

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

ORDER ON REHEARING

Entered in the Journal on September 21, 2023

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies: (1) the application for rehearing filed by Kingwood Solar I LLC; (2) the application for rehearing filed by Citizens for Greene Acres; and (3) the application for rehearing filed by Greene County Commissioners.

II. PROCEDURAL BACKGROUND

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906-1, et seq.

{¶ 3} Kingwood Solar I, LLC (Kingwood or Applicant) is a person as defined in R.C. 4906.01.

{¶ 4} Pursuant to R.C. 4906.04, no person shall construct a major utility facility without first having obtained a certificate from the Board.

{¶ 5} On March 11, 2021, Kingwood filed a pre-application notification letter with the Board regarding its proposed solar-powered electric generation facility in Cedarville, Miami, and Xenia Townships, Greene County, Ohio with up to 175 megawatts (MW) of electric generating capacity (Project or Facility).

{¶ 6} On April 16, 2021, Kingwood filed an application with the Board for a certificate of environmental compatibility and public need to construct and operate the Facility.

{¶ 7} On August 26, 2021, the administrative law judge (ALJ) granted intervention to Cedarville Township Board of Trustees (Cedarville Township), Xenia Township Board of Trustees (Xenia Township), Miami Township Board of Trustees (Miami Township), In Progress LLC (In Progress), Tecumseh Land Preservation Association (Tecumseh), Citizens for Greene Acres, Inc. and 14 members of the group (collectively, CGA), Greene County Board of Commissioners (Greene County or the Commissioners), and the Ohio Farm Bureau Federation (OFBF).

{¶ 8} On October 29, 2021, Staff filed its report of investigation (Staff Report).

{¶ 9} On March 4, 2022, a joint stipulation (Stipulation) was filed by Kingwood and OFBF (Jt. Ex. 1).

{¶ 10} The adjudicatory hearing commenced as scheduled on March 7, 2022, and concluded at the close of rebuttal witness testimony on April 26, 2022.

{¶ 11} On June 13, 2022, Kingwood, Staff, Xenia Township, Miami Township, Cedarville Township, Greene County, CGA, and In Progress timely filed initial post-hearing briefs.

{¶ 12} On July 22, 2022, Kingwood, Staff, CGA, and Greene County timely filed post-hearing reply briefs. Additionally, Miami Township, Xenia Township, and Cedarville Township filed a timely joint reply brief.

{¶ 13} On December 15, 2022, the Board issued an Opinion and Order (Order) that denied Kingwood's application to construct, maintain, and operate the Facility. Specifically, the Order declared that Kingwood did not satisfy R.C. 4906.10(A)(6), which requires that, in

order to receive Board certification, a project must serve the public interest, convenience, and necessity.

{¶ 14} R.C. 4906.12 provides that R.C. 4903.02 to 4903.16 apply to any proceeding or order of the Board in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission). R.C. 4903.10 provides that any party to a proceeding before the Commission may apply for rehearing with respect to any matter determined in that proceeding within 30 days after entry of the order upon the journal of the Commission. The statute further directs that applications for rehearing be in writing and set forth specifically the ground or grounds on which the party seeking rehearing considers an order unreasonable or unlawful. Additionally, Ohio Adm.Code 4906-2-32 provides that any party may file an application for rehearing within 30 days after an order has been journalized by the Board in the manner, form, and circumstances set forth in R.C. 4903.10.

{¶ 15} On January 13, 2023, CGA, Cedarville Township, Miami Township, and Xenia Township (Joint Intervenors) filed an application for rehearing (Joint Application for Rehearing) from the Order.

{¶ 16} On January 17, 2023, Greene County filed an application for rehearing (Greene Application for Rehearing) from the Order.

{¶ 17} On January 17, 2023, Kingwood filed an application for rehearing (Kingwood Application for Rehearing) from the Order.

{¶ 18} On January 17, 2023, Kingwood also filed a motion for extension of the deadline to respond to the applications for hearing filed by Joint Intervenors and Greene County. The ALJ granted this motion via entry issued on January 18, 2023.

{¶ 19} On January 27, 2023, Greene County filed a memorandum contra the Kingwood Application for Rehearing (Greene Memo Contra).

{¶ 20} On January 27, 2023, Joint Intervenors filed a memorandum contra the Kingwood Application for Rehearing (Joint Intervenors Memo Contra).

{¶ 21} On January 27, 2023, Kingwood filed a separate memorandum contra in opposition to both the Greene Application for Rehearing (Memo Contra Greene County) and the Joint Application for Rehearing (Memo Contra Jt. Intervenors).

{¶ 22} By Entry issued February 7, 2023, the ALJ granted all three applications for rehearing for the express purpose of affording the Board more time to consider the issues raised in the applications pursuant to Ohio Adm.Code 4906-2-32(E).

III. DISCUSSION

{¶ 23} In the Kingwood Application for Rehearing, Applicant argues that the Project meets all of the statutory requirements that have been approved by the Board in earlier, similar cases. Kingwood believes that the Board gave undue weight to unsubstantiated opinions of local government entities and a vocal minority of citizens to deny the application under R.C. 4906.10(A)(6). Applicant submits that the Board now has an opportunity, on rehearing, to redirect its position and alter its Order to come back into compliance with the statutory framework provided by the General Assembly. Kingwood submits 10 grounds for rehearing as to why it believes the Order to be unlawful and unreasonable.

{¶ 24} Joint Intervenors support the decision of the Board to deny Kingwood's application but submit that the Order is in part unlawful and unreasonable because it failed to state that there are additional grounds for denying the certificate. Joint Intervenors request that the Board add these grounds to the Order as additional reasons for denying the application and outline 15 assignments of error.

{¶ 25} Greene County also supports the Board's decision to reject the Stipulation and deny a certificate of environmental compatibility and public need for the Project. However, the Commissioners also aver that there are additional or alternative grounds for

the Board's denial that should be incorporated into the Order. Greene County outlines three assignments of error in support of its application for rehearing.

{¶ 26} The Board will address each application for rehearing below. Any claim or argument raised in an application for rehearing that is not specifically discussed herein, was nevertheless thoroughly and adequately considered by the Board, and is denied.

A. Kingwood Application on Rehearing

1. FIRST GROUND FOR REHEARING: THE BOARD'S CONSIDERATION OF THE LOCAL GOVERNMENTAL AUTHORITIES' POSITIONS ON THE PROJECT TO DETERMINE WHETHER THE PROJECT IS IN THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY EXCEEDED THE BOARD'S STATUTORY AUTHORITY AND THEREFORE WAS UNLAWFUL AND UNREASONABLE.

{¶ 27} Kingwood cites established case law to reiterate that the Board is a creature of statute and can only act within the powers the legislature has conferred upon it. Based upon this universally accepted principal, Kingwood submits that the key question for its application for rehearing is whether the General Assembly, through its enactment of R.C. 4906.10(A)(6), permits the Board to consider the opinions of the local government authorities to determine whether a project satisfies that criterion. Kingwood avers that the language of R.C. 4906.10(A)(6) is unambiguous—the Board must determine whether a facility will “serve the public interest, convenience, and necessity.” While the terms “public interest, convenience, and necessity” are not defined in the statute, Kingwood proffers that these terms require a more general understanding such that it is evaluated in terms of the benefit to the public at large rather than that of a particular area or municipality. Kingwood submits that prior projects before the Board, which faced similar alleged “unanimous opposition” from local governmental entities, were still approved and issued certificates of environmental compatibility and public need. Kingwood argues that the Board added an additional requirement that a project must be supported, or at least not opposed, by the local

governments where a project area is located. Kingwood believes that there is no textual basis in R.C. 4906.10(A)(6) for the Board to add such a requirement. In fact, Kingwood submits that there is no language in the statute that allows the Board to take into account local government opinions. In support of this, Kingwood asserts that the 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 General Assembly believed the statute already provided local government with such authority. Kingwood states that the Board acknowledged the public benefits that the Project would supply but determined that the opinions of local government entities alone were enough to defeat the Project. Kingwood argues that including local government opinion and general public opinion from a “vocal minority” as part of the Board’s analysis under R.C. 4906.10(A)(6) is unlawful and unreasonable. (Kingwood App. for Rehearing at 4-9.)

{¶ 28} In its memorandum contra the Kingwood Application for Rehearing, Joint Intervenor respond that Kingwood’s arguments misread the Board’s opinion. Joint Movants aver that the Board did not consider *only* the expression of local opposition in its analysis under R.C. 4906.10(A)(6) but balanced the alleged benefits and weighed them against the adverse impacts on the local community. Accordingly, Joint Intervenor believe that the Board considered the Project’s effects on the entire public. Joint Intervenor are unmoved by Kingwood’s arguments concerning Senate Bill 52. Whereas Senate Bill 52 allows counties to place a complete moratorium on solar projects, the Board’s interpretation of R.C. 4906.10(A)(6) simply allows it to consider local support or opposition as part of the balancing test to determine if a project satisfies the public interest, convenience, and necessity. Joint Intervenor state that Greene County and the township trustees recognized opposition to the Project from their constituents and based on their positions in this case on these voiced concerns, as evidenced by the resolutions passed by all the governmental intervenors. In summary, Joint Intervenor aver that the Board’s balancing of the local public interest against the Project’s purported overall benefits is an appropriate procedure under R.C. 4906.10(A)(6). (Joint Intervenor Memo Contra at 6-13.)

{¶ 29} Greene County, in its memorandum contra, argues that the public interest provision of R.C. 4906.10(A)(6) does not confine the Board to any specific evidence or considerations and in no way excludes the Board from considering local government opposition as part of its analysis. Greene County submits that the Board correctly noted that Kingwood's arguments in support of the Project being in the public interest, convenience, and necessity (increased energy generation, potential job creation, tax revenues, air quality benefits, etc.) are arguments that apply in every solar case and if these alone were sufficient to issue a certificate, then there would be no need for an analysis under R.C. 4906.10(A)(6). Greene County emphasizes that the county commissioners and trustees of the intervening townships are elected officials that speak for residents of the county and townships. Greene County believes that the Board reasonably and lawfully considered the rationale presented by these elected officials and found it to be compelling and credible. (Greene Memo Contra at 2-5.)

{¶ 30} The Board finds Kingwood's first ground for rehearing to be without merit. We agree with Kingwood's uncontested proposition that the Board is a creature of statute and can only act within the powers conferred by the General Assembly. However, Kingwood's interpretation of R.C. 4906.10(A)(6) to somehow foreclose the Board's consideration of the opinions of local government entities when evaluating proposed projects is misguided. R.C. 4906.10(A)(6) charges the Board with determining whether a project will "serve the public interest, convenience, and necessity," but, as pointed out by Greene County, this language does not confine the Board to considering only particular evidence or viewpoints as part of its analysis. The Board views this factor through a broad lens, taking into account the general public's interest in energy generation and potential prosperity for the state of Ohio, while also considering the local public interest, local citizen input, and impact to natural resources (*See In re the Application of Republic Wind (Republic Wind)*, Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate (June 24, 2021) at 28; *In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021) at 36 (*Ross County Solar*); *In re Harvey Solar I*, Case No. 21-164-EL-BGN, Opinion, Order, and

Certificate (Oct. 20, 2022) at 109). That is precisely what the Board did in this Order, recognizing certain benefits that could flow from the Project, while balancing those against the opposition of local citizens and government entities (Order at ¶¶ 149-150). The Board did not, as Kingwood alleges, add an additional requirement that a project must be supported by local governments in order to be approved. The opposition of local governments was simply one of the many factors contributing to the Board's analysis. The four elected government entities with physical contact to the Project all intervened in this proceeding and actively participated at hearing to voice their opposition. The Board found these arguments, made by entities comprised of elected officials, compelling as to the public interest of the Project. (Order at ¶¶ 150-152.) Nothing in R.C. 4906.10(A)(6), nor Board precedent, bars such a consideration of public opinion, and this ground for rehearing is denied accordingly.

2. SECOND GROUND FOR REHEARING: THE BOARD'S DELEGATION OF ITS DECISION-MAKING AUTHORITY TO THE LOCAL GOVERNING BODY OF GREENE COUNTY AND THE THREE INTERVENING TOWNSHIPS WAS IMPERMISSIBLE, UNLAWFUL AND UNREASONABLE.

{¶ 31} Kingwood submits that expanding the analysis of what constitutes as serving the public interest, convenience, and necessity to include "public opinion and perception" impermissibly delegates the Board's decision-making authority to local government bodies or a vocal minority. Kingwood points to R.C. 4906.02(C), which, states that the authority to grant certificates under R.C. 4906.10 shall not be exercised by any officer, employee, or body other than the Board itself. Kingwood argues that local governments, including elected representatives, have no say over the how major utility projects are to be built and run. Kingwood stresses that the Project met every "technical criteria" of R.C. 4906.10(A). However, Kingwood states that the Board denied the application solely because intervening local governmental entities passed resolutions opposing the Project. Kingwood argues that this amounts to the Board abdicating its

exclusive authority regarding the issuance of certificates under R.C. 4906.10. Kingwood avers that the Board has rules in place which allow local governing bodies and members of the public to engage in the certification process outside of R.C. 4906.10(A)(6). Kingwood believes that to allow otherwise would potentially lead to energy development in Ohio being determined not by the Board, but by political entities. (Kingwood App. for Rehearing at 9-11.)

{¶ 32} Joint Intervenors dismiss Kingwood's contention that the Board delegated its decision-making authority, as the opening paragraph of the Order states that "[t]he Ohio Power Siting Board ... denies the application of Kingwood Solar I LLC ..." Likewise, the conclusion states that the Board denies Kingwood's application. Therefore, the seven members of the Board, not local government officials, made the decision to deny Kingwood's application. (Joint Intervenors Memo Contra at 13-15.)

{¶ 33} Greene County also finds Kingwood's second grounds for rehearing to be illogical. Greene County points out that on one hand Kingwood states that the General Assembly expressly delegated the authority to grant certificates under R.C. 4906.10 to the Board, but then claims that the Board's decision to consider local government opposition to the Project is unlawful—Greene County submits that both of these propositions cannot be true. Greene County argues that nothing in the Revised Code prohibits the Board from considering local government opposition as part of the Board's analysis. Further, the fact that there have been previous cases where unanimous public opposition was overruled by the Board, and cases where unanimous local opposition has been upheld by the Board, prove that the Board has decision-making authority based on the statutory criteria and the individual circumstances of each case. (Greene Memo Contra at 5-6.)

{¶ 34} Largely for similar reasons as those outlined above in our denial of the first ground for rehearing, the Board finds this second ground for rehearing to be without merit. Having already determined above that nothing in R.C. 4906.10(A)(6) bars the Board from considering the opposition of local government entities as part of its analysis of this

criterion, we likewise disagree with Kingwood's assertion that considering arguments from such entities somehow equates to a delegation of authority. As pointed out by CGA, the Order clearly states that "**The Ohio Power Siting Board** ... denies the application of Kingwood Solar I LLC ..." (emphasis added) (Order ¶ 1). The views expressed by local elected officials, through government entities that intervened in the case, were prudently considered. The decision, however, was the Board's, and none of the local government entities possessed any form of approval or veto power as to whether a certificate would be issued for the Project. Kingwood's repeated assertion that its application met every "technical criteria" of R.C. 4906.10(A) is unavailing—the statute requires satisfaction of all criteria thereunder, including (A)(6). To interpret the statute as Kingwood desires would render R.C. 4906.10(A)(6) irrelevant. This second ground for rehearing is denied.

3. THIRD GROUND FOR REHEARING: THE BOARD'S CHANGE OF ITS INTERPRETATION OF WHAT IS REQUIRED TO MEET THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY" CRITERION OF R.C. 4906.10(A)(6) TO NOW ALLOW UNANIMOUS OPPOSITION BY LOCAL GOVERNMENTAL AUTHORITIES WITHIN THE PROJECT AREA TO CONTROL THE BOARD'S DECISION WITHOUT A REASONABLE BASIS FOR DOING SO IS UNLAWFUL AND UNREASONABLE.

{¶ 35} Kingwood states that the Supreme Court of Ohio has made clear that administrative agencies must respect their prior precedent and may only alter prior interpretations with a reasonable basis to do so. Kingwood submits that "for years" the Supreme Court and the Board have interpreted R.C. 4906.10(A)(6) by considering whether a proposed project benefits the general public. Kingwood points to prior decisions issued by the Board in which local opposition, even strong opposition, was deemed insufficient to outweigh the benefits of a project. Kingwood asserts that the Board has only recently shifted its interpretation of R.C. 4906.10(A)(6) to include local government opinion in its assessment, which, in Kingwood's opinion, effectively allows local governments to veto potential projects. Kingwood argues that the Board has not provided any reasonable basis

for the alleged departure from precedent. Kingwood believes that there is no justification for why a renewable energy project that faced uniform opposition from local governments was approved (*In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN), while Kingwood's application faced similar opposition from intervening governmental entities and was denied. Kingwood asserts that strong local opposition alone cannot outweigh the benefits that the Project would generate for the general public and, therefore, the Board should grant rehearing, approve the Project, and issue a certificate to Kingwood in accordance with the Board's prior precedent. (Kingwood App. for Rehearing at 11-14.)

{¶ 36} Joint Intervenors do not believe that the Order deviates from prior Board precedent. First, Joint Intervenors argue that the cases cited by Kingwood for the Board's precedent do not state that the Board ignores local opposition or local interests under R.C. 4906.10(A)(6). Joint Intervenors point to the Board's decision in *Ross County Solar*, as proving that the Board has considered local and non-local public interest in its (A)(6) analysis and found that the evidence supported approval of a project. Joint Intervenors also point to earlier Board decisions in which the Board found that prominent and one-sided local opposition to projects were key factors in denying applications for certificates. (See *In re Birch Solar I*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) (*Birch Solar I*); *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021) (*Republic Wind*); *In re American Transmission Systems*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022) (*American Transmission Systems*); *Ross County Solar*). Even if the Order did alter the Board's prior precedent, Joint Intervenors believe that the Board provided sufficient explanation for any such change enacted by the Order. Joint Intervenors argue that time and changing circumstances can show that the public interest is no longer being served by a particular interpretation. In addition, Joint Intervenors point out that the Supreme Court of Ohio has indicated that it will not second-guess any agency's divergence from precedence so long as there are reasons supporting it. (Joint Intervenors Memo Contra at 15-18.)

{¶ 37} Greene County also believes that the Board followed its precedents in considering local government opposition to a project as a criterion for determining satisfaction of R.C. 4906.10(A)(6), pointing to the analyses outlined in *Birch Solar I*, *Republic Wind*, and *American Transmission Systems*. Greene County submits that if the Board was as bound to past precedent as Kingwood claims, it would also need to consider local government opposition based on the opinions issued in *Birch Solar I*, *Republic Wind*, and *American Transmission Systems*. Because the Board has consistently reviewed local government opposition in recent years, this argument should be denied. (Greene Memo Contra at 6.)

{¶ 38} The Board finds this third ground for rehearing to be without merit. This ground for rehearing is largely a remix of the first two grounds, with Kingwood expressing its displeasure that the Board considered the opposition of local government entities within the Project area as part of its analysis under R.C. 4906.10(A)(6). As an initial point, the Board disagrees that this Order disregarded precedent, as there are previous cases in which the Board weighed local government opposition and denied a certificate in which the Board fielded local opposition and approved a certificate. (See *Birch Solar I*, *Republic Wind*, *American Transmission Systems*, *Ross County Solar*). In recent years, the Board has consistently considered local government opposition as part of its “broad lens” view of R.C. 4906.10(A)(6) and did nothing different in this case (Order at ¶¶ 142-145). Thus, like the first two grounds discussed above, the Board denies this third ground for rehearing.

4. FOURTH GROUND FOR REHEARING: THE BOARD’S RELIANCE ON PUBLIC COMMENTS THAT ARE NOT A PART OF THE RECORD IN THESE PROCEEDINGS VIOLATES R.C. 4906.10(A)(6), AND IS THEREFORE UNLAWFUL AND UNREASONABLE.

{¶ 39} Kingwood avers that the Board gave “substantial weight” to the public comments filed in opposition to the Project on the case docket. Kingwood concedes that the Order acknowledged that these public comments fall short of admitted evidence, but Applicant still takes issue with the Board acknowledging the value added by the public

comments in the Board's analysis under R.C. 4906.10(A)(6). Kingwood cites R.C. 4906.10(A) and Ohio Adm.Code 4906-2-30 in arguing that any decision made by the Board must be made "upon the record" or "based solely on the record." Kingwood stresses that these public comments are not in the evidentiary record of these proceedings and, therefore, the Board's review and reliance upon the sentiments expressed in the comments was unlawful and unreasonable. (Kingwood App. for Rehearing at 14-15.)

{¶ 40} Joint Intervenors respond to this ground for rehearing by pointing out that the overwhelming opposition to the Project seen in the docketed comments is observable in many pieces of evidence that are part of the record, for instance the Staff Report's discussion of the public comments. Joint Intervenors stress that the public's submission of comments is an integral part of the Power Siting process. According to Joint Intervenors, for the Board to solicit public comments from citizens and then simply ignore the comments would be misleading the public to engage in a meaningless process. Joint Intervenors also point out that one of Kingwood's own witnesses also discussed the public comments as part of his testimony. Joint Intervenors argue that an overwhelming number of public comments opposed to the Project simply serves to complement other substantial evidence to the Project contained within the record. (Joint Intervenors Memo Contra at 18-20.)

{¶ 41} Greene County finds Kingwood's characterization of the Board relying on the public comments as the basis for its decision to be disingenuous. Greene County states that the Board could not be clearer as to the basis for its denial of the application, which was: – uniform public opposition expressed by local government entities whose constituents are impacted by the Project; opposition by all four government entities with physical contact to the Project; the adoption by each government entity of an opposition resolution; and active participation throughout the evidentiary hearing by each entity. The Board's acknowledgement of the public comments aligning with the opposition of local government entities is not unlawful, as the Board did not cite it as the basis for the decision. Rather, the Board simply acknowledged the comments as being in line with the opposition expressed by intervening government entities. Greene County also echoes Joint Intervenors in stating

that the public comment submittal and review is an important part of the Board's process and should not be disregarded. (Greene Memo Contra at 7.)

{¶ 42} The Board finds Kingwood's fourth ground for rehearing to be without merit. As an initial matter, the Board will point out that, despite Kingwood's characterization in its application for rehearing, nowhere in the Order is it stated that we gave "substantial weight" to the public comments filed in the case docket. We stated that the vast majority of public comments voiced opposition to the Project and noted that the comments reinforced the positions of the local government entities that intervened in the case. We explicitly acknowledged that these comments "fall short of being admitted evidence," but stated that they do add value to the Board's consideration as to the local perception of the Project. (Order at ¶ 151.) As pointed out by Greene County, the public comments are not cited as a basis for the decision, but rather a recognition of comments filed by members of the general public aligning with the views expressed by their elected representatives. Kingwood's fourth ground for rehearing is denied.

5. FIFTH GROUND FOR REHEARING: BECAUSE THE RECORD, INCLUDING HUNDREDS OF PAGES OF EXHIBITS AND DAYS OF EXPERT TESTIMONY, BEFORE THE BOARD ESTABLISHED THAT THE PROPOSED SOLAR-POWERED ELECTRIC GENERATION FACILITY MEETS ALL OF THE STATUTORY CRITERIA OF 4906.10(A), INCLUDING THAT THE PROJECT WILL BE IN THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY" UNDER R.C. 4906.10(A)(6), THE BOARD'S DECISION TO REJECT THE STIPULATION AND TO DENY KINGWOOD A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE A SOLAR-POWERED ELECTRIC GENERATION FACILITY IN GREENE COUNTY, OHIO IS UNLAWFUL AND UNREASONABLE.

{¶ 43} In this ground for rehearing, Kingwood asserts that the Order is unlawful and unreasonable for two primary reasons. First, Kingwood argues that the record contains overwhelming evidence that the Project is compliant with all statutory requirements and

serves the public interest, convenience, and necessity. Kingwood notes the Board found that the application complied with all the statutory criteria but one. With respect to R.C. 4906.10(A)(6), the lone criterion that the Board found Kingwood failed to satisfy, Kingwood argues that it presented significant evidence to show that the Project would serve the public interest, convenience, and necessity. Kingwood states that it submitted 12 expert witnesses to support compliance with (A)(6). Kingwood also outlines the benefits that it states demonstrate how the Project would serve the public interest, convenience, and necessity, “based on the plain meaning of that term.” In support, Kingwood references jobs that would allegedly be created, increased economic activity, increased tax revenue, no decrease in property values, newly created income streams, and a number of other economic and environmental gains. Kingwood points out that the Board acknowledged many of the benefits of the Project. Kingwood argues that the Board erred, however, in finding that the unanimous opposition of the intervening government entities is controlling as to whether the Project satisfies R.C. 4906.10(A)(6). Kingwood believes that this overstated the local opposition and ignores the majority support that the Project received. (Kingwood App. for Rehearing at 16-19.)

{¶ 44} Second, Kingwood argues that the “vague opinions and unfounded statements” of Greene County and the three townships cannot outweigh the significant evidence in the record. Kingwood asserts that the resolutions passed by Greene County and the three townships deal with issues that are adequately addressed in the application and further through the Stipulation and represent nothing more than politically motivated opposition. Kingwood finds these resolutions to be vague and irrelevant to the Board’s inquiry. While the resolutions and intervenor witnesses at hearing reference vague “angst” or “high tension” in the community, they do not provide any evidence of actual harm to the community. Kingwood dismisses the reasoning offered by the townships as either being irrelevant to these proceedings or as adequately addressed in the application and/or Stipulation. (Kingwood App. for Rehearing at 19-22.)

{¶ 45} Joint Intervenors state that the Board struck a reasonable balance between the Project's perceived benefits and the serious downsides to the local community. First, Joint Intervenors believe that Kingwood exaggerated the Project's supposed benefits, as many of these benefits are either temporary in nature or will have negative consequences for other surrounding businesses, properties, and citizens. Joint Intervenors are also skeptical of the overall economic impact of the Project alleged by Kingwood. Joint Intervenors argue that the detriments of the Project are severe and the alleged benefits doubtful and negligible and that the Board was correct to determine that the balance between these two factors weighed in favor of denying a certificate. In response to Kingwood's second argument in this section, Joint Intervenors state that the resolutions and testimony of local governments opposing the Project are based on reasonable concerns expressed by the constituents their members were elected to represent. Joint Intervenors point to specific grounds for opposition cited within the resolutions passed by Greene County and the three townships, as well as the reasonable concerns that were expressed to the representatives and served as the bases for the concerns. With respect to Kingwood's continued assertion that Applicant's satisfaction of all the "technical requirements" of R.C. 4906.10(A) demonstrates that it also satisfies R.C. 4906.10(A)(6), Joint Intervenors counter that such an interpretation would render (A)(6) meaningless. (Joint Intervenors Memo Contra at 20-25.)

{¶ 46} Greene County's response to this ground for rehearing is the same as that provided in opposition to Kingwood's first ground for rehearing. As outlined above, Greene County submits that the Board correctly noted that Kingwood's arguments in support of the Project being in the public interest, convenience, and necessity (increased energy generation, potential job creation, tax revenues, air quality benefits, etc.) are arguments that apply in every solar case and if these alone were sufficient to issue a certificate, then there would be no need for an analysis under R.C. 4906.10(A)(6). Further, Kingwood's continued reference to its "technical compliance" under other provisions of R.C. 4906.10(A) should not guarantee that an application serves the public interest,

convenience, and necessity. Otherwise, the application and hearing process would be unnecessary, as any applicant able to meet certain technical requirements would be granted a certificate. Greene County disagrees with Kingwood that the alleged job creation, increased tax revenue, and other economic output outweigh the public interest in preserving wildlife, parks, recreations areas, cultural areas, and the myriad other reasons expressed at the local public hearing and evidentiary hearing. Greene County asserts that nothing in R.C. 4906.10(A)(6) prevents the Board from weighing these considerations and that the Board reasonably did so in the Order. (Greene Memo Contra at 2-5.)

{¶ 47} The Board finds that Kingwood's fifth ground for rehearing is without merit. The Board is aware of, and considered, the benefits that Kingwood highlights as potentially flowing from the construction and operation of the Project. The Board acknowledged these benefits but noted that such Project benefits must be balanced against the impact of the Project on individuals who are most directly affected by the Project. (Order at ¶ 149.) The Board performed this analysis, considering all of the evidence which Kingwood cites as supporting its satisfaction of R.C. 4906.10(A)(6), and found that the potential benefits did not outweigh the local opposition to the Project within the local community (Order at ¶¶ 29, 141-152). To dismiss the arguments and evidence proffered by intervening local government entities as "vague and unfounded" is unwarranted. Each of the intervening entities passed resolutions in which they stated grounds for their opposition and all of them actively participated in this proceeding. Kingwood's continual reference to its satisfaction of all the "technical criteria" or R.C. 4906.10(A)(6) is a red herring. If such compliance were enough to be issued a certificate, then the entire application and hearing process would be meaningless, as any applicant that demonstrates some type of "technical compliance" would be guaranteed a certificate. R.C. 4906.10(A) states that the Board shall not grant a certificate unless it finds and determines satisfaction of *all* eight criteria outlined thereunder. As Kingwood later more accurately admits, it complied "with all but one of the statutory requirements" (Kingwood App. for Rehearing at 16). Not satisfying that lone criterion

requires a denial of the certificate application, as the Board correctly ruled. The fifth ground for rehearing is denied.

6. SIXTH GROUND FOR REHEARING: THE BOARD’S FINDING THAT THE STIPULATION WAS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES IS NOT SUPPORTED BY THE RECORD AND THEREFORE IS UNREASONABLE AND UNLAWFUL.

{¶ 48} Kingwood disagrees with the Board’s finding that the Stipulation entered into by Kingwood and OFBF was not the product of serious bargaining. Kingwood takes particular exception to the Board’s determination that a stipulation must resolve the core issue of whether an application is to be approved, arguing that this sentiment is contrary to the Board’s rules and regulations. Kingwood points to Ohio Adm.Code 4906-2-24(A) permitting two or more parties in a case to enter into a stipulation concerning “some or all of the issues in a proceeding.” Kingwood asserts that nothing in the Board’s statutes or rules requires that a stipulation only be accepted if it addresses the core issue in a proceeding. Additionally, Kingwood asserts that the Board’s implication that all parties must join a stipulation in order for it to be considered the product of serious bargaining is also unsupported by Board rules. Kingwood states that the Board has previously approved numerous stipulations that are only agreed to and signed by some parties in a case. Kingwood asserts that it engaged in significant settlement discussions with each of the intervening parties, each of which was represented by competent counsel. While these discussions were ultimately unsuccessful with all parties but OFBF, Kingwood states that it did amend the Project design in an effort to reach agreement among all the parties. (Kingwood App. for Rehearing at 22-24.)

{¶ 49} Joint Intervenors respond that Kingwood’s invitation to all parties for negotiations does not signify that the Stipulation is the product of serious bargaining. Joint Intervenors point out that while Kingwood now claims that it incorporated feedback from parties after settlement discussions, the Stipulation itself makes no such representation.

Joint Intervenors also feel that the Stipulation does not adequately address the numerous problems associated with the Project. (Joint Intervenors Memo Contra at 26-27.)

{¶ 50} In response to this ground for rehearing, Greene County simply states that it agrees with the Board's assessment that because the Stipulation does not even recommend the grant of a certificate, it cannot be a "product" of serious bargaining among the parties (Greene Memo Contra at 8-9).

{¶ 51} The Board finds that Kingwood's sixth ground for rehearing has merit and that the Stipulation likely did result from serious bargaining. Pursuant to Ohio Adm.Code 4906-2-24, parties before the Board are permitted to enter into stipulations concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding. In accordance with Ohio Adm.Code 4906-2-24(D), no stipulation is binding on the Board. However, the Board may afford the terms of the stipulation substantial weight. The standard of review for considering the reasonableness of a stipulation has been discussed in numerous Board proceedings. (*See* Order at ¶ 163.) In considering a stipulation, the Board uses the following criteria:

- a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- b) Does the settlement, as a package, benefit ratepayers and the public interest?
- c) Does the settlement package violate any important regulatory principal or practice?

{¶ 52} While the Board still believes that the Stipulation did not speak to the core issue in this entire proceeding, the parties seem to concede that Kingwood did engage (or at least attempt to engage) in settlement discussions with each party, all of which were represented by experienced, competent counsel (Kingwood App. for Rehearing at 22; Joint Intervenors Memo Contra at 26). While the Stipulation ultimately entered into by two of the parties was lacking, Kingwood is correct that this criterion does not require that all

parties join in a stipulation for it to be considered as having been the product of serious bargaining. As will be addressed further below, however, the Board maintains that the Stipulation does not satisfy the second and third criteria in considering a Stipulation and, thus, cannot be adopted by the Board. Accordingly, while the Board agrees with the Applicant, this ground for hearing is dismissed as moot.

7. SEVENTH GROUND FOR REHEARING: THE BOARD'S FINDING THAT ITS DETERMINATION AS TO THE PROJECT'S NON-COMPLIANCE WITH R.C. 4906.10(A)(6) NECESSITATES FINDINGS THAT (1) THE STIPULATION, AS A PACKAGE, IS NOT BENEFICIAL TO THE PUBLIC INTEREST, AND (2) ADOPTION OF THE STIPULATION WOULD VIOLATE AN IMPORTANT REGULATORY PRINCIPLE OR PRACTICE IS NOT SUPPORTED BY THE RECORD OR LAW, AND THEREFORE IS UNREASONABLE AND UNLAWFUL.

{¶ 53} Kingwood restates its assertion that the Board's determination that the Project fails to serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) is unlawful and unreasonable. Based on an acceptance of this assertion, Kingwood then submits that the Board's rejection of the Stipulation based on such a false determination is likewise unlawful and unreasonable. Further, Kingwood argues that conditions contained within the Stipulation would ensure that additional aspects of the Project will serve the public interest and conform to important regulatory principles and practices. Kingwood highlights commitments in the Stipulation regarding coordination with local government, protections for local wildlife and ecology, increased setbacks, substantial commitments to prevent drainage issues, and increased landscape screening, among others. Kingwood argues that the Board ignored all of these conditions and safeguards for the public, declining to even address them in the Order. Kingwood avers that the Board regularly approves similar stipulations that include similar conditions. (Kingwood App. for Rehearing at 25-27.)

{¶ 54} Joint Intervenors respond that the Stipulation deserves no weight or deference from the Board, pointing out that only two parties agreed to the Stipulation and that one of the signatory parties (OFBF) does not even ask that the Board approve the Project. Further, nowhere in the Stipulation or the evidentiary record does OFBF offer any opinion as to whether the Project satisfies R.C. 4906.10(A)(6). In short, Joint Intervenors agree that the Stipulation does nothing to promote the public interest, convenience, and necessity. (Joint Intervenors Memo Contra at 26-27.)

{¶ 55} Greene County also focuses on the fact that although OFBF joined in the Stipulation, even OFBF offers no position as to whether a certificate should be issued in this case. Greene County states that Kingwood was unable to convince any party in this proceeding to sign a Stipulation recommending the grant of a certificate. Instead, it convinced one party, which was not a local government entity, to sign on to a Stipulation recommending 39 conditions. However, Greene County asserts that the problems to the public interest resulting from the Project are so comprehensive that not even these supposedly comprehensive 39 conditions could persuade one local government entity to join the Stipulation. Greene County states that the Stipulation is not beneficial to the public interest for the same reasons that Kingwood's application is not beneficial to the public interest and therefore any adoption of the Stipulation would violate important regulatory principles. (Greene Memo Contra at 8-9.)

{¶ 56} The Board finds that Kingwood's seventh ground for rehearing is without merit. As outlined in the Order, and affirmed within this Order on Rehearing, the Board does not believe that the Project satisfies R.C. 4906.10(A)(6), which states that no certificate shall be issued unless the Board finds that a project will serve the public interest, convenience, and necessity (Order at ¶¶ 149-150). Such a conclusion dictates a related finding that the proposed Stipulation, as a package, is not beneficial to the public interest, and adoption of the Stipulation would violate an important regulatory principle. The Board sees no argument to alter this finding—it seems unreasonable that a stipulation, joined by two of the ten parties in the case, in support of the Project would somehow serve the public

interest when the Board already determined that the Facility itself would not serve the public interest, convenience and necessity. Likewise, if the Board has determined that a Project does not satisfy R.C. 4906.10(A) and that a proposed stipulation is not in the public interest, it naturally flows that to certificate such a project would violate important regulatory principles. Kingwood asserts that the Stipulation contains conditions that represent “additional aspects” of the Project that would serve the public interest. However, none of these conditions overcome the Board’s finding that the Project itself is not in the public interest, convenience, and necessity. This seventh ground for rehearing is denied. (Order at ¶ at 169.)

{¶ 57} Thus, even with our acknowledgement above that the Stipulation was the product of serious bargaining among the parties, the Stipulation still fails to satisfy the second and third criteria used by the Board in determining the reasonableness of a stipulation.

8. EIGHTH GROUND FOR REHEARING: THE BOARD’S DECISION TO DENY KINGWOOD’S INTERLOCUTORY APPEAL OF THE ALJ’S DENIAL OF ITS SUBPOENA REQUESTS TO COMPEL THE TESTIMONY OF THE EXECUTIVE DIRECTOR OF THE OHIO POWER SITING BOARD, MS. THERESA WHITE, IS UNLAWFUL AND UNREASONABLE BECAUSE, ABSENT MS. WHITE’S TESTIMONY, THE BOARD DID NOT HAVE COMPLETE INFORMATION ON THE NATURE OF STAFF’S INVESTIGATION IN VIOLATION OF R.C. 4906.07(C).

{¶ 58} Kingwood states that R.C. 4906.07(C) requires the chairperson of the Board to investigate an application and prepare a written report with recommended findings on the statutory criteria and that report becomes part of the record. Additionally, the statute states that the “report shall set forth the nature of the investigation.” Kingwood argues that the Staff Report does not set forth the nature of the investigation. In support, Kingwood points to the outreach by Staff to local governments just prior to issuance of the Staff Report. Because this outreach is not outlined within the Staff Report, Kingwood submits that the Staff Report failed to comply with R.C. 4906.07(C). Kingwood contends that the ALJ and

the Board barred Kingwood from presenting evidence as to why Staff conducted this outreach because such evidence would have been elicited through the testimony of the Board's executive director, Theresa White. Kingwood asserts that Ms. White's testimony was important to its attempt to challenge the basis for Staff's recommendation that the Project did not satisfy R.C. 4906.10(A)(6). Kingwood argues that, as supported by the subpoenaed testimony of Juliana Graham-Price, Ms. White's involvement was central to Staff's investigation and the "last-minute change" in its recommendation for the Project. By restricting its ability to question all parties with knowledge of the reason for the extent of the local outreach, the Board allowed the Staff Report to enter the record without transparency as to the full nature of the Staff investigation, as required by R.C. 4906.07(C). Kingwood states that this was unlawful and unreasonable and that it should have been permitted to call Ms. White as a witness. (Kingwood App. for Rehearing 27-29.)

{¶ 59} Joint Intervenors reply to Kingwood's eight, ninth, and tenth grounds for rehearing collectively. With respect to this eighth ground for rehearing, Joint Intervenors state that the "Nature of Investigation" section of the Staff Report clearly meets the requirement of R.C. 4906.07(C) for Staff to set forth the nature of the investigation, as this section describes the type or main characteristic of the investigation. Joint Intervenors aver that nothing in R.C. 4906.07(C) requires a staff report to document every phone call and communication made by all Board Staff. They state that Juliana Graham-Price was the staffer who contacted the local officials and that she testified in the hearing about these conversations and that the purpose of the outreach is obvious—to obtain input from the public on the Project. Joint Intervenors point out that Ms. White did not make any of these contacts, so subpoenaing Ms. White to testify as to the substance of these conversations would add nothing to the discussion. At best, Joint Intervenors believe that any testimony from Ms. White concerning any other contacts would constitute the needless presentation of cumulative evidence, which a tribunal is free to exclude under Ohio R. Evidence 403(B) and the Board's general authority to manage and expedite the flow of a proceeding. Joint Intervenors contend that, despite Kingwood claiming otherwise, the record in these

proceedings does identify the purpose of Staff's outreach to local governments. Joint Intervenor submit that Kingwood has the burden of demonstrating that it "suffered prejudice" from the denial of its subpoena request; but no prejudice occurs if the complaining party can obtain the relevant information by other means. In this proceeding, Kingwood had the opportunity to question not only Ms. Graham-Price, but the local governments' witnesses as well. Because of these opportunities for Kingwood to elicit this information from multiple other sources, Joint Intervenor find Kingwood's procedural due process claims to be hollow. (Joint Intervenor Memo Contra at 27-28.)

{¶ 60} Greene County also collectively responds to Kingwood's eighth, ninth, and tenth grounds for rehearing dealing with the denied subpoena of Ms. White. Greene County finds it logical that Staff would have made "last-minute outreach" to local governments affected by the Project, considering the significant size and scope of the Project. Ms. Graham-Price, whose job title is Community Liaison, testified that she was reaching out to government officials simply to determine their positions on the proposal at the direction of Ms. White. Ms. White, however, never spoke to any local authorities. Greene County argues that no statute or regulation restricts the Board or Staff from considering the positions of local governments impacted by an application. In short, Ms. Graham-Price was simply doing her job and following the direction of her superior. Kingwood's contention that testimony from Ms. White is critical to determining the nature of Staff's investigation is, in Greene County's estimation, unconvincing, as Kingwood was permitted to subpoena and examine Ms. Graham-Price on this issue. Even more significant, Greene County submits that none of these discussions were dispositive to the Board's decision to reject the application as not in the public interest, convenience, and necessity. Greene County believes that Kingwood's argument on this issue inaccurately assumes that the Board blindly follows the recommendations. While the Board relies on the Staff Report to the extent it finds its recommendations persuasive, the Board does this regarding any evidence submitted to the Board. The Staff Report is only one piece of evidence in the overall process which the Board considers in reaching its independent determination to approve or deny an application.

Greene County concludes that a subpoena of Ms. White's testimony would be unreasonable because her testimony is irrelevant to the Board's ultimate decision. (Greene Memo Contra at 9-10.)

{¶ 61} The Board finds that Kingwood's eighth ground for rehearing is without merit. Kingwood is correct that R.C. 4906.07(C) requires Staff to set forth the nature of its investigation—which it did in the Staff Report, both in the section titled "Nature of Investigation," which outlined the procedures of Staff's investigation, but also in the ensuing 49 pages evaluating the application. As we stated in the Order, the collective testimony of Staff witnesses makes clear that the Staff Report was the collective work of Staff "as a whole" and there was no disagreement among Staff members as to its contents or conclusions (Order at ¶ 79). Further, as to the specific issues that Kingwood stresses it needed further investigation into, Kingwood was permitted to subpoena and cross-examine Ms. Graham-Price, the individual who contacted the local government entities. Kingwood fully questioned Ms. Graham-Price as to why she initiated such outreach and the substance of the conversations. The Board sees no new argument as to how the ALJ erred in making this ruling, nor how the Order was incorrect in denying Kingwood's interlocutory appeal. This eighth ground for rehearing is denied.

9. NINTH GROUND FOR REHEARING: THE BOARD'S DECISION TO DENY KINGWOOD'S INTERLOCUTORY APPEAL OF THE ALJ'S DENIAL OF ITS SUBPOENA REQUESTS TO COMPEL THE TESTIMONY OF THE EXECUTIVE DIRECTOR OF THE OHIO POWER SITING BOARD, MS. THERESA WHITE, IS UNLAWFUL AND UNREASONABLE BECAUSE, ABSENT MS. WHITE'S TESTIMONY, THE BOARD DID NOT HAVE SUFFICIENT INFORMATION ON WHY THE BOARD STAFF WAS SOLICITING THE LOCAL GOVERNMENT AUTHORITIES' POSITIONS ON THE PROJECT ON THE EVE OF THE DATE THE STAFF'S REPORT AND RECOMMENDATION WAS DUE AND AFTER THE STAFF HAD ALREADY RECOMMENDED

**APPROVAL OF THE PROJECT IN THE CURRENT DRAFT OF THE STAFF REPORT AND
RECOMMENDATION.**

{¶ 62} Kingwood contends that the Staff Report is a “watershed moment” in a Board proceeding that can impact the entire trajectory of the proceeding, such that a recommendation to deny a certificate can embolden opponents and seriously restrict the ability of an applicant to effectively negotiate with other parties. Kingwood submits that was the case in this proceeding, as Staff’s recommendation to deny the application severely limited Kingwood’s ability to effectively negotiate with the intervenors. Kingwood states that it was able to establish that Ms. Graham-Price, at the explicit direction of Ms. White, reached out to local government officials the day before the Staff Report was issued in order to solicit their input. Kingwood avers that it established that an initial Staff recommendation to approve the Project was reversed only on October 29, the day the Staff Report was issued. Kingwood asserts that by denying its subpoena of Ms. White, it was denied the ability to question Ms. White as to the motivations or purposes of the outreach to local government officials. Kingwood avers that while the Board found that Staff did not act with impropriety in these communications, nowhere in the Order does the Board state that all relevant information was included in the record. Kingwood reiterates that the Board must hear testimony from Ms. White in order to evaluate the impetus of what Kingwood claims was “highly irregular” outreach to local government officials. Without testimony from Ms. White, Kingwood contends that the record is incomplete. (Kingwood App. for Rehearing at 30-32.)

{¶ 63} Joint Intervenors assert that Kingwood’s claim that Staff’s recommendation “emboldened” opponents of the Project and hindered settlement negotiations is both inaccurate and irrelevant. Joint Intervenors state that public opposition to the Project did not increase after the issuance of the Staff Report and the Order does not make such a finding. Joint Intervenors take issue with Kingwood seeming to imply that Staff should refrain from recommending denial of a project in order to facilitate settlement discussions

and also assert that it is irrelevant as to whether Ms. White should have been subpoenaed to testify. (Joint Intervenors Memo Contra at 29-31.)

{¶ 64} As noted above, Greene County responded globally to Kingwood's eighth, ninth, and tenth grounds for rehearing and did not delineate particular arguments to specific grounds for rehearing.

{¶ 65} The Board finds that Kingwood's ninth ground for rehearing is without merit. As already stressed above in our denial of the eighth ground for rehearing, the Board remains unpersuaded by Kingwood's repeated assertions that the Board lacked sufficient information surrounding Staff outreach to local government entities. Kingwood was permitted to subpoena and cross-examine Ms. Graham-Price about the calls themselves and inquire into why she initiated the outreach. As we recounted in the Order, Ms. Graham-Price, whose job title is the self-explanatory "Community Liaison," testified, among other things, that her primary job functions are interacting with local government officials regarding the Board's processes and pending projects. Further, Ms. Graham-Price stated that Ms. White instructed her to contact Greene County and the three intervening townships to determine the respective positions of these entities with respect to the Project. Ms. Graham-Price fully explained the substance of these conversations: (1) Greene County planned a resolution to oppose the Project; (2) Cedarville Township communicated that it and the other townships planned to oppose the Project; and (3) Xenia Township responded that it also planned to oppose the Project. As the ALJ ruled at hearing, and as we affirmed in the Order, Ms. Graham-Price provided these salient facts on the communications such that further testimony, whether from Ms. White or any other Staff witness, was unwarranted. (Order at ¶ 77; *see* Tr. VIII at 1928-1945.) Kingwood has raised no new arguments to change this position and the Board therefore denies this ninth ground for rehearing.

**10. TENTH GROUND FOR REHEARING: THE BOARD'S DECISION TO DENY KINGWOOD'S
APPEAL OF ITS SUBPOENA REQUESTS TO COMPEL THE TESTIMONY OF THE EXECUTIVE**

DIRECTOR OF THE OHIO POWER SITING BOARD, MS. THERESA WHITE, IS UNLAWFUL AND UNREASONABLE BECAUSE THE DENIAL OF THE SUBPOENA REQUESTS CONSTITUTES A VIOLATION OF DUE PROCESS AS KINGWOOD WAS UNABLE TO PUT ON EVIDENCE THAT THE STAFF'S REPORT AND RECOMMENDATION, WHICH SET THE TONE FOR THE REMAINDER OF THE PROCEEDING, WAS OUTCOME DETERMINATIVE AND NOT BASED ON AN ANALYSIS OF KINGWOOD'S APPLICATION.

{¶ 66} Kingwood alleges that the Board's failure to allow the Applicant to call Ms. White to testify infringed on Kingwood's right to due process, as found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. Kingwood states that due process requires, at a minimum, notice and the opportunity to be heard, which entails an ability to present all arguments a party deems important to a case. According to Kingwood, only Ms. White was in a position to answer Applicant's inquiries into why a Staff subordinate reached out to intervening local government entities and whether the application review process was influenced by external factors. Kingwood argues that the ALJ denial of its subpoena of Ms. White as "unwarranted" is not a valid reason to deny or quash a subpoena. Because neither the ALJ nor the Board determined that the subpoena of Ms. White would be "unreasonable or oppressive," Kingwood asserts that the subpoena was not validly denied. Kingwood repeats that Ms. White's testimony was critical to allowing it to fully present arguments that it deemed important and necessary and the Board's refusal to allow Kingwood to question Ms. White constitutes a due process violation. As such, Kingwood avers that the Board's decision to deny its earlier appeal of the ALJ's denial of its subpoena of Ms. White is unlawful and unreasonable. (Kingwood App. for Rehearing at 32-33.)

{¶ 67} With respect to Kingwood's due process claim, Joint Intervenors state that the key in determining whether an administrative hearing satisfies procedural due process is whether a party had the opportunity to present the facts that demonstrated a party was entitled to the requested judgment. Joint Intervenors submit that a tribunal's denial of a subpoena does not violate due process if the requesting party can present facts via other

means, such as subpoenas to other witnesses. In this proceeding, Kingwood had ample opportunity to cross-examine multiple Staff witnesses, including Ms. Graham-Price. Further, Joint Intervenors argue that Ms. White's testimony, and the purposes for which Kingwood sought her testimony, was irrelevant. (Joint Intervenors Memo Contra at 29.)

{¶ 68} As noted above, Greene County responded globally to Kingwood's eighth, ninth, and tenth grounds for rehearing and did not delineate particular arguments to specific grounds for rehearing.

{¶ 69} The Board finds that Kingwood's tenth ground for rehearing is without merit. Similar to our reasoning in denying Kingwood's ninth ground for rehearing, the Board remains unreceptive to Kingwood's repeated claims that it was prohibited from delving into the contacts between Staff and intervening local government entities. We disagree with Kingwood's assertion that only Ms. White could answer its inquiries. As stated in the Order, and reiterated above, Kingwood was permitted to subpoena Ms. Graham-Price and cross-examine her on all relevant topics. Ms. Graham-Price explained her role as Community Liaison and fully recounted the substance of the pertinent conversations. (Order at ¶ 77) Further, Staff submitted testimony from 11 other witnesses, all of whom were offered up for cross-examination by Kingwood. Greene County and the intervening townships also offered witnesses which Kingwood was able to cross-examine. Applicant was afforded ample opportunities to investigate the contacts between Staff and local government entities, and no due process rights of Kingwood were violated in either the ALJ's rulings as to Ms. White or the Board's opinions in the Order. Accordingly, this tenth ground for rehearing is denied.

B. Joint Application for Rehearing

{¶ 70} In the Joint Application for Rehearing, Joint Intervenors profess their support of the overall decision of the Order to deny Kingwood's application for a certificate of environmental compatibility and public need but believe that the Order failed to

determine that there are grounds other than those enumerated in the Order for denying the certificate. As grounds for rehearing, Joint Intervenors submit that the Order is unlawful and unreasonable based upon 15 assignments of error outlined within the Joint Application for Rehearing. The 15 assignments of error are listed below but will be addressed collectively by the Board.

- 1. ASSIGNMENT OF ERROR NO. 1: THE BOARD HAS ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE FACTS AND REASONING SUPPORTING MANY OF ITS CONCLUSIONS.**
- 2. ASSIGNMENT OF ERROR NO. 2: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S INCOMPATIBILITY WITH THE OBJECTIVES OF LOCAL LAND USE PLANNING CODES AS ANOTHER REASON TO DENY THE CERTIFICATE PURSUANT TO R.C. 4906.10(A)(6).**
- 3. ASSIGNMENT OF ERROR NO. 3: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S INCAPACITATION OF 1,025 ACRES OF GOOD FARMLAND FOR FOOD PRODUCTION FOR 35 YEARS AS ANOTHER REASON TO DENY THE CERTIFICATE PURSUANT TO R.C. 4906.10(A)(6).**
- 4. ASSIGNMENT OF ERROR NO. 4: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO FIND THAT THE PROJECT'S PROVEN NEGATIVE ECONOMIC IMPACTS ARE AN ADDITIONAL REASON WHY THE PROJECT DOES NOT SERVE THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY UNDER R.C. 4906.10(A)(6), AND BY FAILING TO FIND THAT KINGWOOD'S FAILURE TO EVALUATE THE PROJECT'S OTHER POTENTIAL NEGATIVE ECONOMIC IMPACTS AS REQUIRED BY**

R.C. 4906-4-06(E)(4) AND R.C. 4906.10(A)(6) ARE ADDITIONAL REASONS FOR DENYING THE CERTIFICATE.

5. ASSIGNMENT OF ERROR NO. 5: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO FIND THAT THE PROJECT DOES NOT MINIMIZE THE PROJECT'S ADVERSE ENVIRONMENTAL IMPACT UNDER R.C. 4906.10(A)(3) NOR SERVE THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY UNDER R.C. 4906.10(A)(6) DUE TO IT SHORT SETBACKS.
6. ASSIGNMENT OF ERROR NO. 6: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD PROVIDED THE INFORMATION REQUIRED BY R.C. 4906.10(A)(2) AND OHIO ADM.CODE 4906-4-08(D)(4)(e) & (f) TO DESCRIBE AND MITIGATE THE PROJECT'S ADVERSE VISUAL IMPACTS AND BY FINDING THAT THE PROJECT'S ADVERSE VISUAL IMPACTS DO NOT PRECLUDE THE ISSUANCE OF A CERTIFICATE UNDER R.C. 4906.10(A)(3) AND R.C. 4906.10(A)(6).
 - a. *Kingwood did not accurately describe the Project's adverse visual impacts pursuant to R.C. 4906.10(A)(2) and Ohio Adm.Code 4906-4-08(D)(4)(e), but instead submitted non-representative simulations designed to conceal the Project's actual visibility from the board and the public.*
 - b. *The Board erred by finding that the Project's adverse visual impacts do not preclude the issuance of a certificate under R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).*
 - c. *Kingwood did not provide measures to minimize the Project's adverse visual impacts pursuant to Ohio Adm.Code 4906-4-08(D)(4)(e), R.C. 4906.10(A)(3), and R.C. 4906.10(A)(6).*
7. ASSIGNMENT OF ERROR NO. 7: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD HAS PROVIDED THE INFORMATION

ABOUT THE PROJECT'S POTENTIAL IMPACTS ON WILDLIFE AND PLANTS REQUIRED BY OHIO ADM.CODE 4906-4-08(B) AND R.C. 4906.10(A), (3), AND (6).

8. ASSIGNMENT OF ERROR NO. 8: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY ERRONEOUSLY FINDING THAT THE PROJECT PROVIDES FOR WATER CONSERVATION MEASURES AS REQUIRED BY OHIO ADM.CODE 4906-4-07(C)(3)(e) AND R.C. 4906.10(A)(2), (3), (6), AND (8).
9. ASSIGNMENT OF ERROR NO. 9: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S THREAT TO THE NEIGHBORS' PROPERTY VALUES AS ANOTHER REASON WHY THE PROJECT WOULD NOT SERVE THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY UNDER R.C. 4906.10(A)(6).
10. ASSIGNMENT OF ERROR NO. 10: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S THREAT TO THE NEIGHBORS' HISTORIC AND CULTURAL RESOURCES AS ANOTHER REASON WHY THE PROJECT DOES NOT COMPLY WITH R.C. 4906.10(A)(3) AND (6).
11. ASSIGNMENT OF ERROR NO 11: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S RISK TO THE COMMUNITY DURING TORNADOES AS ANOTHER REASON WHY THE PROJECT DOES NOT COMPLY WITH R.C. 4906.10(A)(6).
12. ASSIGNMENT OF ERROR NO. 12: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT THE PROJECT'S NOISE IMPACTS DO NOT PRECLUDE THE ISSUANCE OF A CERTIFICATE UNDER R.C. 4906.10(A)(3) AND R.C. 4906.10(A)(6).
13. ASSIGNMENT OF ERROR NO. 13: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD PROVIDED THE INFORMATION REQUIRED BY OHIO ADM.CODE 4906-4-07(C) AND R.C. 49016.10(A)(2), (3), (5), AND

(6) ABOUT THE PROJECT'S DRAINAGE IMPACTS AND ASSOCIATED MITIGATION TO PREVENT FLOODING.

14. ASSIGNMENT OF ERROR NO. 14: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD PROVIDED THE INFORMATION REQUIRED BY OHIO ADM.CODE 4906-4-07(C) AND R.C. 4906.10(A)(2), (3), (5), AND (6) ABOUT THE PROJECT'S POLLUTION IMPACTS AND ASSOCIATED MITIGATION.

15. ASSIGNMENT OF ERROR NO. 15: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE APPLICANT'S INEXPERIENCE AS ANOTHER REASON WHY THE PROJECT DOES NOT COMPLY WITH R.C. 4906.10(A)(6).

{¶ 71} In the responding Memorandum Contra, Kingwood responds generally that all of Joint Intervenors' assignments of error should be denied. Kingwood avers that the assignments of error dealing with administrative rule compliance are irrelevant as to whether Kingwood satisfied the R.C. 4906.10(A) criteria. Kingwood points out that much of the Joint Application for Rehearing are near identical recitations of Joint Intervenors' post-hearing briefs. Kingwood submits that there is ample evidence in the record to refute the assignments of error alleged by Joint Intervenors and each of them should, therefore, be denied.

{¶ 72} The Board finds that the assignments of error alleged by Joint Intervenors are without merit, as the arguments made in the Joint Application for Rehearing were all previously made in post-hearing briefs and evaluated by the Board in rendering the Order. While the nature of an application for rehearing inherently lends itself to some repeating of previous arguments, a thorough comparison of the Joint Application for Rehearing and the initial post-hearing brief of CGA demonstrates that the Joint Application for Rehearing is essentially a facsimile of the initial brief. While there are alterations in certain sections, with some additional information or sentences added in particular locations, the arguments

remain identical, with large swaths being word-for-word reproductions.¹ The Board addressed the topics raised by Joint Intervenors within the statutory analysis in the Order. Specifically, the Board addressed land use (§ 103, 107, 108); loss of farmland (§ 153-156); economic impacts (§ 136, 142, 149); setbacks and environmental impact (§ 108-112); visual impacts (§ 110-112), information on the wildlife and plant impacts (§ 108); and water conservation measures (§ 108, 162). To the extent that an argument made by CGA or any of the Joint Intervenors was not explicitly referenced in the Order, it was nevertheless thoroughly and adequately considered by the Board in making its determinations. In issuing its June 15, 2021 correspondence, Staff determined that the application submitted by Kingwood complied with Ohio Adm.Code Chapters 4906-01, et seq., such that Staff found sufficient information to begin its review of the application. Despite CGA's arguments, the Board saw no reason to doubt this assessment and, having reviewed the same arguments for a second time in the Joint Application for Rehearing, sees no reason to question that determination now. With respect to rulings made in the Order, Joint Intervenors fail to present any new arguments regarding the statutory findings and we decline the invitation to reweigh the evidence, which is basically what is being asked of the Board in submitting a near-copy of the initial brief. Accordingly, all 15 assignments of error outlined in the Joint Application for Rehearing are denied.

¹ Compare Joint App. for Rehearing at 14-15 with CGA Initial Br. at 8-9; compare Joint App. for Rehearing at 16-21 with CGA Initial Br. at 9-14; compare Joint App. for Rehearing at 21-28 with CGA Initial Br. at 15-21; compare Joint App. for Rehearing at 28-30 with CGA Initial Br. at 21-22; compare Joint App. for Rehearing at 30-50 with CGA Initial Br. at 22-38; compare Joint App. for Rehearing at 50-55 with CGA Initial Br. at 38-43; compare Joint App. for Rehearing at 55-57 with CGA Initial Br. at 43-44; compare Joint App. for Rehearing at 57-60 with CGA Initial Br. at 44-46; compare Joint App. for Rehearing at 60-67 with CGA Initial Br. at 46-55; compare Joint App. for Rehearing at 68-70 with CGA Initial Br. at 55-57; compare Joint App. for Rehearing at 70-74 with CGA Initial Br. at 57-60; compare Joint App. for Rehearing at 74-78 with CGA Initial Br. at 60-63; Compare Joint App. for Rehearing at 79-81 with CGA Initial Br. at 64-65; compare Joint App. for Rehearing at 81 with CGA Initial Br. at 65.

C. Greene County Application for Rehearing

{¶ 73} In the Greene Application for Rehearing, Greene County states that while it agrees with the Board's Order in rejecting the stipulation and denying the application, it believes that there are additional or alternative grounds for the denial that should be incorporated into the Order. Greene County submits three assignments of error, arguing that the Board acted unlawfully and unreasonably by: (1) not expressly citing conflicts between the Project and the county's Perspectives 2020 land use plan as reasons the Project did not satisfy R.C. 4906.10(A)(6); (2) failing to identify the Project's threat to the neighbors' property values as an additional reason why the Project would not satisfy R.C. 4906.10(A)(6); and (3) failing to find that the Project's negative economic impacts are an additional reason why the Project does satisfy R.C. 4906.10(A)(6) and by failing to find that Kingwood failed to evaluate the Project's economic impacts as required under statute and Commission regulations. Greene County states that its second and third assignments of error are identical to those Assignment of Error Nos. 4 and 9 in the Joint Application for Rehearing and Greene County incorporates by reference the arguments made by Joint Intervenors in those sections. In support of its first assignment of error, Greene County argues that the only potential "shortcoming" in the Order is that it could be read as relying only upon the Commissioners' opposition (and that of township trustees), rather than the underlying rationale of the opposition. Greene County requests that its application for rehearing be granted for the limited purpose of amending the Order to "unequivocally adopt" the contents of the Commissioners' Resolution No. 21-10-28-8 (Greene Co. Ex. 2) and Resolution 21-8-26-10 (Greene Co. Ex. 3) as additional grounds for denying Kingwood's application. (Greene App. for Rehearing at 1-5.)

{¶ 74} In its Memo Contra Greene County, Kingwood responds that the Board should deny all three assignments of error. With respect to the first assignment of error, Kingwood points out that the Board is not bound to adopt any local land use plan or resolution when either granting or denying a certificate under R.C. 4906.10(A). Kingwood

states that the Board referenced the County's resolutions as examples of local opposition but did not indicate a need to formally adopt the resolutions in their entirety. Further, Kingwood answers that the Board did make explicit findings in the Order on the issues raised in the County's resolution opposing the Project. (Memo Contra Greene County at 2-4.)

{¶ 75} The Board finds that Greene County's first assignment of error is without merit. In this assignment of error, Greene County essentially requests that the Board reassess evidence that it already considered in formulating the Order. Similar to our reasoning in denying Joint Intervenors' assignments of error, the Board declines the invitation to reweigh evidence that was already thoroughly considered in issuing the Order. The Board fully evaluated all record evidence and found that the Project is not in the public interest, convenience, and necessity for the reasonings explained in the Order (Order at ¶¶ 142-152). To the extent that a particular piece of evidence was not explicitly cited in support of this conclusion, the Board did not feel it appropriate to make such a statement. However, the Board stands behind the analysis and determinations previously made and are unpersuaded that any additional grounds for denying the application are necessary.

{¶ 76} Greene County's second and third assignments of error are identical to Joint Intervenors' Assignment of Error Nos. 4 and 9 and the sole support for these assignments are incorporating the arguments made by Joint Intervenors in their application for rehearing (Greene App. for Rehearing at 2). As the Board already denied all assignments of error in the Joint Application for Rehearing, we likewise deny both the second and third assignments of error in the Greene Application for Rehearing, for the same reasoning outlined above.

IV. ORDER

{¶ 77} It is, therefore,

{¶ 78} ORDERED, That the application for rehearing filed by Kingwood be denied.
It is, further,

{¶ 79} ORDERED, That the application for rehearing filed by Joint Intervenors be denied. It is, further,

{¶ 80} ORDERED, That the application for rehearing filed by Greene County be denied. It is, further,

{¶ 81} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:

Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Jack Christopher, Designee for Lydia Mihalik, Director
Ohio Department of Development

Damian Sikora, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

Drew Bergman, Designee for Anne Vogel, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Brian Baldridge, Director
Ohio Department of Agriculture

DMH/dr

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Case No(s). 21-0117-EL-BGN

Summary: Opinion & Order on Rehearing denying: (1) the application for rehearing filed by Kingwood Solar I LLC; (2) the application for rehearing filed by Citizens for Greene Acres; and (3) the application for rehearing filed by Greene County Commissioners electronically filed by Debbie S. Ryan on behalf of Ohio Power Siting Board.