

BEFORE
THE OHIO POWER SITING BOARD

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

MEMORANDUM OF CITIZENS FOR GREENE ACRES, INC., JENIFER ADAMS, P. CHANCE BALDWIN, JACOB CHURCH, VERITY DIGEL, JED HANNA, KRAJICEK FAMILY TRUST, JAMES JOSEPH KRAJICEK, KAREN LANDON, NICOLE MARVIN, CHAD MOSSING, KAREN MOSSING, NICHOLAS PITSTICK, KYLE SHELTON, MARLIN VANGSNESS, JEAN WEYANDT, JERALD WEYANDT, THE BOARD OF TRUSTEES OF CEDARVILLE TOWNSHIP, THE BOARD OF TRUSTEES OF MIAMI TOWNSHIP, AND THE BOARD OF TRUSTEES OF XENIA TOWNSHIP IN OPPOSITION TO KINGWOOD SOLAR'S APPLICATION FOR REHEARING

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Intervenors Citizens for Greene Acres, Inc. (“CGA”), its above-named members (collectively with CGA, the “Citizens”), the Boards of Trustees of Cedarville, Miami, and Xenia Townships, (collectively with the Citizens, the “Intervenors”), hereby file their Memorandum in Opposition to the Application for Rehearing of Applicant Kingwood Solar I LLC (“Kingwood”). Kingwood’s Application for Rehearing merely repeats the arguments that the Ohio Power Siting Board (“Board” or “OPSB”) found meritless in its Opinion, Order, and Certificate (“Opinion”) dated December 15, 2022. Therefore, OPSB should deny Kingwood’s Application for Rehearing.

I. Overwhelming Public Opposition To The Project Shows That The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6).

Kingwood’s Application for Rehearing betrays its realization that the public overwhelmingly hates its Project. Seeking to divert attention from the Project’s poor design and terrible siting, Kingwood injects its arguments with name-calling in an attempt to shame its

detractors. Kingwood invokes the worn-out cliché utilized by developers everywhere who want to draw attention away from their developments' flaws – the “not in my backyard” (NIMBY) argument that its Project is opposed only because the neighbors do not want to live next to it. However, there is nothing wrong with protecting one's home and community from a harmful project.

In seven places, Kingwood's Application for Rehearing mischaracterizes the opponents of this ill-sited and poorly designed Project as a “vocal minority,” as if repeating this term over and over will fool anyone into believing it. To the contrary, the opposition to Kingwood's Project has been especially prominent and one-sided. Greene County, Cedarville Township, Miami Township, and Xenia Township all oppose this Project for being contrary to their citizens' best interests. The speakers at OPSB's local public hearing overwhelmingly opposed the Project, with so many people attending the hearing that many of the Project's opponents had to leave without delivering their remarks. The sign-in sheets for the public hearing also indicated one-sided opposition to the Project.

Jenifer Adams testified that she attended a Town Hall hosted by the Greene County Board of Commissioners at the Greene County Fairgrounds on April 6, 2021. Citizens Exh. 1, Adams Direct Testimony, p. 8, lines 18-19. The purpose of the Town Hall was for the commissioners to hear the concerns and input from Greene County residents regarding the Project. *Id.*, lines 19-21. Based on her observations, over 150 people attended, 39 local residents spoke, and based on the timing of applause, the majority of those who did not speak appeared to be in opposition to the Project. *Id.*, p. 8, line 21 to p. 9, line 1. The majority of those who spoke were in opposition to the Project. *Id.*, p. 9, lines 1-2.

Ms. Adams further observed that opposition to the Project has been extensive, long-standing, and continues to grow. *Id.*, line 5. Opposition to the Project far outweighs support for the Project. *Id.*, lines 5-6. She has observed this in many ways which include through CGA's membership, attendance at CGA meetings, attendance at local government meetings including the commissioners' town hall meeting, attendance at meetings hosted by Kingwood, attendance at the OPSB public hearing for the Project, letters regarding the Project submitted to the OPSB as public comments, and general feedback from members of the community. *Id.*, lines 6-11. Due to widespread local opposition to the Project, 92 local residents living near the Project Area have joined CGA to fight the Project.

Faced with overwhelming local opposition to the Project, Kingwood tried to entice the community into dropping its opposition by offering money. Kingwood sent good neighbor agreements to 65 landowners adjacent to the Project Area offering to pay each landowner \$1,000 upon signing the agreement and another payment of \$7,500 to \$25,000 once Project construction started. Kingwood Exh. 6, Stickney Direct Testimony, p. 8, lines 3-7. Kingwood started offering good neighbor agreements in August 2021. Stickney, Tr. I 61:9-12. As of the time of hearing on March 7, 2022, only six landowners had taken the bait. Kingwood Exh. 6, Stickney Direct Testimony, p. 8, lines 8-9; Stickney, Tr. I 182:18 to 183:1. Few people wanted the money badly enough to accede to such a bad project. These offers started in August 2021, but they did not have their intended effect as evidenced by their failure to suppress the public outpour of opposition on display at the local public hearing on November 15, 2021. A wealthy developer's inability to buy meaningful citizen support for its Project is a telltale sign that the Project is widely recognized as contrary to the public's interest, convenience, and necessity.

For the same reason, Kingwood also offered money to the three townships on the condition they withdraw their opposition to the Project. Kingwood Exh. 6, Stickney Direct Testimony, p. 8, lines 10-20; Stickney, Tr. I 219:14-19. Kingwood is offering a “community benefit fund” of \$225,000 per year of the Project’s life to be divided among whichever townships agree to drop their opposition. *Id.*; Stickney, Tr. I 186:6-9. The townships have declined this offer. Stickney, Tr. I 190:1-3. So even big money from a wealthy developer cannot drum up any significant local enthusiasm for this Project.

Although Kingwood tries to downplay the extent of public opposition, Kingwood’s decision to conduct an opinion poll about the Project reflects its realization that it had to manufacture the appearance of public support for its Project. And, as shown by its polling questions, Kingwood knew that it could make its Project appear popular only by concentrating primarily on respondents who knew nothing of the Project’s harms and by skewing the questions so badly as to guarantee the answers it wanted. Kingwood’s pollster also steered its questioners primarily towards citizens living outside of the three affected townships, thus guaranteeing that most of the respondents would know little to nothing about the Project’s threats to the community. Its pollster’s argument that it had to concentrate primarily on interviewees living in cities outside of these townships because 75 to 100 phone numbers are required to complete one interview is just nonsense. There is no valid excuse for interviewing so few people from these townships. The Board cannot gauge the public interest, convenience, and necessity of a project by polling people who know nothing or next to nothing about the project. For the poll’s respondents who know little or nothing about the Project, and most of the Respondents fit those descriptions, their answers meant nothing more than the fact that they generally favored solar energy, not that they thought this Project was desirable.

If Kingwood truly thought that the public had already demonstrated its support for this Project, it would not have needed an opinion poll to make that demonstration. But, by the time Kingwood conducted its opinion poll on March 2-3, 2022 (Citizens Exh. 16, p. 2), OPSB's local public hearing had already demonstrated the public's opposition to the Project on November 15, 2021. That display of opposition, along with other considerable evidence of opposition, led Kingwood to commission and conduct its opinion poll in a desperate attempt to portray the opponents as a "minority." If Kingwood actually believed the public favored its Project, it would have employed an honest opinion poll to measure that opinion instead of a deceptive one. OPSB justifiably rejected the poll's methodology and results. Opinion, ¶ 148.

Importantly, the Greene County Commissioners and the Boards of Trustees of Cedarville, Miami, and Xenia Townships intervened into this proceeding and passed resolutions opposing the Project. In another desperate ploy, Kingwood states that the Project's opponents are in the minority, because only three of Greene County's 12 townships voiced opposition to the Project. However, the other nine townships had no reason to get involved in the case, because the Project does not threaten their communities. Notably, these nine townships also did not express any support for the Project. The non-involvement of these townships does not support Kingwood's view that the Project's opponents are in the minority. Greene County and Cedarville, Miami, and Xenia Townships have opposed this Project, because they recognized the immense damage that the Project would impose on their community.

For these reasons, the Board should deny Kingwood's Application for Rehearing and reaffirm its denial of the certificate for this Project. The Project does not satisfy the objectives of R.C. 4906.10(A)(6).

II. Intervenors' Response to First Grounds for Rehearing:

OPSB Lawfully And Reasonably Considered The Interests Of The Entire Public Rather Than Excluding Local Public Interests From Its Consideration Of The Public Interest Under R.C. 4906.10(A)(6).

Kingwood argues that the term “public interest” as used in R.C. 4906.10(A)(6) is not the same as “public opinion,” and that OPSB’s denial of the Certificate is impermissibly based solely on public opinion. The company also theorizes (at 8) that OPSB “focused on singular local issues rather than the statewide implications of the Project.” All three premises are incorrect.

Kingwood’s arguments misread the Board’s Opinion. The Board did not consider only the expressions of local opposition in its analysis of public interest, convenience, and necessity. OPSB also identified the Project’s overall perceived benefits and weighed them against the adverse impacts on the local community to determine that the balance favored denial of the certificate. Opinion, ¶¶ 144, 149. The Opinion explicitly states that the Board “must balance projected benefits against the magnitude of potential negative impacts on the local community.” *Id.*, ¶ 144. Accordingly, OPSB considered and balanced the Project’s effects on the entire public. The Board did not limit its analysis to the public interests of local communities. Nor did OPSB ignore the public interests of the segment of the public living near the Project, despite Kingwood’s demands to do so.

Accordingly, OPSB did not allow local governments to veto this Project. Instead, it was OPSB, not the local governments, which weighed local opposition to Kingwood’s facility against the Project’s perceived benefits to find out whether the Project is in the public interest as a whole. Kingwood asserts that the Ohio General Assembly would not have found it necessary to pass Senate Bill 52 to allow the counties to veto solar projects in their communities if the

legislature believed R.C. 4906.10(A)(6) already provided local governments with that authority. Kingwood provides no legislative history or other evidence for this theory. A more plausible explanation for the General Assembly's action is that it wished to correct OPSB's previous misinterpretation of R.C. 4906.10(A)(6) that inappropriately diminished the voices of local governments and their citizens in certification decisions. Moreover, Senate Bill 52 provides counties with outright authority to veto solar projects, while OPSB interprets R.C. 4906.10(A)(6) to allow OPSB to consider local support or opposition as a factor in OPSB's balancing test for determining whether a project complies with R.C. 4906.10(A)(6). The Board's Opinion in this case does not interpret R.C. 4906.10(A)(6) as an avenue for local governments to veto projects, unlike Senate Bill 52.

Kingwood also contends (at 6) that two prior decisions of the Supreme Court of Ohio indicate that local opposition should not be considered as a factor under R.C. 4906.10(A)(6), citing *In re Buckeye Wind L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 5 and *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 8. However, the parties in those cases did not argue that local community opposition was grounds to disapprove a project under R.C. 4906.10(A)(6). Because this issue was not presented to the Court in those cases, they provide no precedent for the Board's decision in this case.

Turning to OPSB's interpretation of "public interest, convenience, and necessity" in R.C. 4906.10(A)(6), Kingwood asserts that this statutory provision is unambiguous and immune from the rules of statutory construction. Then Kingwood admits that the statute does not define "public interest, convenience, and necessity," so Kingwood falls back on dictionary definitions and court decisions as means of statutory construction in an attempt to interpret them to devise its own definitions. Kingwood claims that dictionaries and court decisions do not define "public

interest” to include “public opinions.” This is a curious distinction, since OPSB’s Opinion does not refer to the local communities’ views as “public opinions.”

Kingwood’s attempted dichotomy between public interest and public opinion is a false one. The testimony from citizens and local officials, government resolutions, and the public’s comments were expressions about how the Project does not serve the public interest, convenience, and necessity. After all, Kingwood asked OPSB to consider its witnesses’ opinions on whether the Project is in the public interest, convenience, and necessity. For example, Kingwood project manager Dylan Stickney submitted written direct testimony opining that “[t]he Project will serve the public interest” under R.C. 4906.10(A)(6). Applicant’s Exh. 17, p. 35. He again expressed that opinion in his rebuttal testimony. Stickney Rebuttal Testimony, Applicant’s Exh. 107, pp. 6-14, Answers 8-12, 15. Kingwood witness English also opined that the Project serves the purposes of R.C. 4906.10(A)(6). Supplemental Testimony of Alex English, Applicant’s Exh. 18, p. 4, Answer 9. Thus, even Kingwood regards witness opinions about compliance with R.C. 4906.10(A)(6) to be relevant. Kingwood can hardly complain about the Staff’s and the Board’s consideration of the same genre of testimony from citizens and local officials. Kingwood cannot credibly argue that opinions are not valid evidence of compliance with the R.C. 4906.10(A)(6) criteria, when it promoted witness testimony for the same purpose. The Staff and the Board members were well within their authority to consider everyone’s positions on public interest, convenience, and necessity, not just those of Kingwood and its witnesses.

Kingwood’s theory that OPSB’s decision is based solely on public opinion is too simplistic. Public opposition does not occur without a reason, and the Project’s unpopularity is not based simply on the community not wanting it in their back yards. The Project is opposed

because it will seriously harm the community's back yards, and everything else in the surrounding community. The Board considered the judgment of local officials and residents about these impacts, since they are the most familiar with the area. The Staff Report recognizes this component of public interest, stating that its recommendation of disapproval under R.C. 4906.10(A)(6) was based on the fact that local officials "have responsibility for preserving the health, safety, and welfare within their respective communities" and therefore their interest in and strong opposition to the Project is "especially compelling." Staff Exh. 1, Staff Report, p. 44. The Board's Opinion concurred in the Staff's position. Opinion, ¶¶ 145-147.

Thus, while the Greene County Commissioners and the township trustees recognized their constituents' widespread opposition to the Project, these officials also based their positions on the reasons for their citizens' opposition. Contrary to Kingwood's assertions, the local officials' grounds for opposing the Project are not vague, generic statements and the hearing testimony establishes that their concerns have not been eliminated by Kingwood's changes to Project design. The County Commissioners' resolution recited that Kingwood sited the Project within a relatively densely and growing populated area in close proximity to 51 non-participants' houses, its proximity to numerous cultural, historic, scenic, and recreational resources, its visibility from roads leading to those vital resources, its potential economic threat to tourism, its narrow setbacks from parcel lines and public rights-of-way, and its incompatibility with the county's policies for development of renewable energy and farmland preservation as some of the reasons for the county's opposition to the Project. Greene County Exh. 2. Xenia Township's resolution of opposition cited reasons for opposing the Project that include its displacement of farmland, its negative impacts on neighboring property values, its placement in an area with a history of violent weather events, and its inconsistency with the principles for safeguarding the

public as enunciated in the township’s zoning ordinance, the township’s land use policies, and the county’s land use plan. Xenia Township Exh. 1, Combs Direct Testimony, Attachment A. Miami Township’s resolution of opposition cited the Project’s occupation of prime farmland and its proximity to three long-protected natural areas as grounds for its opposition. Kingwood Exh. 65, Miami Township’s resolution of November 15, 2021. Cedarville Township’s resolution of opposition listed the Project’s short setbacks, its displacement of agriculture from farmland, its incompatibility with township and county land use plans and policies, its visual impacts, its proximity to numerous residences, its negative impacts on property values, and its placement in an area with a history of violent weather events as reasons for opposing the Project. See Kingwood Exh. 86, Cedarville Township’s resolution of December 8, 2021. The local governments’ witnesses amplified these and other concerns with the Project at the hearing.

OPSB’s Opinion summarizes and elaborates these concerns as support for its determination that the Project does not satisfy R.C. 4906.10(A)(6). Opinion, ¶¶ 146-147. Contrary to Kingwood’s position, OPSB’s certificate denial was not based solely on the Project’s unpopularity, because it also considered the reasons expressed by the local governments and citizens for their opposition. Rather, OPSB balanced the local public interest against the Project’s purported overall benefits and found that the balance favored denial of the certificate. Opinion, ¶¶ 144, 149. This procedure is entirely appropriate under R.C. 4906.10(A)(6).

In fact, this balancing of public interests is consistent with the federal courts’ interpretation of “public interest, convenience, and necessity” under the federal Communications Act, from which Ohio’s standard may have been borrowed. This act requires the Federal Communications Commission (FCC) to approve or disapprove licenses for communication companies in a manner that achieves this standard. *National Broadcasting Co. v. U.S.*, 319 U.S.

190, 225, 63 S. Ct. 997, 1013, 87 L. Ed. 1344 (1943). This is an “expansive” standard, so that the FCC will have broad discretion to consider any factor relevant to attaining the goals and objectives of the act. *Id.*, 319 U.S. at 219, 63 S. Ct. at 1010. This standard also is flexible so that the FCC can adjust its practices “[i]f time and changing circumstances reveal that the ‘public interest’ is not served.” *Id.*, 319 U.S. at 225, 63 S. Ct. at 1013. R.C. 4906.10(A)(6) should be interpreted in the same way.

The FCC has interpreted public interest, convenience, and necessity in a manner that prohibits the licensing of stations that fail to protect local community interests, and the U.S. Supreme Court has upheld these requirements. *Id.*, 319 U.S. at 203, 63 S. Ct. at 1003–04 (requiring stations to broadcast local news, local events, local advertisements, and other programs of local consumer and social interest). Consistent with this principle, the FCC has carefully balanced local public interests against broader national and regional interests to achieve the public interest, convenience, and necessity. For example, see *Simmons v. F.C.C.*, 169 F.2d 670, 672 (D.C. Cir. 1948) (finding that the public interest, convenience, and necessity would be served by FCC’s order denying application to increase power and change frequency of radio station that would have enabled the station to plug into a network line and act as a mere relay of program material piped in from outside the community without regard for local community needs or desires for local news broadcasts and other programs of local interest); *Courier Post Pub. Co. v. F.C.C.*, 104 F.2d 213, 218 (D.C. Cir. 1939) (requiring the FCC to issue a permit for a local radio station to serve the local interests (e.g., local news) of a community that was being served only by regional stations, because the public interest component of public interest, convenience, and necessity required service of local interests, not just regional interests); *CBS Television Network Affiliates Ass’n v. F.C.C.*, 555 F.2d 985, 989–90 (D.C. Cir. 1977) (finding

that the public interest component of public interest, convenience, and necessity could be implemented by prohibiting cable television companies with stronger signals from sending their signals into areas occupied by local cable television stations serving local interests whose economic viability would be threatened by the competition). The same standard in R.C. 4906.10(A)(6) should be interpreted in the same way.

Although OPSB in the instant case has based its certificate denial on more than widespread public opinion, its consideration of local opposition is relevant. In an analogous case, the U.S. Supreme Court announced that, in a proceeding by the Public Utilities Commission of the District of Columbia to determine whether installation and use of radio receivers in streetcars and busses were consistent with public convenience, comfort and safety, the weight to be attached to public opinion surveys was a proper matter for determination by the Commission. *Pub. Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 72 S. Ct. 813, 96 L. Ed. 1068 (1952). Thus, OPSB has the discretion to assign the weight to the expressions of public opposition to the Project that it finds to be appropriate in determining whether the Project complies with the similar standard of public interest, convenience, and necessity. Notably, the opinion poll in *Pollak* was carefully designed to assess actual public opinions, unlike Kingwood's bogus poll.

Certainly, while Kingwood urges OPSB to concentrate solely on the Project's supposed benefits to members of the public outside of the local community, the Board cannot fully evaluate the public interest in a facility without considering its effects on the local public. R.C. 4906.10(A)(6) does not allow OPSB to ignore the interests of the segment of the public most impacted by a project. Local governments and citizens are the most knowledgeable about whether a project will harm their community, and OPSB was justified in considering their views.

In considering the “public interest, convenience and necessity” under R.C. 4906.10(A)(6), the Board should ascribe the greatest weight to the views of the members of the public who are most impacted by a project.

Kingwood argues (at 7) that OPSB should not have considered the local public’s “perception” of the Project. Kingwood also notes that the dictionary meaning of “perception” includes an “observation,” citing the Merriam-Webster Dictionary. The local public’s observations about a project and its negative effects on their surroundings absolutely should be considered in determining what is in the public interest. To ignore their observations and pay attention only to Kingwood’s observations may be Kingwood’s goal, but OPSB is responsible for considering all evidence for and against a project.

While the Intervenor recognizes the widespread unpopularity of the Project in their community, they also have identified many substantive reasons for the community’s opposition as expressed above. In addition, the Intervenor’s post-hearing briefs and Application for Rehearing describe many of the ways in which this poorly conceived Project will harm the public interest. The issues identified by the Citizens and the local governments should be considered in determining that the Project does not satisfy R.C. 4906.10(A)(6). For that purpose, Intervenor hereby fully incorporate by reference their Application for Rehearing.

OPSB should rebuff Kingwood’s argument that the Board should exclude the local public interest from its consideration of the public interest.

III. Intervenor’s Response to Second Grounds for Rehearing:

The Board Has Not Delegated Its Decision-Making Authority To Local Governments.

Kingwood argues that the Board has delegated its authority to local governments for approving or denying certificates. This argument is easily dismissed under the precedent of *In re*

Application of Am. Transmission Systems, Inc., 125 Ohio St.3d 333, 336-38, 2010-Ohio-1841, 928 N.E.2d 427, 430-31, ¶¶ 18-28. In that case, a party contended that the Board delegated its authority to grant a certificate under R.C. 4906.10(A) to the administrative law judge (ALJ), because the ALJ drafted the certificate. *Id.*, ¶¶ 18, 24. The Court held that the dispositive fact proving that the Board rather than the ALJ had made the decision was evidenced by the certificate's opening and closing representations that the Board had made the decision:

The order states, "The Ohio Power Siting Board * * * hereby issues its Opinion, Order and Certificate ...," and concludes by stating, "[T]he Board approves the application and hereby issues a certificate...."

In the same vein, the Opinion's opening in this case states that "[t]he Ohio Power Siting Board ... denies the application of Kingwood Solar I LLC for a certificate...." Opinion, ¶ 1. The Opinion's conclusion states: "Based on the record, the Board finds that Kingwood's application for a certificate ... is denied consistent with this Opinion and Order." *Id.*, ¶ 183. The Opinion indicates that seven Board members approved the Opinion. *Id.*, at p. 72. Consequently, the Board members, not local officials, made the decision to deny Kingwood a certificate.

Although Kingwood correctly states that R.C. 4906.13(B) preempts local governments from requiring separate local approvals for energy projects under OPSB's jurisdiction, its statement (at 9-10) that local governments "have no say over whether, where, or how major utility projects may be built or run" is incorrect. Recognizing the draconian impact of this preemption, the Ohio General Assembly instituted a restraint on OPSB's authority to make sure that local community interests are considered rather than trampled roughshod when deciding applications for certificates. This restraint, found in R.C. 4906.10(A)(6), assigned to OPSB the responsibility to make sure that any energy project "serve[s] the public interest, convenience, and necessity."

Kingwood contends (at 10) that OPSB found its Project has “met every technical criteria.” Although OPSB may have opined that the Project complies with the other criteria of R.C. 4906.10(A) – a conclusion with which the Intervenor disagrees – the Board correctly found that the Project did not meet the criterion in R.C. 4906.10(A)(6). Kingwood must satisfy all of the criteria to demonstrate entitlement to a certificate, not just some of them.

The Staff, and then the Board members, reviewed and considered the hearing testimony and government resolutions opposing the Project and properly used this information as evidence that the Project does not comply with R.C. 4906.10(A)(6). This process in no way abdicated OPSB’s decision-making to local governments or the public. Kingwood’s assertion to the contrary is illogical. Surely, if OPSB had granted a certificate based on Kingwood’s application and its witnesses’ testimony, Kingwood would not have conceded that OPSB was abdicating its decision-making to Kingwood. OPSB should give little regard to Kingwood’s argument that the local governments made the decision in this case.

IV. Intervenor’s Response to Third Grounds for Rehearing:

OPSB’s Consideration Of Local Public Interests Is Consistent With Prior Board Decisions, And Its Opinion Satisfactorily Explains The Rationale For This Practice.

A. OPSB’s Decision In This Case Does Not Diverge From Prior OPSB Precedent.

Kingwood contends that the Opinion breaks from prior OPSB precedent by factoring local public impacts and local opposition to the Project into the Board’s determination as to whether the Project serves the public interest, convenience, and necessity. Kingwood cites a number of OPSB decisions for its proposition that OPSB previously has not considered local public opposition or local impacts in deciding whether a project complies with R.C. 4906.19(A)(6). A review of the cited decisions shows that OPSB’s current practice is not a

reversal of Board practice. None of these decisions stated that OPSB does not take local opposition or local interests into account under R.C. 4906.19(A)(6).

In one of these decisions cited by Kingwood as precedent for prior Board practice, the Board stated that it does consider local public interests as expressed in local government opinion:

Pursuant to R.C. 4906.10(A)(6), the Board must determine that the facility will serve the public interest, convenience, and necessity. Public interest, convenience, and necessity should be examined through a broad lens. For example, this factor should consider the public's interest in a power siting project that ensures continued utility services and the prosperity of the State of Ohio. At the same time, this statutory criterion regarding public interest, convenience, and necessity, must also encompass the local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion and impact to natural resources. As part of the Board's responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, we must balance projected benefits against the magnitude of potential negative impacts on the local community.

In re Ross County Solar LLC, Case No. 20-1380-EL-BGN, 2021 WL 4974122, at *23, ¶ 135 (Oct. 21, 2021) (emphasis added). In that case, OPSB determined that its balancing of local and non-local public interests favored approval of the project. *Id.*, 136.

OPSB's Opinion in the instant case identifies three other previously issued decisions that take local opposition and local impacts into account in the Board's balancing of public interests under R.C. 4906.10(A)(6). Opinion, ¶ 142. See *In re Birch Solar 1, LLC*, Case No. 20-1605-EL-BGN, 2022 WL 15476256, at *12–15, ¶¶ 68-72 (Oct. 20, 2022); *In re American Transmission Systems, Inc.*, Case No. 19-1871, 2022 WL 1689512, at *20–21, ¶¶ 79-81 (May 19, 2022); *In re Republic Wind*, Ohio Power Siting Board Case No. 17-2295-EL-BGN, 2021 WL 2667132, at *1, *18, ¶ 91 (June 24, 2021). In those cases, OPSB found that the especially prominent and one-sided local opposition to the energy projects was an important factor in OPSB's determination that the projects did not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). OPSB's Opinion in the instant case recounted that the

Birch Solar decision recognized the need to fully consider the impact on individuals who are most directly affected, *i.e.*, primarily residents living near the project. Opinion, ¶ 142. If OPSB had granted a certificate to Kingwood, it would have deviated from this precedent.

Accordingly, OPSB’s consideration of the Kingwood Project’s local impacts, as expressed in overwhelming local opposition, does not reverse any prior Board precedent.

B. Even If OPSB’s Decision Had Changed Its Precedent, The Board Has Satisfactorily Explained The Rationale For Its Decision.

The Supreme Court of Ohio has advised that an administrative agency must “respect its own precedents.” *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 5, 2015-Ohio-2056, 40 N.E.3d 1060, 1065, ¶ 16. The Court qualified this principle by noting that “[t]his does not mean, however, that the commission may never revisit a particular decision, only that if the commission does change course, it must explain why.” *Id.* Modifying a regulatory scheme is not problematic in itself. *Id.*, ¶ 17. “Agencies undoubtedly may change course, provided that the new regulatory course is permissible.” *Id.* The Court further noted:

The court has not set the explanatory hurdle very high. In a case in which the commission did not follow its earlier precedent, we said that if the commission had put “[a] few simple sentences” in its order to explain why the earlier case was no longer controlling, it would have been sufficient.

Id., ¶ 16, citing *Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 21, 21–22, 475 N.E.2d 786 (1985).

The Supreme Court of Ohio has indicated that it will not second-guess an agency’s reason for changing its precedent, as long as there are good reasons for it:

[A]n agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”

Ohio Power Co., 144 Ohio St.3d at ¶ 17, quoting from *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009). Thus, the Supreme Court of Ohio will defer to the agency’s modified interpretation of a statute if it is reasonable. *Ohio Power Co.*, 144 Ohio St.3d at ¶ 28. OPSB has adequately and persuasively explained its rationale for considering local impacts, as expressed by local opposition, in this case.

As explained above, the public interest, convenience, and necessity is an “expansive” standard, so that the FCC will have broad discretion to consider any factor relevant to attaining the goals and objectives of the act. *National Broadcasting Co.*, 319 U.S. at 219, 63 S. Ct. at 1010. This standard also has the flexibility necessary to adjust regulatory practices “[i]f time and changing circumstances reveal that the ‘public interest’ is not served.” *Id.*, 319 U.S. at 225, 63 S. Ct. at 1013. Even if OPSB’s protection of local public interests in its balancing test is a change in direction, the Board has the authority for this practice under the same public interest standard in R.C. 4906.10(A)(6).

V. Intervenors’ Response to Fourth Grounds for Rehearing:

The Evidentiary Record Contains Admissible Evidence That The Numerous Public Comments Submitted To The Case Docket Overwhelmingly Opposed The Project.

Kingwood quibbles with the Opinion’s reference in Paragraph 151 to “the overwhelming number of public comments filed in the case, which largely disfavor the Project,” arguing that these comments are not part of the evidentiary record. However, the Staff Report finds:

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

Staff Exh. 1, p. 44. The Staff's observation about the one-sided and overwhelming "opposition filed in the docket" is a reference to the public comments in the case docket. The Staff Report, including that observation, was admitted into the record without an objection by Kingwood, as well as being part of the record as provided by R.C. 4906.07(C). The Staff Report's discussion about these public comments serves as evidentiary support for the Board's finding in Opinion Paragraph 151.

The public's submission of comments is an important component of an OPSB proceeding. The Staff has a duty to review and consider them in determining whether a certificate should be issued. Otherwise, OPSB would be inviting the public to engage in a useless exercise and misleading the public into believing their comments will be considered. The Staff Report reflects that the Staff fulfilled its duty to consider the comments, and the report's observation about the comments was admitted into the evidentiary record. The Board should reject Kingwood's plea to assign no significance to these comments.

Not only did Kingwood fail to object to the admission of evidence about the contents of the public comments in the docket, but it also discussed the public comments in its own testimony. Project manager Stickney's written rebuttal testimony contains an extensive discussion about the public comments. Applicant's Exh. 107, pp. 2-5, ¶ 6. A party waives an objection to a tribunal's use of documents by relying on their contents. *N. Canton City Sch. Dist. Bd. of Educ. v. Stark Cnty. Bd. of Revision*, 152 Ohio St. 3d 292, 294, 2018-Ohio-1, 95 N.E.3d 372, 375, ¶ 10. Consequently, Kingwood has waived its right to object to OPSB's use of the public comments.

The overwhelming percentage of public comments opposed to the Project complement other substantial evidence of public opposition contained in the record. OAC 4906-2-09(A)

provides that the evidentiary hearing consists of two sessions: (1) a local public hearing session in which the public at large is invited to testify; and (2) the hearing session in Columbus at which parties can present testimony. R.C. 4906.09 provides that “[a] record shall be made of the hearing and of all testimony taken. Emphasis added. In compliance with this mandate, the testimony at both sessions was sworn, subject to cross-examination, and transcribed as part of the record. R.C. 4906.10(A) requires OPSB to base its decision on this record – the entire record.

The testimony at the local public hearing session was especially one-sided against the Project, as proven by the transcript of this session. Anyone in attendance could witness how one-sided the public’s opposition was. This was borne out in the sign-in sheets for the hearing, which overwhelmingly indicated the public’s opposition. The volume of this opposition was all the more impressive given that Kingwood had earlier initiated its campaign in August 2021 to pay people not to oppose the Project. Stickney, Tr. I 61:9-12.

The considerable testimony by the Citizens and local government officials at the evidentiary hearing also demonstrates the overwhelming nature of public opposition to this ill-conceived Project. The Board’s findings about the one-sided public opposition to the Project, including the public comments in the docket, are fully supported by the record.

VI. Intervenors’ Response to Fifth Grounds for Rehearing:

The Board Struck A Reasonable Balance Between The Project’s Perceived Benefits And Its Serious Downsides To The Local Community.

A. Kingwood Has Exaggerated The Project’s Supposed Benefits.

In its grounds for rehearing, Kingwood first asserts that the Project complies with all statutory criteria in R.C. 4906.10(A). The Intervenors have filed an 82-page Application for Rehearing demonstrating that the Project falls well short of compliance in a multitude of ways.

The Intervenor's incorporate their Application for Rehearing by reference into their response to Kingwood's fifth grounds for rehearing.

Kingwood also summarizes what it regards as evidence showing that the Project serves the public interest, convenience, and necessity under R.C. 4906.10(A)(6). As recounted in Intervenor's response to Kingwood's first grounds for rehearing, the Board has correctly found that none of these supposed benefits outweighs the potential negative impacts on the local community. Opinion, ¶¶ 144, 149. Intervenor's fully incorporate their response to Kingwood's first grounds for rehearing into this response to Kingwood's fifth grounds for rehearing.

In addition, a closer look at the Project benefits touted by Kingwood reveals that they are not at all impressive. As explained in Assignment of Error No. 4 of Intervenor's Application for Rehearing, the Project's construction jobs are only temporary and permanent employees are few. Moreover, the Project will terminate existing jobs for agriculture and supporting business. The Project's actual adverse economic impacts are unknown, because Kingwood concealed them by choosing not to identify and study them. See Assignment of Error No. 4 of Intervenor's Application for Rehearing for more details.

Kingwood states that the Project will not decrease property values, but common sense and expert testimony demonstrates the inaccuracy of that position. See Assignment of Error No. 9 of Intervenor's Application for Rehearing for more details. Even if property values do not decrease, merely maintaining the status quo is not a benefit.

Kingwood claims the Project will preserve farmland, but the opposite is true. See Assignment of Error No. 3 of Intervenor's Application for Rehearing for more details. Moreover, the local governments do not need any assistance from Kingwood to preserve farmland, as that objective has already been achieved by the farmland preservation measures in

Greene County's comprehensive land use plan and the townships' resolutions incorporating that plan by reference.

Kingwood contends that it will give money to the community through donations and taxes, but paying off potential opponents to overlook the Project's harms and let it operate is not the same as serving the public interest. The local governments and most of the communities' citizens have recognized this fact, as displayed by their rejection of Kingwood's offers of payment. Rational people normally act rationally. When 59 landowners rejected Kingwood's offer of good neighbor agreement payments, those landowners made clear that the damages they expect to be caused by the Project to their properties and/or the community at large cannot be fully compensated by the amount of money offered.

Kingwood represents that the Project will reduce dependency on fossil fuels and attract new businesses to Ohio, but OPSB is rapidly approving other solar projects and has a multitude of additional solar projects in the pipeline to meet those objectives. Approving a flawed Project that will severely damage a community is not the right way to promote green energy when a better designed project can be planned and constructed in a more appropriate location.

Kingwood contends that it will coordinate with local officials on emergency response plans, but that is not a benefit. That is simply a promise to assist local officials when they have to respond to harmful emergencies caused by the Project.

Similarly, Kingwood's promise to address community complaints is simply an indication that the Project will harm the community. Without the Project, no complaints would occur. Sponsoring a Project that will cause complaints can hardly be considered a benefit.

In summary, the Project's detriments are severe. Its benefits are doubtful and negligible. And even if Kingwood's claims of Project benefits are accepted at face value, OPSB correctly

determined that the balance between the Project's perceived benefits and its serious downsides to the local community weighs in favor of denying the certificate.

B. The Resolutions and Testimony of Local Governments In Opposition To The Project Are Based On The Reasonable Concerns Expressed By The Constituents They Were Elected To Serve.

Kingwood asserts that the local governments' resolutions and testimony are vague and unfounded, and therefore should not be considered by the Board. The opposite is true.

The dictionary definition of "vague" includes: 1a - not clearly expressed or stated in indefinite terms; 1b: not having a precise meaning; and 2a: not clearly defined, grasped, or understood. <https://www.merriam-webster.com/dictionary/vague>. The dictionary definition of "unfounded" includes: lacking a sound basis, groundless, unwarranted. <https://www.merriam-webster.com/dictionary/unfounded>.

By those definitions, the local government resolutions and testimony are neither vague nor unfounded. The resolutions in opposition to the Project adopted by Greene County and each of the three intervening townships oppose the Project as incompatible with the general health, safety, and welfare of their respective residents. This finding is explicitly stated in the resolutions of Greene County, Cedarville Township, and Xenia Township. Their opposition was based on a number of reasonable concerns that had been expressed by citizens to their elected officials, including but not limited to: lack of adequate setbacks; failure to respect local land use planning; inadequate consideration of negative effects on property values; incapability of anticipating the negative effects on drainage systems in the Project area; and the impossibility of protecting the Project from major violent storms that frequently hit the area. The townships supported their resolutions with 18 pages of technical, expert direct testimony from Eric Sauer, who detailed many of the Project's technical deficiencies. Direct Testimony of Eric Sauer,

Miami Twp. Exh. 1. The government intervenors' resolutions and testimony in opposition to the Project are a formal reflection of these concerns. Tellingly, Kingwood does not mention Mr. Sauer's testimony in its argument that the townships did not submit technical evidence to support their position.

Furthermore, the fact that all three townships promptly intervened to preserve their abilities to participate in the power siting process and waited to adopt official resolutions in opposition to the Project until after they carefully considered Kingwood's application for certificate and the negative views of it from their constituents, shows that the three townships operated precisely as they should throughout the application process. Yet Kingwood twists this narrative to frame the government intervenors' rational concerns and opposition as "politically motivated." Indeed, Kingwood's refusal to recognize local concerns as legitimate evinces a lack of connection with the people and place where it proposes to operate the Project. Kingwood's stubborn insistence that the "issues ... are already adequately addressed in Kingwood's Application and ... the Joint Stipulation condition" is wrong, and that fact is demonstrated by the intervenors' persistent opposition to the Project.

Kingwood also criticizes Greene County and the intervening townships for not conducting their own expert studies and hiring their own expert witnesses to provide additional testimony at the hearing. That criticism is untrue, unfair, irrelevant, and prejudicial. How a local government uses its limited financial resources is a decision best left in the reasonable discretion of the governmental officials who must make difficult decisions on tight budgets, in direct contrast to the vast financial resources enjoyed by Kingwood. Moreover, the townships provided extensive expert testimony on technical issues from Eric Sauer. In addition, the contents of Kingwood's application for certificate and the cross-examination of Kingwood's expert

witnesses provide more than enough evidence to support the Intervenor's objections to the Project.

Finally, The Board should not be persuaded by Kingwood's assertion here that satisfaction of "technical requirements" under R.C. 4906.10(A) should also satisfy R.C. 4906.10(A)(6). In its Application for Rehearing, Kingwood actually insisted that the Board give no evidentiary weight to the resolutions and reasoned testimony of local government intervenors that the Project will not serve the public interest, convenience, and necessity. To follow Kingwood's rationale would reduce to meaningless the balance the Board must strike under R.C. 4906.10(A)(6) between projected benefits of a project against the negative impacts on the local community. *In re Ross County Solar*, 2021 WL 4974122, at *23, ¶ 135. Kingwood's position on this point is unlawful and should not be adopted.

The Ohio General Assembly has declared it to be a public policy and public purpose of the state to require the fiscal integrity of municipal corporations, counties, and townships so that they may "provide for the health, safety, and welfare of their citizens." R.C. 118.02. Local governmental officials are uniquely qualified to make that determination because they normally live, work, worship and recreate in the community with their constituents. Local government officials are far more qualified to determine what is in the local "public interest" than employees and experts paid by a non-Ohio energy company whose purpose and goal is to generate profits by constructing and operating an energy facility on land to which it has no historical or personal connection.

VII. Intervenors' Response to Sixth And Seventh Grounds for Rehearing:

Stipulations That Do Not Settle Anything Are Not Entitled To Deference.

Kingwood makes a big deal out of the fact that Kingwood and the Ohio Farm Bureau Federation (“OFBF”) filed a Joint Stipulation and Recommendation as to Certificate Conditions on March 4, 2022, stating that its terms should be afforded substantial weight. However, the fact that only two parties agreed to the stipulation means that eight parties (counting the Citizens as one party) did not agree to the stipulation. And even OFBF did not ask the Board to approve the Project. In fact, the stipulation’s introduction states only that Kingwood and OFBF recommended the stipulation’s conditions “in the event the Ohio Power Siting Board (the ‘Board’) issues a Certificate in this proceeding.” Nor did OFBF express, in the stipulation or in the evidentiary record, any opinion that the Project complies with R.C. 4906.10(A)(6). In short, Kingwood did not settle with any party, not to mention all nine of them. This stipulation is entitled to no weight.

While Kingwood correctly represents that any two or more parties can enter into a stipulation, that does not mean that the stipulation is automatically entitled to any weight or deference. Otherwise, any two allies could enter into a sweetheart deal and impose that deal on everyone else. Surely, Kingwood would not agree that a stipulation between only the Citizens and the townships would be entitled to deference.

Nor does Kingwood’s invitation to all parties for negotiations carry any weight or signify that the stipulation is the product of serious bargaining. Although Kingwood represents that it incorporated feedback from and addressed concerns raised by non-signing intervenors, the stipulation makes no such statement. It only states that the stipulation “results from” discussions with intervenors, not that it addressed or satisfied the intervenors’ concerns about the

stipulation's conditions. Actually, while Kingwood attempts to sell the supposed benefits of the stipulation's proposed conditions, the stipulation comes nowhere close to addressing the Intervenor's concerns. The Intervenor's post-hearing briefs and Application for Rehearing identify numerous problems that the stipulation does not satisfactorily address. In short, the stipulation does nothing to promote the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

VIII. Intervenor's Response to Eighth, Ninth, and Tenth Grounds for Rehearing:

OPSB's Denial Of Kingwood's Request To Subpoena Theresa White Was Lawful, Reasonable, And Constitutional.

Kingwood argues that R.C. 4906.07(C) requires the Staff Report to "set forth the nature of the investigation" and that the Staff Report had to detail the calls that the Staff made to the local governments and the reason for making these calls. OPSB's rules do not define "nature" as used in this statute, but in this context it means "the type or main characteristic (of something)." Cambridge Dictionary. <https://dictionary.cambridge.org/us/dictionary/english/nature> (last accessed on Jan. 21, 2023). The section on Pages 2 and 3 of the Staff Report entitled "Nature of Investigation" describes far more than the "type or main characteristic" of the investigation. Nothing in the meaning of "nature" suggests that the report must document every phone call and communication in order to describe the investigation's type or main characteristic.

Kingwood contends that the Staff did not disclose why Executive Director Theresa White directed her subordinates to contact the local officials for their input and demands that the ALJs compel Ms. White to testify pursuant to subpoena to explain the reason for this outreach. However, the record identifies the purpose of this outreach. The Staff had not only the authority, but the obligation, to obtain input from the public on whether the Project "will serve the public interest, convenience, and necessity" under R.C. 4906.10(A)(6). Emphasis added. Juliana

Graham-Price was the staffer who contacted the local officials, and she testified about what these communications revealed about the local officials' positions on the Project. The Staff used the information obtained by Ms. Graham-Price to gauge the public's views on the Project, and Kingwood was allowed to fully question her about this information. Ms. White did not make these contacts, so subpoenaing Ms. White to testify about these contacts will add nothing to this discussion.

Kingwood argues that it must be allowed to cross-examine Ms. White to find out whether additional contacts were made to ascertain the local government officials' positions on the Project. However, the local officials expressed their positions unequivocally both before and during the evidentiary hearing. Even if the Staff had made additional contacts with them, that information would have been the "needless presentation of cumulative evidence" that a tribunal is free to exclude under Ohio Rule of Evidence 403(B). On procedural matters, OPSB "has the discretion to decide how ... it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *In re Application of Am. Transmission Systems, Inc.*, 125 Ohio St.3d 333, 336, 2010-Ohio-1841, 928 N.E.2d 427, 430, ¶ 17, quoting from *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 559, 560, 433 N.E.2d 212. Denying Kingwood's request for subpoena was well within OPSB's discretion.

Consistent with this principle, Kingwood must demonstrate that it "suffered prejudice" from the Board's denial of a subpoena request. *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 501, 2016-Ohio-1513, 58 N.E.3d 1142, 1156, ¶ 40. No prejudice occurs if the complaining party could obtain the relevant evidence by other means. *Id.* In the instant case, Kingwood had the opportunity to question not only Ms. Graham-Price to obtain this evidence,

but the local governments' witnesses as well. Kingwood took full advantage of these opportunities, tediously examining witness after witness for long periods of time on this issue.

Kingwood claims that its inability to question Ms. White violated Kingwood's procedural due process rights. The key factor in determining whether an administrative hearing satisfies procedural due process is whether a party has had the opportunity to present the facts that demonstrate that party was entitled to the requested judgment. *Reid v. MetroHealth Systems, Inc.*, 2017-Ohio-1154, ¶ 29 (8th Dist.). A tribunal's denial of a subpoena does not offend due process if the requesting party can present these facts through other means, such as subpoenas to other witnesses. *Id.*, ¶ 29. In the instant case, Kingwood was provided with ample opportunities to question witnesses other than Ms. White about the local governments' opposition to the Project.

As a corollary to the foregoing principle, a tribunal does not violate due process by declining to subpoena a witness to present irrelevant testimony. *Reid* illustrates this point. In that case, a party argued he was deprived of due process, because the tribunal refused his request to subpoena a witness he wanted to question about the administrative agency's motivation for denying his unemployment benefits. *Id.*, ¶ 30. Because the agency's motive was irrelevant, the tribunal's denial of the subpoena did not detract from the hearing's fairness nor violate due process. *Id.*, ¶¶ 31-33. Kingwood's witch hunt for the Staff's motive for reaching out to the local governments is just as irrelevant, and the Board's denial of a subpoena to satiate Kingwood's desire to search for motive is just as appropriate.

In that regard, the relevant factual issue is whether local governments favor or oppose the Project, which is a vital factor in gauging the Project's compliance or noncompliance with R.C. 4906.10(A)(6). That information was fully presented and transcribed at the hearing, including

testimony from Ms. Graham-Price and local officials. The transcript of that testimony is the evidence on which the Board members based their decision. Ms. White's motive to communicate with local officials or to recommend certificate denial is irrelevant to whether the local governments oppose this Project, which is the cornerstone of the Board's finding that the Project does not comply with R.C. 4906.10(A)(6). Ms. White had no vote in the Board's decision, so any motive she had is immaterial to the integrity of the Board's vote. The Staff's recommendation to deny a certificate is not binding on the Board members, who have demonstrated their willingness to reject the Staff Report's recommendation under R.C. 4906.10(A)(6) if warranted by the evidence in the record. See *In re Application of Republic Wind*, Ohio Power Siting Board Case No. 17-2295-EL-BGN, 2021 WL 2667132, at *1, *18 (June 24, 2021). Accordingly, the Board has not erred by refusing Kingwood's demand for a subpoena for its irrelevant inquiry.

Kingwood complains that the Staff's recommendation to deny the certificate "emboldened" the Project's opponents and disincentivized settlement negotiations. This argument is both inaccurate and irrelevant. The opposition by the Project's opponents was plenty bold before the Staff Report due to the egregious damage this Project would cause. Contrary to Kingwood's statement (at 30, n. 4), public opposition did not increase after the Staff Report, nor does the Opinion make such a finding. The local governments and the public at large were fully committed to their opposition prior to the Staff Report and, indeed, that is why the Staff announced in its report that local opposition was overwhelming. Moreover, Kingwood's implication that the Staff should recommend Project approval to intimidate the community into submitting to Kingwood's settlement demands is not only arrogant and irresponsible, but irrelevant to whether Ms. White should have been subpoenaed to testify.

Kingwood contends that something must be amiss about the Staff's decision to recommend denial of the certificate on the day before issuing the certificate while its preliminary draft of the Staff Report had recommended approval. However, there is nothing unusual about making changes to preliminary drafts of agency documents prior to releasing them to the public as final documents. The Staff, like any administrative agency, circulated a preliminary draft to the committee of staffers working on the case for comment, discussion, and deliberation. This thorough deliberation resulted in a recommendation of denial based on the evidence of local opposition to the Project. The fact that the Staff Report was subjected to this deliberative process indicates that the Staff's recommendation was based on a careful and thoughtful examination of the evidence. In fact, Grant Zeto testified that the Commissioners' resolution was just "a factor" in the final recommendation, which also was based on "all the details within the case on the docket here, the Intervenor's public comments, the kind of information that we had been receiving from the public on it, to name – amongst others." Zeto, Tr. VII 1843:8-14. That evidence was submitted to the Board's members, who have concurred with the Staff's recommendation.

Kingwood claims that it must be allowed to subpoena Ms. White to explain the "irregularity" of the Staff's outreach to the local governments on the day before the Staff Report's issuance, arguing that this supposed irregularity may indicate the presence of some improper ulterior motive for denying the certificate. Kingwood has identified no ulterior motive that could be revealed by its fishing expedition, nor does the record even hint at one. Neither the contents nor the timing of these contacts was irregular.

As to the timing of the Staff's contacts with local officials, Kingwood questions why the Staff contacted local officials on October 28, 2021, the day prior to issuing the Staff Report. The

answer to that inquiry is obvious. The ALJ's Entry of August 26, 2021 required the Staff to file the Staff Report by October 29, 2021. Since the Board is required to gauge the public interest under R.C. 4906.10(A)(6), the Staff needed to confirm the local governments' positions on whether the Project would serve the public interest so that the Staff could make an informed recommendation. The Staff contacted the local officials on October 28, 2021, because the Staff needed the information prior to finishing the Staff Report that was due the next day. There is nothing curious about the timing of that outreach.

With regard to the subject matter of the Staff's contacts with local officials, Kingwood criticizes the Staff for asking Greene County and township officials for their input on whether a certificate should be issued for the Project. As context for the absurdity of Kingwood's argument, the Board should consider the fact that the Staff routinely asks applicants for information to inform the Staff's recommendations on whether the R.C. 4906.10(A) criteria have been met. In this case, the Staff sent Kingwood six sets of data requests on May 17, May 20, June 1, June 3, July 13, and July 20, 2021 for that purpose, providing Kingwood with numerous opportunities for its input on the Staff's recommendations. Yet Kingwood complains about the Staff making a single request for input from the county and the townships. Kingwood should not have a one-sided monopoly on communications with the Staff, and there is nothing improper about the Staff obtaining information from local officials or anyone else.

Nor is there anything nefarious about the fact that the Staff initiated these contacts with local officials. The Staff did not suggest to them what their positions should be. *Graham-Price*, Tr. VIII 1927-1960. Gauging the public's views on a project must be done for every project in order to make recommendations under R.C. 4906.10(A)(6). In fact, this is now done routinely in all wind and solar cases. *Graham-Price*, Tr. VIII 1956:12-24. The Staff's outreach was not only

appropriate, but necessary to determine whether the Project would serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). Kingwood has provided OPSB with no basis for subpoenaing Ms. White.

IX. Kingwood Has Waived Its Right To Object To The Admission Of The Evidence Upon Which OPSB Has Based Its Denial Of The Certificate.

Kingwood's Application for Rehearing contends (at 20) that the townships' resolutions are irrelevant. Although not specifically acknowledged in Kingwood's Application for Rehearing, the rest of Kingwood's arguments are based on the same premise. The gist of Kingwood's claim is that evidence of local public opposition, including the public's statements that the Project does not serve the public interest, convenience, and necessity, are not relevant to OPSB's determination of noncompliance with R.C. 4906.10(A)(6). However, Kingwood failed to object during the hearing to the relevancy of the evidence on which OPSB relied, nor did it object to the information's admission on any other grounds.

The failure to object at trial or hearing to the admission of evidence on relevancy grounds is a waiver of that objection. *State v. Jackson*, 107 Ohio St.3d 53, 67, 2005-Ohio-5981, 836 N.E.2d 1173, 1193, ¶ 70; *Gable v. Gates Mills*, 103 Ohio St.3d 449, 456, 2004-Ohio-5719, 816 N.E.2d 1049, 1056, ¶ 33; *State v. Cowans*, 87 Ohio St.3d 68, 87, 1999-Ohio-250, 717 N.E.2d 298, 315. Although Kingwood does not raise hearsay objections in its Application for Rehearing, its failure to object at hearing on hearsay grounds also waives that objection. *Plain Loc. Sch. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 130 Ohio St.3d 230, 234, 2011-Ohio-3362, 957 N.E.2d 268, 273, ¶ 20. In fact, the failure to object waives all objections, regardless of basis. *N. Canton*, 152 Ohio St. 3d at ¶ 10.

Kingwood failed to object to any of the evidence admitted into evidence supporting the Board's determination that the Project failed to comply with R.C. 4906.10(A)(6), including the following:

1. The Staff Report's discussion of and recommendation that OPSB determine that the Project fails to meet the criteria in R.C. 4906.10(A)(6). Staff Exh. 1, pp. 42-44.
2. The testimony of Staff witness Grant Zeto about the overwhelming local opposition to the Project. Staff Exh. 11, pp. 3-4, Answer 9; Zeto, Tr. 1842-1910.
3. The testimony of Citizens witness Jenifer Adams, Answers 27 and 28. Adams Direct Testimony, Citizens Exh. 1, Answers 27, 28; Tr. IV 830:19 – 832:24, 846:18-24.
4. The public testimony submitted at the local public hearing. Transcript of public hearing, Nov. 15, 2021.
5. The testimony of Xenia Township witness L. Stephen Combs and its Exhibit A (Xenia Township's resolution opposing the Project). Combs Direct Testimony, Xenia Twp. Exh. 1; Xenia Twp. Resolution 2021-226 marked as Exh. A of Xenia Twp. Exh. 1; Combs, Tr. VI 1280-1323, 1332:2-4.
6. The testimony of Cedarville Township witness Jeff Ewry and the township's resolution opposing the Project. Ewry Direct Testimony, Cedarville Twp. Exh. 1, Answers 4, 5, 9 (except lines 120-121 and 135-146), and Answer 10; Kingwood Exh. 68 (Cedarville Twp. Resolution 2021-23); Ewry, Tr. VI 1519-1541:10, 1542:14-24, 1546:24 - 1547:22, 1548:5 – 1550, 1554:6-8, 1554:16-24.

7. The testimony of Miami Township witness Don Hollister and the township resolution opposing the Project.¹ Direct Testimony of Don Hollister, Miami Twp. Exh. 3; Applicant's Exh. 65 (Miami Twp. Resolution 2021-45); Hollister, Tr. VI 1449-1484:8.
8. The testimony of Greene County witness Brandon Huddleson and the county resolution opposing the Project. Direct Testimony of Brandon Huddleson, Greene Cty. Exh. 1; Greene Cty. Exh. 2 (Greene Cty. Resolution 21-10-28-8); Huddleson, Tr. VII 1694 – 1745.

Kingwood itself introduced much of this evidence into the record by sponsoring exhibits and eliciting testimony during the hearing. Kingwood's failures to object to the evidence described in Paragraphs 1-8 above, and its failures to object to other evidence of local public opposition in the record, is dispositive of Kingwood's Application for Rehearing in its entirety.

Intervenors also note that Kingwood submitted testimony from its own witnesses expressing opinions about the degree of public opposition and about whether the Project satisfies the R.C. 4906.10(A)6) criteria. Stickney Rebuttal Testimony, pp. 6-14, Answers 8-12, 15. Kingwood even commissioned and introduced into evidence an opinion poll on the opinions of Greene County residents about the Project during Kingwood's rebuttal case, after Kingwood witness Stickney brought up the opinion poll during Kingwood's case-in-chief. Hobart Rebuttal Testimony, Applicant's Exh. 104, pp. 4-5, Answers 10-11. Kingwood cannot claim that this type of evidence is admissible from its own witnesses but not from anyone else's witnesses.

¹ A Kingwood cheap shot (at 21) accuses Mr. Hollister of bias, stating that he followed and commented on CGA's Facebook page and was personally opposed to the Project. But he can hardly be faulted for educating himself on the issues by reading the Facebook page or communicating with other citizens on Facebook, no more than the Staff can be criticized for monitoring public comments on the docket. That is simply good, responsive government. And he testified that he was personally opposed to the Project because it violates the township zoning requirements designed to protect the public that otherwise would apply absent preemption of local zoning authority. Hollister, Tr. VI 1466:13 to 1467:24. Wanting to protect the public is hardly bias.

X. Conclusion

The Board's denial of the certificate sought by Kingwood is more than justified under R.C. 4906.10(A)(6). The Board should deny Kingwood's Application for Rehearing.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2023, a copy of the foregoing memorandum was served by electronic mail on the following: Jodi Bair at Jodi.Bair@ohioattorneygeneral.gov; Daniel A. Brown at dbrown@brownlawdayton.com; Kevin Dunn at kdd@planklaw.com; John Hart at jehartlaw@gmail.com; Nathaniel B. Morse at nbmorse@vorys.com; Werner.Margard@ohioattorneygeneral.gov; Michael Settineri at mjsettineri@vorys.com; Lee Slone at lslone@mdllp.net; Charles Swaney at cswaney@woh.rr.com; David Watkins at dw@planklaw.com; Anna Sanyal at aasanyal@vorys.com; Thaddeus Boggs at tboggs@fbtlaw.com; Chad A. Endsley at cendsley@ofbf.org; and Leah F. Curtis at lcurtis@ofbf.com.

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Summary: Memorandum in Opposition to Kingwood Solar's Application for
Rehearing electronically filed by Jack A Van Kley on behalf of Citizens for Greene
Acres and Members and Cedarville, Miami, and Xenia Township Trustees