

1,000 acres of land within Franklin Township and Columbiana County and would surround the Village of Summitville on all four sides (the “Project.”) (*Id.*)

The fourth quarter of 2023 has come and gone, and the application for the Project was only deemed complete on August 12, 2023. (Notice Regarding Application Completeness). Since that time, not only have the Local Government Entities and their constituents learned that the Project has more than doubled its originally advertised size at 2,264 acres and would have a generating capacity of up to 145 MW, but also that it could be built only twenty-five feet away from neighboring properties. (Redacted Application at 2, 16-17.) Many local residents would no longer enjoy the views of the beautiful, rolling Columbiana County countryside currently offered by their properties, as the Project promises to substantially change the visual character of the area, making solar modules the dominant visual feature on the landscape. (*Id.*, 87).

For over 2 ½ years the members of the Local Government Entities and their constituents have lived with the uncertainty of whether the Project would ever be completed, and in what final form. They have lived with concerns regarding whether the Board would allow the Project to go forward to affect their environment, wildlife, local economy, property values, and enjoyment of property, in addition to their concerns regarding whether a resource rich, foreign company could disrupt their carefully chosen way of life. They have spent considerable time, expense, and resources on educating themselves about the Project, the environment, and solar energy, while Kensington sought several extensions of its completion date and decisions about the instant Application remained in flux. Absent the finality that this proceeding will provide, decisions of the Local Government Entities’ constituents would remain in balance.

For this reason and the reasons set forth in the Legal Argument section below, the Local Government Entities respectfully request the Board reasonably exercise its discretion and deny Kensington's Motion.

II. LEGAL ARGUMENT

OAC 4906-2-07(A) provides that continuances of public hearings and extensions of time may be granted upon motion of any party "for good cause shown." However, Kensington has not shown good cause. Kensington cites the fact that there are pending appeals of the Board's rulings in *In re the Application of Birch Solar I, LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Allen and Auglaize Counties, Ohio*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) ("*Birch Solar*") and *In re the Application of Kingwood Solar I LLC for a Certificate of Environmental Compatibility and Public Need*, Case No. 21-117-EL-BGN, Opinion and Order (Dec. 15, 2022) ("*Kingwood*") in support of its Motion. However, the issues pending before the Ohio Supreme Court in *Kingwood* and *Birch Solar*, as they are raised by the appellants in those matters, are heavily dependent on the facts in the record of those proceedings. The facts relevant to the instant proceedings are as unique as the citizens of Columbiana County are unique, so any decision of the Supreme Court regarding *Kingwood* and *Birch Solar* could be distinguishable from the instant matter.

Kensington also cites its desire to work with local groups and officials toward a resolution in support of its Motion. However, Kensington has had years to work with local groups and officials toward resolution, and the residents of Columbiana County and Franklin Township continue to express significant opposition to the Project to the Local Government Entities. The longer this matter remains pending before the Board, the more unlikely it has become that

Kensington can offer any resolution that could sway the extensive opposition to the Project. Allowing this matter to continue with the schedule set by the Board's December 12, 2023 entry is the most expeditious path to resolution and finality.

Finally, a stay would harm parties and other interested stakeholders. As detailed above, the Local Government Entities and their constituents have been waiting since at least July 2021 for resolution. The residents of Columbiana County and Franklin Township have spent resources preparing for intervention, discovery, and hearings, and their discomfort grows as they fear the disruption that the Project would cause to their lives.

A. The Board's decisions in *Birch Solar* and *Kingwood* are unique to those decisions.

While *Birch Solar* and *Kingwood* involve issues relating to public opinion and local government opposition, those appeals, as framed by the appellants, hinge on facts that are unique to the respective localities and do not apply to the Project. In *Birch Solar*, pending before the Supreme Court as case no. 2023-1011, the appellant/applicant has argued that it was unreasonable, unlawful, and against the manifest weight of the evidence for the Board to fail to consider the public interest, convenience, and necessity through a broad lens because it allegedly disregarded the manifest weight of the evidence as it related to several topics. It argued that the Board's decision was unlawful because it relied on unsupported, unsworn, and disproven claims, that the Board impermissibly assigned too much weight to public opinion, and that it violated the public policy of RC Ch. 303.

In *Kingwood*, case no. 2023-1286, the appellant/cross-appellee/applicant has asserted on appeal that the Board's rejection of a joint stipulation was unlawful and unreasonable, that the Board unlawfully and unreasonably relied on public opinion and government dissent, that the Board should not have considered items not in the record specific to that matter, and that the Board

erred in relation to discovery disputes in that matter. The arguments were supported, in part, by the claim that the testimony of the local governmental entities and intervenors was unsubstantiated opinion. The appellee/cross-appellant/intervenors assert that the Board's decision was unlawful and unreasonable based on specific evidence in the record relating to land use, economic impact, environmental impact, visual and noise impacts, and cultural and historic impacts. The issues raised on appeal in *Kingwood* require analysis as applied to the record and totality of the circumstances of that specific solar farm. Columbiana County is a unique and exceptional Appalachian area, the Kensington Project is different than the projects at issue in *Birch Solar* and *Kingwood*, and the facts in the record of *Birch Solar* and *Kingwood* will not be the same as the facts that will be adduced in the instant matter.

Even if the Supreme Court does issue a determination that could affect an outcome in this matter, that does not mean that the discovery and hearing processes should be stayed. The parties may present whatever evidence, make whatever objections, that they deem necessary to obtaining their goals. Courts do not typically stay cases in their entirety just because a higher court could issue a decision in a wholly unrelated matter that may affect the proceedings. *See In re TF*, No. 23979, 2008-Ohio-3106, ¶ 21. Neither should the Board.

B. Granting a stay will not promote expeditious resolution or judicial economy.

OAC 4906-2-07(A) does not permit the Board to grant continuances or extensions of time in contradiction to law. And, pursuant to RC 4906.07(A), this proceeding must conclude "as expeditiously as practicable." Granting the stay would be contrary to RC 4906.07(A) as it would unnecessarily delay resolution.

Kensington cites several Board decisions in which it claims that an ALJ has granted similar motions to suspend procedural schedules to allow parties to address local concerns. However, none

of those examples are similar to this matter. In *In re the Application of Cepheus Energy Project, LLC for a Certificate of Environmental Compatibility and Public Need*, Case No. 21-293-EL-BGN, Entry (Dec. 9, 2021), the motion to suspend the procedural schedule was filed jointly by the applicant and the one intervenor, the Ohio Farm Bureau Federation. No local government or interested resident opposed the motion or even intervened in that matter. There was no indication that the applicant's efforts to resolve the matter with the local residents and authorities could not be fruitful. The applicant only sought time to address specific concerns raised on three pages of the staff report.

Similarly, in *In re the Application of Scioto Farms Solar Project, LLC for a Certificate of Environmental Compatibility and Public Need*, Case No. 21-868-EL-BGN, Entry (May 26, 2022) the motion to continue the evidentiary hearing was filed jointly by several parties and faced no opposition. The applicant sought to address specific issues that had been identified in the staff report and sought a continuation of the evidentiary hearing only.

The extensions granted in those matters were granted to address specific, identified concerns. In the instant matter, however, Kensington only provides that a stay will have the benefit of providing more time for Kensington to meet with local groups and officials. It does not identify any plans for Kensington to do so, or any specific concerns that Kensington seeks to address. The staff has not issued any report, the discovery process has not begun, and the intervenor deadline has not passed.

There is no indication that Kensington can address local concerns. The residents of Columbiana County and Franklin Township continue to express significant opposition to the Project to the Local Government Entities, and the Local Government Entities do not believe that an offer could resolve this matter. Therefore, the facts surrounding this motion are akin to the facts

surrounding the motion to continue deadlines in *In re Application of Kingwood Solar I LLC for a Certificate of Environmental Compatibility and Public Need*, Case No. 21-117-EL-BGN. In that matter, the applicant sought continuation of deadlines, citing the desire to continue settlement discussions with the parties, but an intervening township opposed the motion, stating that the public opposition to the solar farm was so widespread that the applicant could not offer any satisfactory resolution. Because the township indicated that it did not foresee discussions being productive, the ALJ denied the motion. The Motion should be denied for the same reason.

Finally, extensions and stays granted by ALJs are typically limited in duration. The movants in *Cephus Energy, supra*, and *Scioto Farms, supra*, sought stays of a duration that would permit fruitful settlement negotiations. In *In re the Application of Hecate Energy Highland 4 LLC for a Certificate of Environmental Compatibility and Public Need*, 20-1288-EL-BGN, Entry (December 13, 2023) the ALJ granted an extension because an attorney for one of the parties faced an exigency, and re-scheduled the postponed hearing for a date certain. In *In re Harrison Power, LLC, for a Certificate of Environmental Compatibility and Public Need for an Electric Generating Facility in Harrison County, Ohio*, 17-1189-EL-BGN, Entry (May 22, 2018) the ALJ granted a motion for extension of deadlines to allow the parties to address issues in the staff report, but re-set the deadlines for specific dates in its entry.

Here, Kensington seeks an indefinite stay until the Ohio Supreme Court resolves two unrelated matters. At the time of filing this Memorandum Contra, neither *Birch Solar* nor *Kingwood* is past the merits briefing stage, and in *Kingwood*, merit briefing will not be complete until March 2024 at the earliest. Granting the stay would put this matter's schedule at the mercy of the schedule of the Supreme Court and could prevent resolution of this matter for months or years. It would have the opposite effect intended by RC 4906.07(A) and OAC 4906-2-07(A). And,

allowing the matter to continue as scheduled would promote judicial economy, as the parties are not sitting idle while *Kingwood* and *Birch Solar* resolve.

C. A stay will harm the parties and interested stakeholders.

Kensington claims that granting the Motion will not harm parties or stakeholders because the ALJ only recently established the procedural schedule and because Kensington's published notice of the Project did not contain any information about the procedural schedule. Neither of these claims satisfies the "good cause" standard.

First, while the current procedural schedule was established only about one month ago, the Local Government Entities and their constituents have been waiting for the schedule to be established since the filing of the application over 2 ½ years ago. Their lives have been hanging in balance, with the additional stress of the issues outlined in the introduction weighing on their shoulders.

Second, while Kensington's published notice may not have contained the procedural schedule, the interested parties and stakeholders have been aware of the schedule since the day it was issued. The undersigned received notice of the schedule through the PUCO's electronic filing system and immediately began preparations with the Local Government Entities for their participation. The Local Government Entities' constituents have been watching this matter closely, and have also undertaken preparations for intervention, discovery, and the scheduled hearings. In *Cepheus Energy, supra*, the ALJ declined to re-schedule the public hearing, as preparations for that hearing had already begun. The Board should follow here, as preparation for the deadlines in the procedural schedule are in place.

Third, when an ALJ grants a motion to continue or stay, the motion is typically unopposed. *Hecate Energy, supra; Harrison Power, supra; Scioto Farms, supra; In re Application of*

Firelands Wind, LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Wind-Powered Electric Generation Facility In Huron and Erie Counties, Ohio, 18-16077-EL-BGN, Entry (December 9, 2020). However, the Local Government Entities object to the Motion because it is harmful to them and their constituents, and expect that additional local resident intervenors will likely also object for similar reasons.

III. CONCLUSION

The Local Government Entities respectfully request the Ohio Power Siting Board deny the Motion.

Respectfully submitted,

/s/Amily A. Imbrogno

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Ohio Power Siting Board on January 10, 2024. The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case.

/s/ Amily A. Imbrogno

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Summary: Memorandum Intervenors' Memorandum Contra to Kensington's Motion to Suspend Procedural Schedule and Stay Proceeding electronically filed by Ms. Amily A Imbrogno on behalf of Columbiana County Board of Commissioners and Columbiana County Soil and Water Conservation District Board of Supervisors and Franklin Township Board of Trustees.