex. 9; Kingwood Ex. 105; Tr. Vol. II at 366–67.)

- Creation of new income streams: Kingwood will pay approximately $1,100,000 in annual land lease to local landowners, escalating each year of operation. (Kingwood Ex. 107 at 10.)

- Other monetary benefits: The Project garnered community donations totaling $100,000 to local organizations and good neighbor agreements totaling $757,000 were offered to 65 non-participating property owners, (Tr. Vol. IX at 2130; Tr. Vol.

IX at 2152; Kingwood Ex. 7 at 8, Kingwood Ex. 107, Ex. A at 1; Tr. Vol. IX at 2153; Kingwood Ex. 6 at 8.)

- Attractive to businesses looking to invest in Ohio: As the Ohio Chamber of Commerce recognized, "[i]nvesting in clean energy in Ohio is also critical to attracting new businesses as many Ohio businesses, across a number of industry sectors, have chosen to implement entirely voluntary renewable energy procurement goals." (Kingwood Ex. 6, Attach. B.)

- Reduce dependency on fossil fuels: The Project will directly assist in replacing fossil-fuel power generation facilities in Ohio that have recently or are planned to retire, contributing to cleaner air and water for the southwest Ohio region. (Kingwood Ex. 107 at 8.)

- Preservation of farmlands: Unlike residential or commercial development, the Project will preserve approximately 1,500 acres for the life of the Project. (Kingwood Ex. 107 at 11.)

- Timely addressment of complaints: will ensure that any complaints from the public are addressed expeditiously. (Kingwood Ex. 1 at 32.)

- Commitment to the community: The Project will maintain communication with the community. (Jt. Ex. 1 at 8–9.)

- Assurance of safety: The Project includes emergency response plans that are coordinated with local emergency services, health and safety trainings for construction contractors and employees, and compliance with all safety and equipment standards. (Jt. Ex. 1 at 8–11; Kingwood Ex. 1 at 50–51.)

The Board does not refute these significant benefits that the Project will provide to the public welfare. (*See* Order ¶¶ 142, 149.) In fact, the Board specifically acknowledged the public benefits of the Project, "which include (1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels, (4) protecting landowner rights, and (5) preserving long-term agricultural land use." (*Id.* at ¶ 149.)

However, despite these acknowledged public benefits of the Project and the mountain of evidence as to the compliance of the Project, the Board held that "the unanimous opposition of

every local government entity that borders the Project ***is controlling*** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 145.) Not only is this determination impermissible under the enabling statute as outlined above, it also overstates these localities opposition and ignores the majority support that the Project received. The Board allowed the unsubstantiated and vague statements of officials from four local governmental entities and comments from a vocal minority to outweigh the substantial evidence that the Project meets all of the R.C. 4906.10(A) requirements, including "public interest, convenience, and necessity". This was unlawful and unreasonable.

2. The vague opinions and unfounded statements of Greene County and the three townships cannot outweigh this significant evidence in the record.

The resolutions and statements made by the intervening local entities that the Board impermissibly focuses on are merely vague and unsubstantiated opinions and therefore cannot provide a basis to outweigh the actual evidence of significant public benefit. The resolutions passed by the Greene County Board of Commissioners and the three townships outline alleged **issues which are already adequately addressed in Kingwood's Application and further through the Joint Stipulation conditions, and represent nothing more than politically motivated opposition**. For example, the Greene County Resolution (filed October 29, 2021) declares the Project as "incompatible with the general health, safety, and welfare of the residents of Greene County" and "incompatible with the adopted policies for development of renewable energy and farmland preservation." (Kingwood Ex. 20 at 2.) However, the original land use plan adopted by Greene County, "Perspectives 2020: A Future Land Use Plan for Greene County," does not address renewable energy installations in the County. (Tr. Vol. VII at 1705.) While an amendment to this plan was passed on August 26, 2021, it was filed **well after** the Application

was filed on April 16, 2021 and **after** the Application was deemed complete by the Board. (*Id.* at 1704.)

The resolutions from the three townships are likewise vague and irrelevant to the Board's inquiry. When they initially intervened, the Boards of Township Trustees of Miami and Cedarville Townships were supported by resolutions that indicated **no opposition** to the Project. And the intervention notice for Xenia Township also notes no opposition and merely the desire for the township trustees to intervene in this proceeding. (Kingwood Ex. 95 at 1.) Although all three townships later passed resolutions in opposition to the Project, these resolutions are **vague and rely on generic statements** stating the Project is "incompatible with the general health, safety, and welfare" of township residents or allude to issues that have been adequately addressed by the Applicant. (Kingwood Ex. 68 at 4; Kingwood Ex. 65 at 3; Xenia Township Ex. 1 at Ex. A.)

The townships presentations at the hearing provided no clarity nor concrete evidence. For example, Jeff Ewry, the chair of the Board of Trustees of Cedarville Township, testified that the township trustees **have not had a discussion on how the Project is incompatible** with the general health of Cedarville Township residents, **but stated the Project has caused "angst" and "high tensions" in the township**. (Tr. Vol. VI at 1530–31.) Allegations of tensions in the community, **without any evidence of actual harm to the community**, should not be a reason for the Board to determine that the Project does not satisfy R.C. 4906.10(A). *See, e.g.*, *In re Ross County Solar, LLC*, Opinion, Order, and Certificate (Oct. 21, 2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area). Mr. Ewry further stated that the Project was incompatible with the safety and welfare of township residents because of **traffic and potential contamination of water wells**. (*Id.* at 1532.) Both of these issues were adequately addressed by

Kingwood in the Application and the expert testimony of Kingwood's witnesses, including Dr. Brent Finley who testified on the lack of toxicity from panel use. Indeed, the Board itself found that these alleged concerns are not founded when it determined that the Project met each of the other statutory requirements, including that the Project represents the minimum adverse environmental impact, minimal ecological impacts, minimal traffic impacts, and minimal drainage and runoff impacts.

Don Hollister, Trustee for Miami Township, testified that Miami Township is opposed to the Project because it violates the local zoning code, **even though such codes are not applicable** to the Project pursuant to R.C. 4906.13. (Tr. Vol. VI at 1467–69.) Although he also expressed concern about setbacks, fencing, noise, road damage, drainage, erosion, and environmental consequences, Mr. Hollister also **admitted the township conducted no studies to support these alleged impacts** nor even mentioned these concerns in their resolution opposing the Project. (*Id.* at 1457–59, 1461.) And again, the Board determined that the Project's technical specifications were adequate to address these alleged concerns. Of note, Mr. Hollister made clear his bias against the Project, **admitting that he is personally opposed to the Project** and has even followed and commented on the Citizens for Green Acres opposition Facebook group since 2018. (*Id.* at 1463–66.)

Stephen Combs, Trustee for Xenia Township, expressed that the township is concerned about the long-term effects of the Project, and **identified a laundry list of issues** the Board should address including decommissioning, health effects, pollution, runoff, dust, wildlife, traffic, emergency response services, property values, and tourism. (Tr. Vol. VI at 1310-19.) Again, the Board determined that **each of these alleged issues have been adequately addressed by the application when it determined that the Project is compliant as to each of the other statutory**

requirements. As with the other two townships and the county, Xenia Township **did not conduct any independent studies or** demonstrate any actual impacts to the township. (Tr. Vol. VI. 1305–08, 1315–16.) Notably, Xenia Township has not expressed any opposition to a 30 MW solar project being developed by another company in the township. (Tr. Vol. VI at 1300–01.)

As the Board's determinations as to the other statutory criteria establish, none of the unsubstantiated concerns of the local governing bodies for Greene County or the three townships have any foundation in the record. That includes the County and townships' concerns related to visibility, tourism, traffic, noise, and other ecological impacts. And the vague and conclusory statements within the resolutions—that the Project is incompatible with the general health, safety, and welfare of the local communities—without actual evidence should not carry any weight—let along *controlling* weight—in the Board's decision. Accordingly, the Board's decision to deny the application and reject the Joint Stipulation contrary to the evidentiary record is unreasonable and unlawful.

F. Sixth Ground for Rehearing: The Board's finding that the Joint Stipulation was not the product of serious bargaining among capable, knowledgeable parties is not supported by the record and therefore is unreasonable and unlawful. (*See* Order ¶¶ 163–70.)

Kingwood and the Ohio Farm Bureau Federation ("OFBF") agreed to and proposed a Joint Stipulation to the Board that subjects the Project to 39 conditions that resulted from recommendations in the Staff Report and discussion with the intervening parties and the general public. (Jt. Ex. 1.) The Board rejected the Joint Stipulation, in part, because it found that the Joint Stipulation is not the "product" of serious bargaining. (Order ¶ 168.) Although the Board acknowledged that Kingwood made efforts to include all parties in settlement dialog and revised the conditions within the Joint Stipulation in accordance with feedback from all parties, the Board found that "the Stipulation fails to describe agreement of any of the parties as to the core issue in

this case—whether the Board should issue a certificate for the Project." (*Id.* at ¶ 168.) The Board then concluded that the Joint Stipulation cannot be a "'product' of serious bargaining." (*Id.*)

As an initial matter, the Board's finding that the Joint Stipulation "does not describe agreement of *any* parties as to the core issue in the case" is factually inaccurate. Both Kingwood and the OFBF are parties to these proceedings. *See* R.C. 4906.08; O.A.C. 4906-2-11. Additionally, the Board's determination that a stipulation must be as to the core issue of whether an application is to be approved is contrary to the Board's governing rules and regulations. Pursuant to O.A.C. 4906-2-24(A), "[a]ny two or more parties may enter into a written or oral stipulation concerning issues of fact or the authenticity of documents, or the proposed resolution of ***some or all of the issues in a proceeding***." (emphasis added). Nothing in the enabling statutes and regulations mandates that a stipulation may only be accepted if it addresses the "core issue" in a proceeding. Indeed, O.A.C. 4906-2-24(A) states the opposite.

Moreover, the Board's suggestion that all parties must join a stipulation in order to be considered the product of serious bargaining is misplaced. As outlined above, O.A.C. 4906-2-24(A) provides that "***[a]ny two or more parties*** may enter into a written or oral stipulation[.]" (emphasis added). O.A.C. 4906-2-24(D) goes on to explicitly delineate what may occur if not all parties join a stipulation—"[p]arties that do not join the stipulation may offer evidence and/or argument in opposition." To be sure, the Board regularly approves, and the Supreme Court consistently affirms, stipulations that are only agreed to and signed by some of the parties involved in the proceedings. *See, e.g.*, *In re Icebreaker Windpower, Inc.*, 2022-Ohio-2742, ¶ 6; *In re in re Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, ¶ 7. This is true even in cases where the non-signatory parties continue to oppose the application after the stipulation is submitted to the Board. Instead, the relevant inquiry is whether all parties were

invited to the settlement table, whether the parties were capable and knowledgeable of the issues, and whether the applicant was open and operated with integrity during the negotiations. *See In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 45; *In re E. Ohio Gas Co.*, 144 Ohio St.3d 265, 2015-Ohio-3627, 42 N.E.3d 707, ¶ 32; *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 85.

In this case, Kingwood engaged in significant settlement discussions with not only the other signatory party to the Joint Stipulation—the OFBF—but also each of the intervening parties. (Kingwood Ex. 7 at 2.) No party was excluded from the table. (*Id.* at 22.) And all parties were represented by competent counsel. (*Id.*) Although the intervenors did not ultimately sign onto the Joint Stipulation and it is now apparent they never would, Kingwood seriously considered and made adjustments to the Project in response to feedback and concerns expressed by all parties. (*Id.* at 2.) Kingwood made every effort, expending significant time and resources, to bargain with all parties to come to a solution. (*Id.*) For example, Kingwood revised the Project layout, increasing the setbacks and enhancing screening, to directly address concerns raised by the intervenors. (*Id.*) Kingwood made these changes for the sole reason of trying to obtain agreement among all parties as to the appropriateness of certification of the Project—the "core issue in the case."

Just because no agreement was ultimately reached by *all* parties does not mean that serious bargaining did not occur. Indeed, the very fact that Kingwood revised and amended the Project to provide additional safeguards is indicative of the serious bargaining that occurred. In the spirit of cooperation, Kingwood has maintained those extra conditions even though the parties who voiced the concerns that led to those changes declined to sign the Joint Stipulation. Accordingly, the Board erred in determining that the Joint Stipulation was not the product of serious bargaining.

G. Seventh Ground for Rehearing: The Board's finding that its determination as to the Project's non-compliance with R.C. 4906.10(A)(6) necessitates findings that (1) the Joint Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Joint Stipulation would violate an important regulatory principle or practice is not supported by the record or law, and therefore is unreasonable and unlawful. (*See* Order ¶ 169.)

The Board further held that its R.C. 4906.10(A)(6) determination "necessitates findings that (1) the Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Stipulation would violate an important regulatory principle or practice." (Order ¶ 169.) As outlined in Section II(A) *supra*, the Board's determination under R.C. 4906.10(A)(6) that the Project fails to serve the public interest, convenience, and necessity is unlawful and unreasonable. For the reasons outline above, the record evidence establishes that the Project will serve the public interest, convenience, and necessity. As such, the Board's rejection of the Joint Stipulation based on that false determination is likewise unlawful and unreasonable.

Furthermore, the conditions in the Joint Stipulation represent additional aspects of the Project that serve the public interest and conform to important regulatory principles and practices. The Stipulation includes documenting commitments that Kingwood has made to **coordinate with the local government** on safety issues, such as the coordination regarding the traffic management and the emergency response training with the local communities. (Jt. Ex. 1 at 7-8, Condition 24.) It includes **further protections for local wildlife and ecology** through restrictions on work in perennial streams and the inclusion of wildlife-friendly fencing. (*Id.* at 5-7, Conditions 15, 20, 21, and 23.) It includes substantial concessions by the Applicant to reduce the Project footprint by **increasing the setbacks**, with significant setbacks in the areas identified by local stakeholders as being particularly important. (*Id.* at 3–4, Condition 4.) It includes **substantial commitments to prevent drainage issues** that would impact adjacent homeowners or farmers such as allowing access for Greene Soil & Water Conservation District inspectors to be present during certain

construction activities. (Jt. Ex. 1 at 9-10, Conditions 32, 33, and 34). And it includes **increased landscape screening** to further minimize visual impacts than originally proposed in the Application. (*Id.* at 5–6, Condition 16.)

Additional conditions in the Joint Stipulation also **require Kingwood to directly engage with local decision makers**, including 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 Greene Soil & Water Conservation District. (Jt. Ex. 1 at 3, 6, 7, 10, and 11.) Local governmental officials can **choose to attend preconstruction conferences**. (*Id.* at 3.) Kingwood will make pre- and post-construction stormwater calculations and will submit the calculation, along with a copy of any stormwater submittals made to the Ohio EPA, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.* at 6.) If post-construction storm water best management practices are required, Kingwood **will submit construction drawings, detailing any stormwater control measures**, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.*)

Additionally, prior to commencement of construction, Kingwood will consult with the Greene Soil & Water Conservation District regarding seed mixes for the Project and shall provide the tags on such seed mixes to the agency. (Jt. Ex. 1 at 7.) Kingwood **will also coordinate with public officials such as the Greene County Engineer and local law enforcement** for temporary road closures, road use agreements, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed Project. (*Id.*) **Kingwood will also consult with the Greene Soil & Water Conservation District and the Greene County**

Engineer to determine the location of any tile located in a county maintenance ditch to ensure that parcels adjacent to the Project area are protected from unwanted drainage problems due to construction and operation of the Project. (*Id.* at 10.)

The Board ignored all of these conditions and safeguards for the public, declining to address them at all in its Order. Instead, faced with pressure from local government entities, the Board allowed the fact that the intervening county and townships opposed the Project to dictate its action altogether. (Order ¶ 168.) This was unlawful and unreasonable. To be sure, the Board consistently approves similar stipulations that include similar, or even less restrictive, conditions—including where not all parties to the proceedings join the stipulation. *See, e.g. In re Union Ridge Solar, LLC*, Case No. 20-1757-EL-BGN, Opinion, Order, and Certificate (Jan. 20, 2022); *In re Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021).

H. Eighth Ground for Rehearing: The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have complete information on the nature of Staff's investigation in violation of R.C. 4906.07(C). (*See* Order ¶¶ 76–79.)

In denying Kingwood's interlocutory appeal and affirming the ALJ's refusal to issue a subpoena for the Board's Executive Director to testify, the Board failed to rectify the failure of the Staff's Report and Recommendation to comply with R.C. 4906.07(C). That statute requires the chairperson of the Board to investigate the application and prepare a written report to the Board and the applicant with recommended findings on the statutory criteria and importantly, that report becomes part of the record. R.C. 4906.07(C). Among other specific requirements, the statute explicitly states that the "report **shall** set forth the nature of the investigation." *Id.* (emphasis added).

There is no dispute that the Staff Report and Recommendation, as submitted on October 29, 2021, **does not** set forth the nature of the investigation. *Id.* The record of the hearing clearly shows that Staff reached out to each of the local governments the day prior to the issuance of the report. (Tr. Vol. VIII at 1942.)[3] That late outreach and the reason for that late outreach is not, however, included anywhere in the Staff Report. It should be undisputed that the Staff Report failed to comply with the statute because it did not detail the full nature of the investigation. (*See* Staff Ex. 1.) The ALJs and then the Board refused to allow Kingwood to present evidence on why Staff conducted that outreach and the extent of that outreach, evidence that would have been elicited through the testimony of the Board's Executive Director, Theresa White. (Tr. Vol. VIII at 1962-1963; Order at ¶79.) That refusal was unlawful and unreasonable.

Ms. White's testimony was very important to Kingwood's presentation to challenge the basis for and validity of Staff's recommendation that the Project did not satisfy the public interest, convenience and necessity criteria of R.C. 4906.10(A). A day before the Staff Report was due to be issued, the Executive Director directed at least one subordinate, Ms. Juliana Graham-Price, to solicit various intervening local public entities on their position on the project. (Tr. Vol. VIII at 1942: 10-16.) After those solicitations, the Greene County Board of Commissioners issued a resolution against the project and then filed it with the Board on the same day that Staff reversed its recommended approval to a recommended denial. (Tr. Vol. VII at 1785:5-12; 1842:21-25; 1843:1-6.) And while the County passed a resolution against the Project, as of that date none of the three townships had issued a resolution opposing the Project.

[3] Note, the Order states that Ms. Graham-Price reached out to the local governments on both October 21 and October 28. See Order at ¶ 77. While Ms. Graham-Price testified that she was directed to reach out (and did reach out) on October 28, the Order does not include a reference to the October 21 outreach.

As established from other testimony in the proceedings, particularly from Ms. Juliana Graham-Price, **Ms. White's involvement was central to Staff's investigation and last-minute change in recommendation**. Indeed, Ms. White is the *only* person who knew why the Staff made last-minute outreach to the local entities. Yet, Kingwood was precluded on multiple occasions from being able to call Ms. White to testify in these proceedings.

In its Order, as justification for denying Kingwood's request to compel Ms. White's testimony, the Board explained that "the record is clear as to Staff's investigation of the positions of local government entities." (Order ¶ 79.) However, nothing in the record indicates 1) that Ms. Graham-Price was the only staff member or staff representative to reach out to the local government entities; 2) if Ms. White directed any other staff member or representative (including counsel) to reach out to the local government entities or their representatives (including counsel); or 3) what prompted Ms. White to initiate the outreach at the very last minute and after the Staff Report had been drafted to recommend approval of the project. By restricting Kingwood's ability to question all parties with knowledge of the reason for and the full extent of local outreach, the Board allowed the Staff Report to be presented to the Board and included in this record as evidence without transparency on the full nature of the Staff investigation (*see* R.C. 4906.07(C) mandating the Report automatically becomes part of the record). That was unlawful and unreasonable, and Kingwood should have been allowed to call Ms. White to the stand.

I. Ninth Ground for Rehearing: The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have sufficient information on why the OPSB Staff was soliciting the local governmental authorities positions on the project on the eve of the date the Staff's Report and Recommendation was due and after the Staff had already recommended approval of the project in the current draft of the Staff Report and Recommendation (*See* Order ¶¶ 76–79.)

In a Board proceeding, the Staff report is a watershed moment. As Staff witness Grant Zeto agreed, a Staff recommendation to approve or deny an application can impact the entire trajectory of the proceeding. (Tr. Vol. VII at 1903: 5-15.) A recommendation to approve a project may cause project opponents to consider reasonable compromises to improve the project in a way that addresses specific impacts. On the other hand, a recommendation to deny an application can embolden project opponents and severely curtail the ability of a project to effectively address those opponents' reasonable concerns. Such was the case in this proceeding. Staff's recommendation in the Report to deny the application severely limited any opportunity for Kingwood to effectively negotiate with various Project opponents.[4]

In this case, Kingwood worked diligently to develop a complete record of Staff's investigation and the irregularities that surfaced with each question. Kingwood, during pre-hearing discovery, identified that at least one Greene County staff member had spoken with Board Staff. (*See, e.g.*, Kingwood Exhibit 24; *see also* Tr. Vol. V at 1086-1094.) By following the thread, which included subsequent subpoenas, Kingwood was able to establish that Ms. Graham-

[4] In the Order, the Board clearly identifies that opposition to the Project picked up and coalesced *after* the Staff Report was issued:

> **Following the issuance of the Staff report,** additional local government opposition included (1) the adoption of Project opposition resolutions by all three affected townships, (2) active participation in opposition to the Project by all four government entities in the evidentiary hearing.

(Order at ¶ 139 (emphasis added).)

Price, at the explicit direction of Ms. White, had reached out to the local governments the day before the Staff Report was issued to solicit their input. (Tr. Vol. VIII at 1942:10-16.) Kingwood further established that the initial recommendation to approve the Project was reversed on October 29, the day the Staff Report was issued. (Tr. Vol. VII at 1785:5-12; 1842:21-25; 1843:1-2.) However, because Kingwood was prevented from subpoenaing Ms. White, her explanation about why the outreach was initiated and whether that outreach was for a reason other than investigating Kingwood's application are not included in the record.

Instead of directly addressing the lack of information about this process in the Order, the Board relied on the "collective testimony" of Staff and summarily concluded that Staff did not act with impropriety. (*See* Order ¶ 79 ("Further we find no impropriety as to the nature and timing of Staff's communications. . ." and ". . .we find no impropriety as to similar communications. . .").) But nowhere in the Order does the Board conclude that all relevant information was included in the record. Because Kingwood was unable to question Ms. White, it was unable to ask what prompted such outreach—outreach which was highly irregular. It is imperative for the Board to hear Ms. White's testimony to actually evaluate the true impetus for the outreach at the eleventh hour, and then evaluate the irregularity of Staff's solicitation based on that information to determine whether Staff's recommendation was improperly influenced.

Only Ms. White can testify about why she directed at least one subordinate to solicit local officials the day prior to when the Staff Report issued. Likewise, only Ms. White can testify on whether other representatives of the Commission or the Board communicated with the local governmental officials or their counsel. Again, Kingwood discovered new information with every overturned stone as it pursued this issue at the hearing. Kingwood was then blocked from overturning another stone – which would have been Ms. White's testimony. Without her

testimony, the record is incomplete. As a result, the Board's decision to affirm the ALJs' refusal to issue a subpoena for Ms. White to testify is unlawful and unreasonable.

J. Tenth Ground for Rehearing: The Board's decision to deny Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because the denial of the subpoena requests constitutes a violation of due process as Kingwood was unable to put on evidence that the Staff's Report and Recommendation, which set the tone for the remainder of the proceeding, was outcome determinative and not based on an analysis of Kingwood's application. (*See* Order ¶¶ 76–79.)

Staff and the Board's failure to allow Kingwood to call on the Executive Director to testify infringed on Kingwood's right to due process. The right to due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *Youngstown v. Traylor*, 123 Ohio St.3d 132, 2009 Ohio 4184, ¶ 8, 914 N.E.2d 1026. "Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution require that administrative proceedings comport with due process." *Richmond v. Ohio Bd. of Nursing*, 10th Dist. No. 12AP-328, 2013-Ohio-110, ¶ 10 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 554 N.E.2d 97 (1990)).

At a minimum, due process requires notice and the opportunity to be heard. *Krusling v. Ohio Bd. of Pharmacy*, 12th Dist. No. CA2012-03-023, 2012 Ohio 5356, ¶ 13, 981 N.E.2d 320 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L. Ed. 865 (1950)). Such an opportunity to be heard requires the "full opportunity to present all evidence and arguments which the party deems important[.]" *Reed v. Morgan*, 12th Dist. No. CA2011-03-065, 2012 Ohio 2022, ¶ 11.

In this case, Kingwood sought to elicit additional evidence to fully understand why the Board's Executive Director ordered a subordinate to solicit the positions of the intervening local

governmental entities on the eve of the issuance of a Staff Report that as then drafted, recommended approval of the Project. Kingwood also sought to elicit evidence on whether the process to finalize the Staff report was improperly influenced and whether the recommendation was influenced by interests outside Board Staff. Only Ms. White could explain the actual reason for the highly irregular, eleventh-hour outreach to the local governmental entities. Kingwood's requests for Ms. White's testimony to complete the record, however, were consistently denied. (Tr. Vol. VII at 1912: 11-15.; Tr. Vol. VIII at 1962: 25; 1963: 1-11.)

There is no dispute that the Board has the authority to grant Kingwood's subpoena. *See, e.g., In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 48, 2013-Ohio-5478, 3 N.E.3d 173. And there is no dispute that Kingwood availed itself of this authority by requesting the subpoena. *(See, e.g.*, Tr. Vol. VIII at 1962-1963; and Order at ¶79.) Yet, the ALJs and the Board denied the request by explaining that Ms. White testimony is "unwarranted." (Tr. Vol. VIII at 1962-193; Order ¶ 79.) This is not a valid reason to deny or quash a subpoena. The ALJ and Board may only do so if the subpoena "is unreasonable or oppressive." O.A.C. 4906-2-23(C). Neither the ALJ nor the Board made any such determination and her testimony was relevant because if the Staff's investigation was shown to be outcome determinative, then that fact would have been of consequence to the Board's consideration of Kingwood's application and its consideration of the Staff's recommendation and testimony.

The Executive Director's testimony was critical to allow Kingwood to fully present the arguments it deemed important and necessary. The Board's refusal to allow Kingwood to call the Executive Director constitutes a due process violation. Accordingly, the Board's decision to deny Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony Ms. White is unlawful and unreasonable.

III. CONCLUSION

Kingwood presents these ten grounds for rehearing to the Board for its consideration. For the foregoing reasons, rehearing should be granted, and the Board should approve the Joint Stipulation and issue Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being sent via electronic mail on January 17, 2023, to:

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Summary: Application Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Kingwood Solar I LLC