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**

SECOND APPLICATION FOR REHEARING OF KINGWOOD SOLAR I LLC

Pursuant to R.C. 4903.10 and Ohio Adm.Code 4906-2-32, Kingwood Solar I LLC ("Kingwood") respectfully submits this Application for Rehearing of the February 7, 2023 Entry ("Entry") issued in this proceeding. Kingwood sets forth the following specific grounds for rehearing as to why the Entry is unlawful and unreasonable:

1. The Board does not have the statutory authority to grant an application for rehearing for the sole purpose of affording the Board more time to consider the issues raised in the application, and therefore the Entry's grant of each application for rehearing filed in the case for the purpose of affording the Board more time to consider the issues raised in the applications for rehearing is unlawful and unreasonable;
2. The Board's application of Ohio Adm.Code 4906-2-32(E) through the Entry to allow for the granting of rehearing of each application filed in this case exceeds the Board's statutory authority, and therefore the application of that rule to issue the Entry is unlawful and unreasonable; and
3. The Board does not have the statutory authority to delegate to an administrative law judge the ability to grant or deny rehearing under R.C. 4903.10, and therefore both Ohio Adm.Code 4906-2-32(E) and the Entry are unlawful and unreasonable.

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

Kingwood respectfully requests that the Board grant this Second Application for Rehearing and issue an entry rescinding Ohio Adm.Code 4906-2-32(E) and the Entry.

Respectfully submitted,

/s/ Michael J. Settineri

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MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

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MEMORANDUM IN SUPPORT OF THE SECOND APPLICATION FOR REHEARING OF KINGWOOD SOLAR I LLC

I. INTRODUCTION

The General Assembly gave the Board the authority to take two actions upon the filing of an application for rehearing: grant the rehearing or deny the rehearing. R.C. 4903.10. The General Assembly did not grant the authority to the Board to grant itself an extension of time to take either of those two actions. Instead, if the Board fails to take either action within 30 days after filing, the application for rehearing is denied by operation of law. *Id.* Likewise, the General Assembly did not give the Board the authority to delegate its authority under R.C. 4903.10 to an administrative law judge ("ALJ") or to enact Ohio Adm.Code 4906-2-32(E). For years, however, the Board has inserted language into the statute to give itself and ALJs the authority to grant rehearing for the limited purpose of giving the Board more time to consider the applications for rehearing. Kingwood submits that the Board does not have the statutory authority for that practice and should not rely on any prior case precedent given the plain language of the statute, the Supreme Court of Ohio's recent clarification on agency deference, and the D.C. Circuit's 2020 decision to end the same practice by the FERC. *See TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677; *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020). The February 7, 2023 Entry was unlawful and unreasonable for the reasons set forth in

Kingwood's second application for rehearing, and the Board should grant rehearing and rescind the Entry as well as Ohio Adm.Code 4906-2-32(E).

II. ARGUMENT

A. The Board does not have the statutory authority to grant itself an extension of time for it to consider an application for rehearing.

1. The Board is strictly bound by the laws of statutory interpretation.

"[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. Importantly, 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. Turning to the matter at bar, there is no language in R.C. 4903.10 that allows the Board to grant itself more time to consider granting or denying an application for rehearing, and the Board cannot unilaterally insert that language.

2. The plain language of R.C. 4903.10 does not give the Board authority to grant itself an extension of time to grant or deny an application for rehearing.

The language of R.C. 4903.10 on this issue is clear and unambiguous.[1] With regard to applications for rehearing, R.C. 4903.10 states, in relevant part:

> Where such application for rehearing has been filed, the commission may **grant** and hold such rehearing **on the matter specified in such application**, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.
>
> If the commission does not grant or deny such application for rehearing **within thirty days from the date of filing thereof, it is denied by operation of law**.
>
> If the commission grants such rehearing, it **shall** specify in the notice of such granting the purpose for which it is granted. The commission **shall also specify the scope of the additional evidence, if any, that will be taken**, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.
>
> If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

(Emphasis added). Notably, the statute only gives the Board the choice of two options when an application for rehearing is filed (1) grant rehearing on the matter specified in such application or (2) deny rehearing. The statute does not give the Board the authority to grant itself an extension

[1] R.C. 4903.10 is applicable to the Board by virtue of R.C. 4906.12.

of time, which clearly is a non-substantive act on an application for rehearing. Moreover, per the express language of the statute, if granting an application for rehearing the Board may take only one of two actions: (1) abrogate or modify its original order or (2) affirm the original order. If the Board does not grant or deny the application for rehearing within thirty days from the date of filing, it is deemed denied by operation of law. The clear and unambiguous language of the statute requires that the party filing an application for rehearing receive a decision within 30 days of filing or a deemed denial. The statute does not provide any authorization for the Board to toll the 30 day period.

B. The Board has a reasonable basis to change its interpretation and application of R.C. 4903.10.

1. Neither the Board nor the Public Utilities Commission of Ohio are bound by precedent so long as the change in interpretation is reasonable.

For many years, the Board and Public Utilities Commission of Ohio ("PUCO") have interpreted R.C. 4903.10 to allow for the Board and PUCO to grant themselves more time for the limited purpose of reviewing applications for rehearing beyond the 30-day statutorily mandated period. *See, e.g.*, *In re State Alarm Inc.*, Case No. 95-1182-TP-CSS, Entry (May 19, 1999) (granting application for rehearing for more time) and Entry (Nov. 20, 2000) (granting, in part, and denying, in part, application for rehearing a year and half later); *In re the Commission's Investigation of Ohio's Retail Service Market*, Case No. 12-31-51-EL-COI, Entry (Apr. 4, 2018) (granting applications for rehearing for more time) and Entry (Mar. 13, 2019) (granting, in part, and denying, in part, applications for rehearing eleven months later); *In re Verde Energy USA Ohio, LLC*, Case No. 19-958-GE-COI, Entry (Apr. 22, 2020) (granting application for rehearing filed by the Office of Ohio Consumers' Counsel over three years ago with no decision issuing); *In re Republic Wind, LLC*, Entry (Aug. 20, 2020), Case No. 17-2295-EL-BGN (granting applications

for rehearing for more time) and Opinion (Mar. 17, 2022) (order on rehearing issued five months later). No basis exists for this practice. Instead, the Board and PUCO seems to rely on a 2004 Supreme Court of Ohio decision for this practice. *State ex rel. Consumers' Counsel v. Public Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶ 1. In that case, the Court stated in dicta that R.C. 4903.10 does not "expressly preclude" the Commission from granting itself additional time to consider the merits of the case. *Id.* at ¶ 19.

In the intervening years, the PUCO has relied on *Consumers' Counsel* to support its practice and rejected arguments challenging this practice. *See., e.g.*, *In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR, et al., Fourth Entry on Rehearing (Feb. 8, 2017) ¶¶ 19-20, 22 (finding that consistent with "longstanding Ohio Supreme Court precedent," the Commission may grant rehearing for the limited purpose of further consideration of the matters specified in an application for rehearing); *In re Dayton Power and Light Company*, Case Nos. 16-395-EL-SSO, et al., Second Entry on Rehearing (Jan. 31, 2018), at ¶ 15. The Court has not revisited its decision in *Consumers' Counsel*. While the Court hinted that the PUCO's practice of granting itself more time could be challenged in a future, more appropriate proceeding, it has not clarified the circumstances under which such a challenge could occur. *Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617, ¶ 28.

Additionally, the Court's statement in *Consumers' Counsel* was dicta and should not be relied upon as precedent. Neither the PUCO nor the Board are therefore bound by the Court's decision in the case. And while the Supreme Court of Ohio has made clear that administrative agencies must respect their prior precedent, an agency may change its prior interpretations but only with a reasonable basis. *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, 28.

2. A reasonable basis exists for the Board to correct its interpretation of R.C. 4903.10.

To the extent the Board has interpreted R.C. 4903.10 to allow it to grant extensions of time to grant or deny applications for rehearing (rather than simply ignoring the lack of authority), a reasonable basis exists for the Board to correct its interpretation. First, the plain unambiguous language of the statute coupled with the most recent Court decision on agency deference and statutory interpretation provide sufficient and reasonable basis for the Board to correct its interpretation. *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.").

In *TWISM*, the Court clarified how courts should interpret statutes administered by agencies. The Court held that: (1) it is never mandatory for a court to defer to the judgment of an administrative agency and (2) a court may consider and weigh an administrative agency's construction of a legal text when interpreting the law but only if the text is ambiguous. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶¶ 42, 44. In the matter at bar, the text of R.C. 4903.10 is unambiguous as to the PUCO's and the Board's obligation to either grant or deny rehearing within 30 days of the filing of an application for rehearing or let the application be deemed denied. The Court's clarification and holdings in *TWISM* means that the Court will not defer to the Board's interpretation of the statute and that the Court will conduct a textual analysis of the statute's unambiguous language. That provides a reasonable basis for the Board to reexamine its practice of granting itself extensions of time under R.C. 4903.10 given the scrutiny it can expect from the Court.

Second, the D.C. Circuit's reversal of the FERC's longtime practice of granting itself more time to consider applications for rehearing provides another reasonable basis for the Board to end its practice. *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020). Many parallels can be drawn between the Board's grant of rehearing for time and FERC's routine practice of granting itself additional time to review applications for rehearing.

Under the Natural Gas Act ("NGA"), a party must seek rehearing before petitioning a court for a review of a FERC order. 15 U.S.C. § 717r(b). The NGA states, in relevant part:

> Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission **acts upon** the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.

15 U.S.C. § 717r(a) (emphasis added).

The issue before the D.C. Circuit was whether the FERC was substantively acting upon an application for rehearing by issuing a tolling order to give itself more time to consider the application. *Allegheny Def. Project*, 964 F.3d at 3-4, 9. The appeal arose from FERC's grant of a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Company ("Transco") for its Atlantic Sunrise Project. *Id.* at 6. A central aspect of the project was the construction of nearly 200 miles of new pipeline in Pennsylvania. *Id.* at 5. Various parties filed rehearing requests of the certificate order and FERC's secretary issued a tolling order "grant[ing rehearing] for the limited purpose of further consideration." *Id.* at 6. Nine months after issuing its tolling order, FERC denied rehearing, and the landowners appealed to the D.C. Circuit. *Id.* at 6-7. In between the initial tolling order and FERC's denial, Transco had already started construction on the pipeline. *Id.* at 8.

On review, the D.C. Circuit concluded that the NGA did not allow the FERC to issue "tolling orders for the sole purpose of preventing rehearing from being deemed denied by its

action." *Id.* at 11. Reading the express language of the statute, the D.C. Circuit determined the statute only allowed the FERC to do four things once an application for rehearing is filed: (1) grant rehearing, (2) deny rehearing, (3) abrogate its order without further rehearing, or (4) modify its order without further hearing. *Id.* at 13. The D.C. Circuit also declared that the statute was "equally precise" about what occurred if the Commission did not "act" on the application. *Id.* In that scenario, the D.C. Circuit determined, an applicant could "deem its rehearing application denied and seek judicial review of the now-final agency order. *Id.*

With regard to FERC's practice of issuing tolling orders for the sole purpose of giving itself additional time, the D.C. Circuit held that such orders did not substantively act on the rehearing applications at hand, which was required under Section 717r(a). *Id.* In fact, the tolling order issued by FERC even indicated that no substantive action was occurring because it directly stated it was being issued for the limited purpose of additional time for consideration of the issues raised in the applications. *Id.* Consequently, the D.C. Circuit held that by issuing tolling orders as a general practice, FERC had "rewritten the statue to say that its failure to act within thirty days means nothing; it can take as much time as it wants; and until it chooses to act, the applicant is trapped, unable to obtain judicial review." *Id.* at 15. Because FERC had no authority "to change the statutorily prescribed jurisdictional consequences of its inaction," the court found that FERC's practice of issuing tolling orders was not supported by Section 717r(a). *Id.* at 16.

Finally, the D.C. Circuit recognized that its prior decisions had upheld tolling orders. *Id.* at 17. However, the D.C. Circuit clarified that its initial decision upholding the tolling orders could not have foreseen FERC's "routinization of tolling orders, the unbounded length of tolling periods, or * * * the severe consequences of the tolling practice for property owners." *Id.* at 17-18. As a result, the D.C. Circuit opined, *stare decisis* principles did not require the court to adhere to past

decisions. *Id.* at 18. Further, the D.C. Circuit also noted that intervening U.S. Supreme Court precedent established that (1) courts must interpret statutory language as written and (2) agencies get no deference in interpreting jurisdictional statutes. *Id.* at 18. Overall, the D.C. Circuit concluded that the tolling order was not a substantive act with regard to the pending applications for rehearing, and consequently, the applications were deemed denied by FERC's inaction. *Id.* at 19.

The D.C. Circuit's decision in *Allegheny* is very persuasive. While the NGA rehearing provision and R.C. 4903.10 are worded differently, each statute puts forth the **same concept**: does the agency have the statutory authority to toll the time for a decision on an application for rehearing? Like the NGA, R.C. 4903.10 identifies the specific actions the Board can take with regard to an application for rehearing. As noted above, the unambiguous language of the statute allows the Board to (1) grant rehearing on the matter specified in such application or (2) deny rehearing. If rehearing is granted, then after the rehearing, the Board can (1) abrogate or modify its original order or (2) affirm the original order.

Like Section 717r(a) of the NGA, R.C. 4903.10 also spells out what happens if the Board does not take action within thirty days. In the case of such inaction, the application is denied by operation of law. And finally, like Section 717r(a), R.C. 4903.10 does not contain a tolling provision. Therefore, under the plain language of R.C. 4903.10, the Board and the ALJ had no authority to bypass the 30-day requirement and issue a grant of rehearing for additional time on February 7, 2023.

The February 7, 2023 Entry also did not act substantively on the applications for rehearing, which indicates that Board is taking no substantive action on the issues raised in the application for rehearing. That same point was made by the D.C. Circuit in *Allegheny*. The primary purpose

of the Entry's issuance was to toll the requirement that the Board grant or deny (or let be denied by operation of law) applications for rehearing within 30 days. *See Allegheny*, 964 F.3d at 13. However, as the plain language of R.C. 4903.10 indicates, the legislature has not granted the Board the authority to provide itself with such extensions. The D.C. Circuit reached the same result in *Allegheny* even though it recognized that prior decisions had upheld tolling orders. *Id.* at 17.

As to the Supreme Court of Ohio's prior decision in *Consumers' Counsel*, like the D.C. Circuit found with FERC, the Board has developed a practice of routinely granting itself more time to consider applications for rehearing. That practice, both at the Board and PUCO, has resulted in applications for rehearing pending for months and even years. *See, e.g.*, *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN, Entry (May 16, 2016) (granting applications for rehearing for more time) and Entry (Feb. 2, 2017) (denying applications for rehearing seven months later); *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN, Entry (Oct. 23, 2014) (granting application for rehearing for more time) and Entry (Aug. 27, 2015) (denying application for rehearing ten months later); *In re Suvon, LLC d/b/a/ FirstEnergy Advisors*, Case No. 20-103-EL-AGG, Entry (Dec. 15, 2021) (granting application for rehearing for more time over 15 months ago with no decision issuing). Fortunately, *TWISM* and *Allegheny* each individually provide a reasonable basis for the Board to reconsider and reverse its long-standing practice of granting extensions of time to itself to grant or deny applications for rehearing. These cases coupled with the plain language of R.C. 4903.10 provide more than a reasonable basis for the Board to grant Kingwood's second application for rehearing and rescind both the rule and Entry.

C. The Board does not have the authority to empower an administrative law judge to grant an extension of time for the Board to consider an application for rehearing.

Notably absent from 4903.10 is any authority for the Board to empower an ALJ to grant rehearing as done in the ALJ's February 7, 2023 Entry in this proceeding. The Entry cites to Ohio Adm.Code 4906-2-32(E), but a rule cannot exceed the scope of the statute it is promulgated under. Ohio Adm.Code 4906-2-32(E) allows the Board , the Chair or an ALG to "issue an order granting rehearing for the purpose of affording the board more time to consider the issues raised in an application for rehearing." However, this rule was promulgated under R.C. 4906.03, which allows the Board, among other things, to adopt rules to evaluate the environmental effects of proposed projects and "such other rules as are necessary and convenient to implement this chapter[.]" R.C. 4906.03 provides no authority for the Board to delegate the ability to grant or deny an application for rehearing let alone give the Board an extension of time to rule on an application for rehearing under R.C. 4903.10 (which is in a different chapter of the Revised Code). Consequently, while the Board has authority to adopt rules to allow it to implement R.C. Chapter 4906, it does not have the ability to override clear statutory mandates or to delegate its authority to grant or deny an application for rehearing. For that reason, the Entry is unlawful and unreasonable.

III. CONCLUSION

The Board is a creature of statute and must follow its governing statutes. The Board must follow the express language of R.C. 4903.10, just as it must follow the language of R.C. 4906.10(A) when determining whether to issue a certificate of environmental compatibility and public need, it. The Board cannot rewrite and insert language in a statute to give itself unilateral and indefinite extensions of time. R.C. 4903.10 is unambiguous and as written requires the Board to either grant or deny rehearing within 30 days of the filing of an application for rehearing. It

does not empower the Board to grant itself an extension of time to consider the rehearing application. The Board should grant Kingwood's second application for rehearing on this issue and rescind both the Entry and Ohio Adm.Code 4906-2-32(E).

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 March 9, 2023, to:

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