

## 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 April 14, 2022

{¶ 1} Kingwood Solar I LLC (Kingwood) 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 obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} On April 16, 2021, Kingwood filed an application with the Board for a certificate of environmental compatibility and public need to construct a 175 megawatt solar powered electric generating facility in Greene County, Ohio.

{¶ 4} On various dates, timely petitions and notices for intervention in this proceeding were filed by the following entities: the Board of Trustees of Cedarville Township, Greene County, Ohio; the Board of Trustees of Xenia Township, Greene County, Ohio; the Board of Trustees of Miami Township, Greene County, Ohio; In Progress, LLC; the Tecumseh Land Preservation Association, also known as the Tecumseh Land Trust; the Greene County Board of Commissioners; the Ohio Farm Bureau Federation; and Citizens for Greene Acres, Inc. and 14 named landowners. Each of these parties were granted intervenor status in subsequent entries issued by the administrative law judge (ALJ).

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

{¶ 6} The public hearing was held on November 15, 2021.

{¶ 7} The adjudicatory hearing convened on March 7, 2022, and continued through March 15, 2022. The hearing is scheduled to resume on April 25, 2022, when rebuttal testimony will be presented.

{¶ 8} In anticipation of the adjudicatory hearing, on February 25, 2022, Kingwood filed a motion for subpoenas for certain members of the Board Staff to attend and testify at the hearing, primarily as to Staff's conclusion that Kingwood's application would not serve the public interest, convenience, and necessity, and therefore does not comply with R.C. 4906.10. The motion was opposed by Staff pursuant to a memorandum contra filed on March 4, 2022.

{¶ 9} On March 8, 2022, Kingwood filed a reply to Staff's memorandum contra the motion for subpoenas, in which Kingwood sought to have the motion for subpoenas held in abeyance until Staff's proffered witnesses testified at the adjudicatory hearing.

{¶ 10} On March 9, 2022, the ALJ ruled that Kingwood's motion for subpoenas would be held in abeyance until after Staff's proffered witnesses testified (Tr. Vol. III at 495-497). The ALJ indicated that the decision as to whether to compel further Staff witness testimony would depend on whether Staff witnesses were able to respond to reasonable questions pertaining to the preparation of the Staff Report.

{¶ 11} On March 15, 2022, following the testimony of ten Staff witnesses, the ALJ determined that Kingwood's motion for subpoenas would be granted solely with respect to additional Staff witness Julie Graham-Price, whose testimony was warranted based on her interactive role with some of the intervenors during the pendency of the case. The ALJ expressly denied the remainder of Kingwood's subpoena request, finding that Staff provided comprehensive witness testimony as to the sponsorship of the Staff Report such that additional witness testimony was unwarranted.

{¶ 12} On March 21, 2022, Kingwood filed an interlocutory appeal and request for certification, in which Kingwood argues that the ALJ erred in not requiring the testimony

of Theresa White, the Board's Executive Director, at the adjudicatory hearing. Kingwood maintains that, because the Staff witnesses who testified were not specific authors of certain sections of the Staff Report that Kingwood is challenging, the witness testimony is inadequate and must be further supplemented through the testimony of Executive Director White.

{¶ 13} On March 28, 2022, Staff filed a memorandum contra interlocutory appeal. Staff maintains that Kingwood errs in focusing on authorship as the determining factor of whether a witness is satisfactory to the Board's consideration of specific portions of the Staff Report. Instead, Staff maintains that its witnesses testify as sponsoring witnesses regarding their respective portions of the Staff Report. As such, the identification and compelled testimony of the person who authored specific language in the report is irrelevant. Moreover, Staff juxtaposes the lack of relevancy of Executive Director White's testimony against the fact that compelling her testimony is inconsistent with public policy considerations impacting the use of Staff's limited resources and the protection of its deliberative process for evaluating certificate applications.

{¶ 14} For the reasons set forth below, Kingwood's interlocutory appeal and request for certification is denied. Kingwood argues for an interlocutory appeal based on Ohio Adm.Code 4906-2-29(B), which prohibits an ALJ from certifying such an appeal unless the appeal (1) presents a new or novel question of law or policy, and (2) is taken from a ruling which represents a departure from past precedent and an immediate Board determination is needed to prevent undue prejudice or expense to a party should the Board reverse the ruling in question. Although both requirements must be met, Kingwood fails to satisfy either provision. Initially, the ALJ finds that the appeal does not involve an issue of novel law or policy. It is well-settled that ALJ's have discretion as to managing the receipt of testimony, including as to making determinations concerning whether testimony is relevant

in a proceeding.<sup>1</sup> Employing this discretion, the ALJ determined that Staff's proffer of testimony from ten witnesses as to the preparation of the Staff Report was sufficient to address the information and conclusions in the Staff Report that are *relevant to this proceeding*. In addition to the determination that the ALJ's exclusion of irrelevant evidence is not a novel question of law or policy, the ruling is also entirely consistent with precedent of the Board,<sup>2</sup> as well as the Public Utilities Commission of Ohio, regarding the fact that Staff witnesses testify broadly according to their roles as part of Staff's collective determination, rather than personally.<sup>3</sup> Contrary to Kingwood's position, the ALJ specifically determined that authorship of specific language in the Staff Report was not the determinative criterion as to whether testimony is relevant to the case. Instead, the ALJ directed the parties to explore whether sponsoring witnesses agreed with the provisions in the Staff Report that were the subject of their sponsoring testimony. The ALJ's determination was an acknowledgment that preparation of the Staff Report is a combined effort involving, at times, the collaborative work of many individuals. As such, pinpointing which person actually typed information into the body of the report is insignificant provided that the proffering witness agrees with the language being sponsored. Here, witness Grant Zeto testified clearly as to his role as the overall Staff Project Lead, which involved his management of the Staff investigation and preparation of the Staff Report. In that capacity, witness Zeto described, in detail, the bases for Staff's recommendation that the Board deny the certificate application, which included the active opposition of all four local government bodies, as well as the alleged "overwhelming public opposition" that was expressed at various local public meetings.

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<sup>1</sup> See, e.g., *In re Application of Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013), wherein the Board affirmed the ALJ determination to exclude draft versions of a Staff Report because the drafts were irrelevant. *Champaign Wind* at 11-12.

<sup>2</sup> See *In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, wherein the Board's decision to grant certification was based solely on the testimony of Staff's project manager who oversaw the compilation of the Staff Report, without the necessity of testimony from all eight of Staff's witnesses who prefiled testimony in the case. *Black Fork* at ¶ 8.

<sup>3</sup> See *In re PALMco Power OH, LLC d/b/a Indra Energy and PALMco Energy OH, LLC d/b/a Indra Energy*, Case No. 19-957-GE-COI, wherein attorney examiners sustained objections as to the personal opinions of Staff witnesses based on the determination that the relevant testimony involved the conclusion of Staff, rather than any individual witness. Tr. Vol. II (Sept. 20, 2019) at 212, 240, 254, 336.

(Staff Ex. 11 at 4.) Further, while Kingwood was unsatisfied with the conclusions of testifying Staff witnesses, it was provided the opportunity to thoroughly explore Staff's conclusions through cross examination. Accordingly, the ALJ properly concluded that no further Staff testimony is warranted as to the consideration of the Staff Report conclusions that Kingwood seeks to oppose.

{¶ 15} Accordingly, the interlocutory appeal will not be certified to the Board for review.

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That the request for certification of the interlocutory appeal to the Board be denied. It is, further,

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

THE OHIO POWER SITING BOARD

/s/Michael L. Williams

By: Michael L. Williams  
Administrative Law Judge

SJP/hac

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

Summary: Administrative Law Judge Entry ordering that the request for certification of the interlocutory appeal to the Board be denied electronically filed by Heather A. Chilcote on behalf of Michael L. Williams, Administrative Law Judge, Ohio Power Siting Board