

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 to Construct a Solar Electric Generation Facility in Greene County, Ohio))))	Case No. 21-0117-EL-BGN
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**MEMORANDUM OF THE BOARD OF GREENE COUNTY COMMISSIONERS IN
OPPOSITION TO THE APPLICATION FOR REHEARING OF APPLICANT
KINGWOOD SOLAR I LLC**

The Greene County Commissioners (the “County”) hereby files its Memorandum in Opposition to the Application for Rehearing of Applicant Kingwood Solar I LLC (“Kingwood”). Kingwood’s Application rehashes the same arguments that the Ohio Power Siting Board (“Board” or “OPSB”) already rejected in its Opinion, Order, and Certificate (“Opinion”) of December 15, 2022. Accordingly, the Board should deny Kingwood’s Application for Rehearing.

INTRODUCTION

Despite multiple recent decisions by the Board reinforcing that the determination of public interest, convenience, and necessity must be examined through a broad lens, Kingwood Solar urges the Board to reconsider its denial of Kingwood’s application for a certificate of environmental compatibility based on a cramped and unsupportable reading of what constitutes the public interest. The Board lawfully reviewed evidence and unanimous opposition from the political subdivisions affected by the proposed solar facility and correctly denied the application based on its past precedent.

Based on that finding, the Board also lawfully rejected a proposed joint stipulation between Kingwood and the Ohio Farm Bureau Federation because the stipulation failed to

address the core issue of the case: whether the project serves the public interest, convenience, and necessity.

Finally, the Board correctly excluded testimony from Ohio Power Siting Board Executive Director Theresa White as irrelevant to the preparation of the Ohio Power Siting Board Staff Report because any testimony from Ms. White is irrelevant to either the Staff Report, the local opposition, or the final decision of the Board.

The Board should deny Kingwood's Application for Rehearing.

STANDARD OF REVIEW

Section 4906.11 of the Revised Code provides that "[i]n rendering a decision on an application for a certificate, the power siting board shall issue an opinion stating its reasons for the action taken." Like the Public Utilities Commission, the Power Siting Board must comply with Section 4903.09 of the Revised Code, providing for "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The purpose of this requirement is that "[f]or a reviewing court to do its job, it needs to have enough information to know how the commission [or board] reached its result." *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator*, 166 Ohio St.3d 519, 188 N.E.3d 140, ¶21, citing *Allnet Communications Servs., Inc. v. Pub. Utilities Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994).

ARGUMENT

- A. The Board's Order reasonably and lawfully determined that the unanimous opposition of local government entities was a dispositive and sufficient reason for the Board to deny the certificate because the project does not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). [Response to Kingwood's First and Fifth Grounds for Rehearing.]**

The Ohio General Assembly empowered the Ohio Power Siting Board to make decisions on the construction and operation of major utility facilities “as the board considers appropriate” pursuant to certain factors that must be met. R.C. 4906.10(A). This Board correctly determined that, based on the evidence before it, Kingwood’s project and application would not “serve the public interest, convenience, and necessity” as required by R.C. 4906.10(A)(6). (Order at ¶152).

The public interest provision of R.C. 4906.10(A)(6) does not expressly confine the Board to any specific evidence or considerations in making its decision; it merely requires the Board to make a determination based on that criteria on the evidence presented to it. But according to Kingwood, the Board cannot even consider local government opposition as a factor in determining the public interest. (Kingwood Rehearing App. at 5-9). That is incorrect.

Kingwood emphasizes repeatedly that its application was “technically compliant” under the other provisions of R.C. 4906.10, but technical compliance does not guarantee that an application serves the public interest, convenience, or necessity. If that were the case, then the application and hearing process would be unnecessary. So long as an applicant could meet certain technical requirements, any project would move forward. But instead, the General Assembly included the public interest, convenience, and necessity provision; and as long as the Board documents the evidence upon which it relied in making its decision, the Board’s judgment as to public interest, convenience, and necessity should remain undisturbed.

Kingwood takes it as a given that about 400 temporary construction jobs, 15 permanent jobs, and the associated increase in taxes (or payments in lieu of taxes (“PILOT”)) and economic output outweigh the public interest in preserving unique characteristics of wildlife, parks, and recreation areas near the project, nearby cultural and historic areas in the region, and all of the other reasons expressed by the County, townships, and intervening parties during public

meetings and at the Board hearing. But it's not up to Kingwood to balance those competing interests and R.C. 4906.10(A)(6) doesn't prohibit the Board from reviewing those considerations.

This Board correctly noted that Kingwood's arguments as to public interest, convenience, and necessity—namely, increased energy generation, potential increased employment, tax revenues, and PILOT, and air quality benefits—are arguments that apply in every single solar panel installation. (Order at ¶149). Those benefits alone cannot be the sole basis for approving such projects, or else there would be no need for R.C. 4906.10(A)(6) and its call for a review of the public interest, convenience, and necessity.

The Board's Order reasonably and lawfully determined that the unanimous opposition of local government entities is a dispositive and sufficient reason for the Board to reject the stipulation and deny the certificate. (Order at ¶¶145, 152). In doing so, the Board properly states that its "focus goes beyond merely counting local government resolutions to determine whether a certificate is warranted," and instead "focus[es] on the vigor and rationale of the local government opposition, which clearly serves as an indicator of this Project's lack of public support." (Order at ¶145). The Board's Order goes on to describe the concerns raised in the Commissioners' amendment to the Perspectives 2020 land use plan and the opposition resolution specific to this project application. (Order at ¶146).

Kingwood's claim that the Board "ignored the countywide implicants of the Project" because it only received opposition from three Greene County townships is risible seeing as the townships immediately bordering the Project participated, and the Greene County Commissioners participated in their role as stewards of the entire county. (Kingwood Rehearing

App. at 8). Notably, the remaining townships in Greene County, who were not threatened by the Project, have never provided public support for the Project.

The Board's discussion of these items was reasonable and lawful, and supports the decision to reject the stipulation and deny the certificate application. The Board's discussion makes clear that it found the rationale presented by the County and the townships credible and compelling, which is why it gave credence to the Commissioners' opposition (and the opposition of the intervening townships). Kingwood characterizes this uniform opposition as a "vocal minority" but that disregards the fact that the County and Intervening Township's elected officials all speak, at least generally, for all the residents of the county and townships.

B. The Board's consideration of uniform, sustained opposition to the Project by local government entities supported by evidence does not constitute a delegation of decision-making authority. [Response to Kingwood's Second Ground for Rehearing.]

R.C. 4906.10(A) does not prohibit the Board from considering the opinions and testimony presented by local government entities. Indeed, as Kingwood points out, local governing bodies are entitled to intervene in the certification process. (Kingwood Rehearing App. at 10). In one breath, Kingwood states that the "General Assembly expressly delegated the authority to grant certificates of environmental compatibility and public need to the Board." (*Id.* at 11). But in the next breath it claims that the Board's decision to consider local government opposition to the Project is unlawful. (*Id.*). Both cannot be true.

The Revised Code does not prohibit the Board from considering local government opposition in the certification process. And, as Kingwood points out again, there have been instances where unanimous local opposition was overruled by the Board and instances where unanimous local opposition has been upheld by the Board. *Compare, e.g., In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio878, 966 N.E.2d 869 with *In re Birch Solar 1, LLC*, Case

No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022). That examples of approval and rejection in similar cases exist prove that the Board has decision-making authority based on the statutory criteria and on the individual circumstances present in each case. The Board lawfully exercised its powers of review and decision-making here, and Kingwood's Application for Rehearing should be denied.

C. The Board followed its precedents in considering local government opposition to a project as a criterion for determining whether the project meets the public interest, convenience, and necessity. [Response to Kingwood's Third Ground for Rehearing.]

In three recent cases, all cited by Kingwood, the Board considered local opposition to a proposed project as informative to its determination of whether the project served the public interest, convenience, and necessity. (Kingwood Rehearing App. at 13). At the same time, Kingwood claims that the Board failed to follow its precedents in denying its application based on unanimous local opposition as a factor to determining whether the project serves the public interest. (*Id.*).

In other words, Kingwood's Application asks this Board not just to reconsider its denial of Kingwood's application, but to reconsider the decision-making process of the board in three other cases. *See In re Birch Solar I, LLC*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022); *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021); *In re American Transmission Systems, Inc. (ATSI)*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022). Indeed, if the Board was as wedded to past precedent as Kingwood claims, it would be mandated to consider local government opposition based on the cases cited by Kingwood itself. Because the Board has consistently review local government opposition in recent years, the Board's decision should be affirmed and Kingwood's Application for Rehearing should be denied.

D. The Board acknowledged negative public comments received regarding the Project but did not rely on those comments as a basis for its denial. [Response to Kingwood's Fourth Ground for Rehearing.]

The Board could not state more clearly why it found that Kingwood's Application did not serve the public interest—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. (Order at ¶150).

The Board's acknowledgement of public comments received, and that aligned with the opposition of the local government entities, is not unlawful because the basis for the Board's decision is clear. The Board did not deny the application because of the public comments; it denied the application because unanimous local government opposition to the Project established that the Project did not serve the public interest, convenience, and necessity. In fact, the Board only referenced public comments to rebut Kingwood's claim of widespread public support for the Project. (Order at ¶148).

The Board understood the public comments were not part of the evidentiary record and accordingly did not base its decision on those comments. (*Id.*) It simply acknowledged those comments as being overwhelmingly in line with the local government opposition upon which it did base its denial. A passing reference to public comments not entered formally upon the record does not invalidate the Board's decision-making process. Kingwood's argument effectively asks this Board to entirely disregard the public comment submittal and review process which is an important part of the Board's review process. Because the Board did not base its decision on submitted public comments, Kingwood's Application for Rehearing should be denied.

- E. The Board correctly found that the Joint Stipulation signed by Kingwood and the Ohio Farm Bureau Federation was not a product of serious bargaining among capable, knowledgeable parties because none of the local government entities signed onto the Joint Stipulation and because the Joint Stipulation does not even recommend the grant of a certificate. [Response to Kingwood’s Sixth and Seventh Grounds for Rehearing.]**

Ohio Adm.Code 4906-2-24(D) states that no stipulation binds the Board and that such stipulations are only persuasive. The Joint Stipulation entered by Kingwood and the Ohio Farm Bureau Federation (“OFBF”) was not signed by any of the other parties to this matter. Moreover, even OFBF’s joinder to the Stipulation was only a recommendation to include 39 conditions on the Project, rather than whether the Project should receive a certificate. (Order at ¶166). The Stipulation settled nothing.

Kingwood rehashes nearly all of the 39 conditions it agreed to include in the Joint Stipulation it entered with OFBF (all of which it claims serve the public interest, necessity, and convenience). (Kingwood Rehearing App. at 22-27). But these are the same recycled claims that the Board rejected in denying the certificate. Kingwood was unable to convince *any* of the parties in this proceeding to sign a Joint Stipulation recommending the grant of a certificate; it convinced *one* party, which was not a local government entity, to sign on to a Joint Stipulation recommending *39 conditions*. But the problems to the public interest in this case are so comprehensive that not even those 39 conditions could persuade one local government entity to sign the Joint Stipulation.

The Board considers three criteria for determining whether a proposed stipulation is reasonable and, here, the Board found that none of those three criteria were met. (Order at ¶167). The Joint Stipulation does not recommend the grant of a certificate and it is therefore not a “product” of serious bargaining among the parties. (*Id.* at ¶168). The Joint Stipulation is not beneficial to the public interest for the same reasons Kingwood’s entire application is not

beneficial to the public interest. (*Id.* at ¶169). And any adoption of the Joint Stipulation would violate the regulatory practice of considering a stipulation that is not beneficial to the public interest. (*Id.*). The Board lawfully denied consideration of the Joint Stipulation and the denial is not a ground for rehearing.

F. Any potential testimony submitted by Ms. Theresa White is irrelevant to the decision issued by the Board rejecting the certificate and irrelevant to the decision-making process of local governments. [Response to Kingwood’s Eighth, Ninth, and Tenth Grounds for Rehearing.]

The ALJ correctly denied Kingwood’s request to compel testimony from Board Executive Director White. Kingwood proposes construction of a 175 MW solar-power electric generating facility that spans three separate townships in Greene County and that would occupy about 1,200 acres of land. (Order at ¶34). But despite the size and scope of the proposal, Kingwood claims not to understand “why [Ohio Power Siting Board] Staff made last-minute outreach to” those local governments affected by the proposal. (Kingwood Rehearing App. at 29). And it claims that Ms. White’s testimony is critical to determining the nature of the investigation that Board Staff made into the proposal even though it was granted the opportunity to examine an additional Staff witness who actually contacted the local entities, Ms. Julia Graham-Price. (Order at ¶¶ 76-78).

It is clear from the record and the testimony of Ms. Graham-Price, whose job title is Community Liaison, that she was simply reaching out to the county and townships to determine their position on the proposal at the direction of Ms. White. (*Id.*; Tr. VIII at 1928-1945). Ms. White never spoke to any local authorities. The Board and Board Staff are lawfully permitted to consider the positions of local governments impacted by applications and Ms. Graham-Price simply completed her role.

None of these discussions were dispositive to the Board's decision to reject the application as not in the public interest. Ms. Graham-Price at the direction of her supervisor, Ms. White, simply reached out to the county and townships to determine those entities position on the project—a lawful and reasonable action. Kingwood's argument on this point assumes that the Board blindly follows the Staff Report's recommendation and, premised on that assumption, asserts that preparation of the Staff Report is "outcome determinative" because that is where the real decision is made. (Kingwood Rehearing App. at 33). This is exactly backward—certainly, the Board relies on the Staff Report and Recommendation to the extent it finds its contents persuasive. The same can be said for any evidence submitted to the Board. But the Staff Report and Recommendation is only one tile in the evidentiary mosaic the Board considered in reaching its independent determination to deny the certificate application. Subpoena of Ms. White's testimony would be unreasonable simply because her testimony is not relevant to the Board's ultimate decision. Kingwood's Application for Rehearing on these grounds should be denied.

CONCLUSION

For the reasons set forth herein, the Commissioners' respectfully request that this Board deny Kingwood's application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The docketing system will electronically notify counsel of record in this proceeding. Additionally, the undersigned hereby certifies that a courtesy copy of the foregoing was served via email to the counsel indicated below on this 27th day of January 2023.

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Summary: Memorandum of the Board of Greene County Commissioners in
Opposition to the Application for Rehearing of Applicant Kingwood Solar I LLC
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Commissioners