

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

ENTRY

Entered in the Journal on August 26, 2021

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

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without first obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} Ohio Adm.Code 4906-3-03 requires an applicant, no more than 90 days prior to submitting a standard application, to conduct at least one informational meeting that is open to the public and is “held in the area in which the project is to be located.”

{¶ 4} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies were required to implement procedures consistent with recommendations from the Department of Health (DOH) to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens were urged to heed the advice of the DOH regarding this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and was to remain in effect until rescinded. The DOH is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 5} Pursuant to R.C. 3701.13, the DOH has supervision of “all matters relating to the preservation of the life and health of the people” and the “ultimate authority in matters of quarantine and isolation.” On March 12, 2020, the Director of the DOH issued an Order

indicating that “all persons are urged to maintain social distancing (approximately six feet away from other people) whenever possible.”

{¶ 6} On February 9, 2021, Kingwood filed a motion for waiver from Ohio Adm.Code 4906-3-03(B), proposing to hold web- and phone-based meetings in lieu of a traditional public information meeting in the area in which Kingwood is proposing to construct a 175 megawatt solar powered electric generating facility in Greene County, Ohio (Facility). By Entry issued March 26, 2021, the administrative law judge (ALJ) granted Kingwood’s motion, subject to Applicant agreeing to hold an in-person public information meeting within 30 days of the lifting of public health orders prohibiting such gatherings or as otherwise ordered by the Board.

{¶ 7} On March 11, 2021, Kingwood filed a preapplication notification letter with the Board regarding the proposed Facility. The letter states that construction of the Facility is estimated to begin in 2022 and that the Facility is scheduled to be in service by the third quarter of 2023.

{¶ 8} On March 30, 2021, Kingwood filed proof of its compliance with Ohio Adm.Code 4906-3-03(B), requiring notice of the public information meeting be sent to each property owner and affected tenant and published in a newspaper of general circulation in the project area.

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

{¶ 10} Pursuant to Ohio Adm.Code 4906-3-06, within 60 days of receipt of an application for a major utility facility, the Board Chair must either accept the application as complete and compliant with the content requirements of R.C. 4906.06 and Ohio Adm.Code Chapters 4906-1 through 4906-7 or reject the application as incomplete.

{¶ 11} On April 16, 2021, Kingwood also filed a motion for protective order and memorandum in support, pursuant to which Kingwood seeks protective treatment of certain cost-related information contained in its application.

{¶ 12} By letter dated June 15, 2021, the Board notified Kingwood that its application was compliant and provided sufficient information to permit Staff to commence its review and investigation. Pursuant to Ohio Adm.Code 4906-3-06 and 4906-3-07, the Board's June 15, 2021 letter directed the Applicant to serve appropriate government officials and public agencies with copies of the complete, certified application and to file proof of service with the Board. The letter further instructed the Applicant to submit its application fee pursuant to R.C. 4906.06(F) and Ohio Adm.Code 4906-3-12.

{¶ 13} On June 21, 2021, the Applicant filed a certificate of service of its accepted and complete application and filed proof that it submitted its application fee to the Treasurer of the State of Ohio as required by Ohio Adm.Code 4906-3-07.

{¶ 14} On June 28, 2021, Kingwood filed notice of its plan to hold an in-person public informational meeting on June 29, 2021, in the Dining Hall of the Greene County Expo Center, in satisfaction of the Applicant's previous commitment to hold an in-person public informational meeting within 30 days after the lifting of all pandemic-related restrictions on mass gatherings.

{¶ 15} Ohio Adm.Code 4906-3-08(A) states that, once the applicant has complied with Ohio Adm.Code 4906-3-07, the Board or the ALJ shall file an entry indicating the date on which the accepted, complete application is deemed filed. Additionally, once the effective date is established, the ALJ must promptly fix the dates for public hearings. Under R.C. 4906.07(A), the public hearing must be held not less than 60 nor more than 90 days after the effective date.

{¶ 16} Therefore, the effective date of the application shall be August 26, 2021. The ALJ finds that a local public hearing in this matter shall be held on November 15, 2021, at

6:00 p.m., in the Assembly Hall of the Greene County Expo Center, 120 Fairground Rd., Xenia, Ohio 45385. Consistent with Centers for Disease Control and Prevention Guidelines and the May 17, 2021 Ohio Department of Health Order, attendees of the local public hearing must abide by mitigation measures required by the venue, and individuals who are not fully vaccinated should continue to wear a face covering and socially distance. For those individuals interested in testifying at the local public hearing, a sign-in sheet will be available at the facility and witnesses will be taken in the order in which they register to testify. If individuals wish to supplement their testimony with an exhibit for the Board's consideration, a copy of the document should be provided to the ALJ during the local public hearing. Testimony to be provided will be limited to five minutes in duration.

{¶ 17} The adjudicatory hearing will commence on December 13, 2021, at 10:00 a.m., 11th Floor, Hearing Room 11-A, at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793. The parties should register at the lobby desk and then proceed to the 11th floor in order to participate in the hearing. Like attendance at the local public hearing, individuals who are not fully vaccinated should continue to wear a face covering and socially distance. Any accommodations necessary to ensure availability of social distancing and plexiglass dividers should be made in advance of the hearing. As pandemic restrictions are evolving, additional instructions regarding further safety requirements or accommodations for the hearing room will either be posted on the Commission/Board website or communicated to the parties.

{¶ 18} Additionally, the ALJ finds that petitions to intervene in this proceeding will be accepted by the Board up to 30 days following publication of the notice required by Ohio Adm.Code 4906-3-09 or by October 8, 2021, whichever is later.

{¶ 19} Kingwood should issue public notices of the application and hearings in accordance with Ohio Adm.Code 4906-3-09. As part of the information to be included in the notices, as required by Ohio Adm.Code 4906-3-09, Kingwood shall include a statement

that the public hearing in this case shall consist of two parts, as well as information concerning guidelines for attendance:

- (a) A local public hearing, pursuant to R.C. 4906.08(C), where the Board shall accept written or oral testimony from any person, commencing November 15, 2021, at 6:00 p.m., in the Assembly Hall of the Greene County Expo Center, 120 Fairground Rd., Xenia, Ohio 45385.
- (b) An adjudicatory hearing to commence on December 13, 2021, at 10:00 a.m., 11th Floor, Hearing Room 11-A, at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793.
- (c) Consistent with Centers for Disease Control and Prevention Guidelines and the May 17, 2021 Ohio Department of Health Order, attendees must abide by mitigation measures required by the venue, and individuals who are not fully vaccinated should continue to wear a face covering and socially distance.

{¶ 20} Further, regarding the initial public notice required under R.C. 4906.06(C) and Ohio Adm.Code 4906-3-09, Kingwood shall include the following statement as part of the public notice:

Petitions to intervene in the evidentiary hearing will be accepted by the Board up to 30 days following service of the notice required by R.C. 4906.06(C) and Ohio Adm.Code 4906-3-09, or October 8, 2021, whichever is later. However, the Board strongly encourages interested persons who wish to intervene in the adjudicatory hearing to file their petitions as soon as possible. Petitions should be addressed to Docketing Division, the Ohio Power Siting Board, 180 East Broad Street, Columbus, Ohio 43215-3793 and cite the above-listed case number.

{¶ 21} Ohio Adm.Code 4906-2-09 provides that the ALJ shall regulate the course of the hearing including requiring that expert or factual testimony to be offered in Board proceedings be reduced to writing and filed with the Board, according to a schedule

established by the ALJ. Accordingly, the ALJ finds that the following procedural schedule and process should be implemented:

- (a) Pursuant to Ohio Adm.Code 4906-3-06, Staff shall file its report of investigation on or before October 29, 2021.
- (b) On or before November 22, 2021, each party shall file a list of issues citing specific concerns about which they may be interested in pursuing cross-examination of witnesses at the evidentiary hearing.
- (c) All expert and factual testimony to be offered by Kingwood shall be filed by December 1, 2021. All expert and factual testimony to be offered by intervenors and Staff shall be filed by December 8, 2021.
- (d) Any stipulation entered into by the parties shall be filed by noon on December 10, 2021, along with the associated testimony supporting the stipulation.

{¶ 22} The ALJ encourages the parties to arrange for electronic service of testimony and other pleadings among themselves. If electronic service is agreed to, the parties are also directed to provide an electronic copy to the ALJ.

{¶ 23} As noted above, on April 16, 2021, Kingwood filed a motion for protective order and memorandum in support, pursuant to which Kingwood seeks protective treatment of certain information contained in its application. Specifically, Kingwood moves to have cost-related information on pages 24-26 of the application narrative to be treated as confidential and not part of the public record. Kingwood explains that the information that is requested to be treated as confidential consists of total estimated capital and intangible costs of the project, cost comparison with a similar facility, present worth of the capital costs, estimated annual operations and maintenance (O&M) cost of the project for the first two years of operations, O&M expenses comparison, present worth of the O&M cost, and cost of delays. Kingwood believes that the public disclosure of this sensitive information would have an adverse effect on it and others and would also provide the Applicant's competitors

with a competitive advantage. Kingwood asserts that estimated cost information is generally not disclosed and constitutes trade secrets under relevant Ohio law. The Applicant cites a number of Board decisions in which the Board or an ALJ previously concluded that estimated project costs constitute trade secret information. *See, e.g., In re Ross County Solar, LLC*, Case No. 20-1380-EL-BGN, Entry (Jan. 20, 2021) at ¶ 17; *In re Big Plain Solar, LLC*, Case No. 19-1823-EL-BGN, Entry (July 7, 2020) at ¶ 12; *In re Hillcrest Solar I, LLC*, Case No. 17-1152-EL-BGN, Opinion, Order, and Certificate (Feb. 15, 2018) at ¶ 19; and *In re North Coast Gas Transmission LLC*, Case No. 14-1754-GA-BLN, Entry (Dec. 30, 2014) at ¶ 3.

{¶ 24} Pursuant to Ohio Adm.Code 4906-2-21(D), the Board “may issue any order that is necessary to protect the confidentiality of information contained in [a] document, to the extent that state or federal law prohibits release of the information, including where it is determined that both * * * the information is deemed * * * to constitute a trade secret under Ohio law * * * and non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code.” To be designated a trade secret under R.C. 1333.61, financial information must both: (1) derive independent economic value from not being generally known to, or readily ascertainable by, other persons who can obtain economic value from its disclosure or use and (2) be subject to reasonable efforts under the circumstances to maintain its secrecy. R.C. 1333.61(D). Moreover, the Supreme Court of Ohio has established a six-part test to apply when analyzing a trade secret claim. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). In addition to information deemed to be a trade secret, Ohio Adm.Code 4906-2-21(A)(7) empowers the Board to issue a protective order providing that other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated manner.

{¶ 25} The ALJ has examined the information filed under seal, as well as the assertions set forth in Kingwood’s memorandum in support of its motion for a protective order. Applying the requirements discussed above, the ALJ finds that Kingwood’s motion

should be granted. Consequently, the cost-related information on pages 24-26 of the application narrative should be kept confidential and not subject to public disclosure.

{¶ 26} Ohio Adm.Code 4906-2-21(F) specifies that, unless otherwise ordered, a protective order issued under Ohio Adm.Code 4906-2-21(D) expires 24 months after the date of its issuance. Should Kingwood wish to extend that 24-month period, it shall file an appropriate motion at least 45 days in advance of the expiration date. Ohio Adm.Code 4906-2-21(F). If no such motion is filed, the Docketing Division may release the information without prior notice.

{¶ 27} On various dates, timely petitions to intervene or notices of intervention were filed by the following entities, and no memoranda contra the petitions or notices were filed: the Board of Trustees of Cedarville Township, Greene County, Ohio (Cedarville Township); the Board of Trustees of Xenia Township, Ohio (Xenia Township); the Board of Trustees of Miami Township, Greene County, Ohio (Miami Township); In Progress, LLC (In Progress); the Tecumseh Land Preservation Association, also known as the Tecumseh Land Trust (TLT); the Greene County Board of Commissioners (Greene County Commissioners); and the Ohio Farm Bureau Federation (OFBF). The ALJ finds that all of the petitions to intervene and notices of intervention filed by the parties listed in this paragraph meet the criteria set forth in R.C. 4903.221 and Ohio Adm.Code 4906-2-12, and should, therefore, be granted for good cause shown.

{¶ 28} On June 25, 2021, Citizens for Greene Acres, Inc. (CGA) and 14 named landowners (collectively, CGA Petitioners) filed a joint petition for leave to intervene, pursuant to Ohio Adm.Code 4906-2-12, along with an accompanying memorandum in support. CGA Petitioners explain that CGA has 57 members and that 47 of the members, including all 14 named landowners, own and/or live on properties that are adjacent to the project area, while the other CGA members live in close proximity. CGA Petitioners assert that CGA has standing to participate as an intervenor in the case through associational standing because one or more of its members have standing to participate as intervenors.

See Fraternal Order of Police v. City of Columbus, 10 Ohio App.3d 1 (10th Dist. 1983). The memorandum in support outlines a number of areas in which CGA Petitioners believe the application to be deficient and the adverse impacts that CGA Petitioners believe they will suffer if the Facility is constructed as proposed. CGA Petitioners assert that no other party can represent their interest and that their participation is necessary to the just and expeditious resolution of this case. Further, CGA Petitioners state that their participation will not unduly delay the proceedings or cause unjust prejudice to the Applicant.

{¶ 29} On July 12, 2021, Kingwood filed a memorandum in opposition and request to consolidate witness examination and presentation of testimony in response to CGA Petitioners' petition for leave to intervene. Kingwood states that the interests of each of the individual petitioners and the interests of CGA are aligned and that nowhere in the petition are their interests differentiated. Further, Kingwood points out that all 14 named landowners are members of CGA and that all CGA Petitioners are represented by the same counsel. Kingwood argues that if intervention is granted to the CGA Petitioners, the Board should order that CGA and the 14 landowners consolidate their examination of witnesses and presentation of testimony pursuant to Ohio Adm.Code 4906-2-12(D)(2).

{¶ 30} On July 13, 2021, CGA Petitioners filed a response to Kingwood's request for consolidation, stating that the CGA Petitioners intend to consolidate their witness examination and testimony and, therefore, do not object to Kingwood's request.

{¶ 31} The ALJ finds that the CGA Petitioners' petition for leave to intervene meets the requirements of Ohio Adm.Code 4906-2-12, is reasonable, and should be granted. Further, the ALJ finds that Kingwood's request for consolidation is reasonable and should be granted and orders that, pursuant to Ohio Adm.Code 4906-2-12(D)(2), the CGA Petitioners shall consolidate their examination of witnesses and presentation of testimony.

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That the hearings in this matter be scheduled in accordance with Paragraphs 16 and 17. It is, further,

{¶ 34} ORDERED, That notice of the application and hearings be published by Kingwood in accordance with Paragraphs 19 and 20. It is, further,

{¶ 35} ORDERED, That the parties observe the filing deadlines set forth in Paragraph 21. It is, further,

{¶ 36} ORDERED, That Kingwood's motion for protective order be granted as stated in Paragraphs 25 and 26. It is, further,

{¶ 37} ORDERED, That the petitions to intervene and notices of intervention filed by Cedarville Township, Xenia Township, Miami Township, In Progress, TLT, Greene County Commissioners, and OFBF be granted, as stated in Paragraph 27. It is, further,

{¶ 38} ORDERED, That the petition to intervene filed by CGA Petitioners be granted, as stated in Paragraph 31. It is, further,

{¶ 39} ORDERED, That Kingwood's request for consolidation be granted and that CGA Petitioners shall consolidate their examination of witnesses and presentation of testimony, as stated in Paragraph 31. It is, further,

{¶ 40} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE OHIO POWER SITING BOARD

/s/ David M. Hicks

By: David M. Hicks
Administrative Law Judge

SJP/hac

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in

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

Summary: Administrative Law Judge Entry ordering that the hearings in this matter be scheduled in accordance with Paragraphs 16 and 17; that notice of the application and hearings be published by Kingwood in accordance with Paragraphs 19 and 20; that the parties observe the filing deadlines set forth in Paragraph 21; Kingwood's motion for protective order be granted as stated in Paragraphs 25 and 26; that the petitions to intervene and notices of intervention filed by Cedarville Township, Xenia Township, Miami Township, In Progress, TLT, Greene County Commissioners, and OFBF be granted, as stated in Paragraph 27; that the petition to intervene filed by CGA Petitioners be granted, as stated in Paragraph 31; and, that Kingwood's request for consolidation be granted and that CGA Petitioners shall consolidate their examination of witnesses and presentation of testimony, as stated in Paragraph 31 electronically filed by Heather A. Chilcote on behalf of David Hicks, Administrative Law Judge, The Ohio Power Siting Board