

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of
Kingwood Solar I LLC for a Certificate of
Environmental Compatibility and Public Need

Case No. 21-0117-EL-BGN

**INTERVENORS' MOTION TO STRIKE THE REBUTTAL TESTIMONY OF JIM
HOBART, PORTIONS OF THE REBUTTAL TESTIMONY OF DYLAN STICKNEY
AND THE REBUTTAL TESTIMONY OF MOHAMED R. KARIM**

Pursuant to Ohio Administration Code Rule 4906-2-37, Intervenor Xenia Township Board of Trustees, Miami Township Board of Trustees, Cedarville Township Board of Trustees and Citizens for Green Acres, respectfully move to strike the rebuttal testimony of Applicant, Kingwood Solar I LLC's, rebuttal witness, Jim Hobart, portions of the rebuttal testimony of Applicant's rebuttal witness, Dylan Stickney, and the rebuttal testimony of Applicant's rebuttal witness, Mohamed R. Karim.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. JIM HOBART

The Applicant has offered the testimony of Jim Hobart, a partner at Public Opinion Strategies, purportedly in response to the direct testimony of “various witnesses who testified about the local opposition to the project.” (Hobart Rebuttal Testimony, A.6). Mr. Hobart testifies that he believes these witnesses “assessed the opinions of local residents by talking to Green County residents and/or reviewing public comments filed on the Board’s docket in this case.” (Hobart Rebuttal Testimony, A.7). Mr. Hobart testifies that he believes that such assessment is not a reliable way to evaluate public opinion. (Hobart Rebuttal Testimony, A.8). He claims that the best way to evaluate public opinion about something like the Kingwood Solar Project is by conducting “a poll of a representative sample of the electorate.” (Hobart Rebuttal Testimony, A.9). Mr. Hobart testifies that such a poll was conducted by his company, Public Opinion Strategies, and a summary of the poll results (the “Poll”) was admitted in the case record as Citizens Exhibit 16. (Hobart Rebuttal Testimony, A.10). Mr. Hobart then goes on to testify about how the Poll was conducted and the results of the Poll.

The first mention of the Poll in these proceedings occurred during the testimony of Applicant’s witness, Dylan Stickney, who mentioned it on cross-examination (Tr. Vol. I, pg. 200, lines 13-15). After an objection to the testimony regarding the Poll by counsel for Citizens for Greene Acres, counsel for the Applicant advised the Court that the Poll was provided to the parties in discovery on Sunday, March 6, 2022, the day before the commencement of the adjudicatory hearing on Monday, March 7, 2022. (Tr. Vol. I, pg. 204, lines 6-13). However, what was produced was only a summary of a poll conducted by Public Opinion Strategies without any supporting documentation.

By Applicant's admission, it is clear that the Applicant had the Poll in its possession prior to the opening of the Applicant's case-in-chief. The Applicant should have adduced testimony about the Poll in its case-in-chief. In fact, Mr. Stickney did testify about the Poll during his redirect examination in the Applicant's case-in-chief. (Tr. Vol I, pg. 206, line 15-pg. 207, line 8). Notably, the Court overruled a motion to strike Mr. Stickney's testimony about the Poll, finding that the Poll was conducted by his company and, therefore, he could testify about it. (Tr. pg. 207, lines 20-25).

Because Mr. Hobart's testimony is not proper rebuttal, Intervenor asks the Administrative Law Judges to strike the testimony. The Poll was not a matter first addressed in the Applicant's opponents' case-in-chief. The Poll was available to the Applicant prior to the start of its case-in-chief and the Poll was testified about on redirect examination in Applicant's case-in-chief. "The Ohio Supreme Court has held that '[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and [that is not testimony that should have been presented] in the rebutting party's case-in-chief.' *Phung v. Waste Mgmt. Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994)." *State v. Carrasquillo*, 9th Dist. Lorain No. 09CA009639, 2010-Ohio-5063, ¶ 13. It is clear that testimony about the Poll needed to be, and was, addressed in the Applicant's case-in chief. "The failure of a party to present evidence in its case in chief is not an excuse to present that evidence on rebuttal." *Blandford v. A-Best Prods. Co.*, 8th Dist. Cuyahoga No. 85710, 2006-Ohio-1332, ¶ 19. Mr. Hobart's testimony is not proper rebuttal. The Intervenor respectfully request that the Administrative Law Judges strike his testimony.

II. DYLAN STICKNEY

A. The Poll

For the reasons set forth above in this Memorandum, Intervenors ask the Administrative Law Judges to strike the following from lines 14-15 on page 6 (A.8) of Mr. Stickney's Rebuttal Testimony: "Again, as shown in the public opinion poll conducted by Public Opinion Strategies, the majority of Greene County residents support the project."

B. Economic and Fiscal Impact Study (Exhibit A) and Executive Summary for Property Tax Estimate (Exhibit B) and Related Testimony

Mr. Stickney states that "[a]fter the hearing concluded on March 15, 2022, I commissioned an addendum to Appendix D to the Application (Economic Impact Study). That addendum is attached to my rebuttal testimony as Exhibit A." (Stickney Rebuttal Testimony Pg. 8, lines 14-17). The tax analysis attached as Exhibit B to Mr. Stickney's rebuttal testimony is dated April 14, 2022. Both the economic impact and tax income resulting from the Project should have been, and were, already addressed in the Applicant's case-in chief.

Mr. Stickney had the opportunity to present evidence regarding the economic impact and tax benefits resulting from the Project in Applicant's case-in chief. In fact, Mr. Stickney did so in his direct testimony. (Direct Testimony of Dylan Stickney, Pg. 19, line 8 – Pg. 20, line 2). The original economic impact study was also attached as Addendum D of the Application. Mr. Stickney states in his Rebuttal Testimony that his testimony is in response to the testimony of Ohio Power Siting Board Staff member, Grant Zeno. Despite Mr. Zeno never challenging the adequacy of tax income generated or questioning the sufficiency of any economic impact during cross-examination, Applicant now seeks to introduce new evidence beyond the scope of Mr. Zeno's direct and cross examination testimony.

Intervenors ask the Administrative Law Judges to strike from Mr. Stickney's Rebuttal Testimony the following: A.11 Pg. 8 - the entirety of lines 14 through line 21; A.12 Pg. 9 - lines 6

beginning “Local tax revenue...” through Pg. 10, line 12; Stickney Rebuttal Testimony Exhibit A; Stickney Rebuttal Testimony Exhibit B.

C. Agricultural Impact to Land

Mr. Zeto did not provide any substantive testimony during his direct and cross-examination regarding the agricultural impact to land other than to reiterate or confirm language contained in the Staff Report. No new information or substantive discussion regarding agricultural impact to the land took place during Mr. Zeto’s direct or cross-examination. Therefore, the entirety of Answer Nos. 13 and 14 of Mr. Stickney’s rebuttal testimony is beyond the scope of rebuttal and should be stricken from his rebuttal testimony.

III. Mohammed R. Karim

For the reasons set forth above in this Memorandum, Dylan Stickney, II B, Intervenor ask the Administrative Law Judges to strike the entirety of the Rebuttal Testimony of Mohammed R. Karim.

IV. Conclusion

“The Ohio Supreme Court has held that ‘[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and [that is not testimony that should have been presented] in the rebutting party's case-in-chief.’ *Phung v. Waste Mgmt. Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994).” *State v. Carrasquillo*, 9th Dist. Lorain No. 09CA009639, 2010-Ohio-5063, ¶ 13. The “rebuttal testimony of Mr. Hobart, Mr. Stickney and Mr. Karim needed to be, and was, addressed in the Applicant’s case-in chief. “The failure of a party to present evidence in its case in chief is not an excuse to present that evidence on rebuttal.” *Blandford v. A-Best Prods. Co.*, 8th Dist. Cuyahoga No. 85710, 2006-Ohio-1332, ¶ 19. Mr. Hobart’s entire rebuttal testimony, the cited portions of Mr. Stickney’s rebuttal

testimony and Mr. Karim's entire rebuttal testimony is not proper rebuttal testimony. The Intervenor respectfully request that the Administrative Law Judges strike this testimony.

/s/ David Watkins
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Kevin Dunn (0088333)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the OPSB electronic system and upon the following via email on this 20th day of March, 2022.

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Summary: Motion Motion to Strike Rebuttal Testimony of Jim Hobart, Portions of the Rebuttal Testimony of Dylan Stickney and the Rebuttal Testimony of Mohamed R. Karim electronically filed by David Watkins on behalf of XENIA TOWNSHIP TRUSTEES, BOARD OF TRUSTEES OF XENIA TOWNSHIP OHIO TRUSTEES