IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Kingwood Solar I LLC for a Certificate of Environmental Compatibility and Public Need	:	**Case No. 2023-1286** **On Appeal from The Ohio Power Siting Board Case No. 21-117-EL-BGN**

MERIT BRIEF OF KINGWOOD SOLAR I LLC

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I. INTRODUCTION

Since 2021, the Ohio Power Siting Board (the "Board") has been proceeding down the unlawful path of delegating its decision making authority to local governmental entities by giving undue weight to the unsubstantiated opinions of local officials. The Court should not allow this practice to continue. Instead, the Court should step in, course correct, reverse, and require the Board to appropriately weigh and consider whether the Kingwood Solar Project (the "Project") is in the public interest, convenience and necessity pursuant to the plain language of R.C. 4906.10(A)(6).

The Project meets all of the statutory requirements that similar projects approved by the Board have met before. Indeed, the Board explicitly determined that the Project meets all technical requirements for approval. Despite this determination, the Board denied Kingwood's application and rejected the joint stipulation between Kingwood and the Ohio Farm Bureau Federation. The rejection was based solely on the grounds that the Board perceived "unanimous" local governmental opposition against the Project – simply by relying on the vague opinions expressed in the intervening local governmental entities' resolutions. The Board then claimed that unsubstantiated comments from a very small fraction of the local population of Greene County, Ohio which totals nearly 170,000, reinforced its reliance on the local governmental entities' opposition. The Board's decision is unreasonable and unlawful and warrants reversal.

To be sure, this is not what R.C. 4906.10(A)(6) provides, nor what the General Assembly intended, when it required the Board to ensure projects serve the "public interest, convenience, and necessity." Nowhere in the statute does it reference public opinion, political motivations, or local perception. Consequently, the Board cannot look to the opinions of a few elected governmental officials, characterize those opinions as for the public welfare, and weigh them

higher than the many actual public interest benefits that the Board attributed to the Project. But, unfortunately, the Board impermissibly delegated its decision-making authority to those local officials—**a delegation which is explicitly prohibited by statute** and which offends the General Assembly's intention to place the approval and siting of major utility facilities in the hands of the Board and insulated from local politics. The Court must step in and correct the Board's unreasonable departure from the statute's plain meaning. Without correction, the Board walks the dangerous path of letting personal and political opinion govern development—which does not always benefit the public good.

Many of the problems in this case arose when, just a few days before the Staff Report and Recommendation was due to be filed, Staff solicited last minute input from the intervening county and three townships. The Staff changed its recommendation upon receiving that input—the sole reason being "strong local government opposition." While Staff's solicitation (and the motivation behind it) was not included in its Staff Report, Kingwood doggedly pursued information about that solicitation, with each stone overturned leading to a new question and new person being involved. Yet, when the path led back to the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, Kingwood was blocked from questioning her on the reason for the solicitation, i.e. was it for the purpose of investigating the Project or was it made to try to find a reason to reverse Staff's recommended approval of the Project.

An administrative agency must follow its guiding statutes and be open to transparency in its investigations, especially an agency like the Ohio Power Siting Board. The Board's Order, however, failed to follow the express language of R.C. 4906.10(A)(6) and also failed to provide full transparency as to what happened just before the Staff Report was issued. The Court therefore

should reverse the Board's order and remand with instructions to approve the joint stipulation and grant Kingwood a certificate of environmental compatibility and public need.

II. STATEMENT OF FACTS

A. Kingwood filed an application for a solar project in Greene County, Ohio.

On April 16, 2021, Kingwood filed its application for a certificate of environmental compatibility and public need for a 175 MW solar-powered generating facility in Cedarville, Miami, and Xenia Townships in Greene County, Ohio (the "Project"). (*See generally* ICN 5, Application, Kingwood Ex. 1) The Project will consist of arrays of photovoltaic ("PV") modules, commonly referred to as solar panels, ground-mounted on a metal racking system. (*Id.* at 7-8.) The Project will also consist of access roads, electrical collector cables, a meteorological station, a Project substation, and a 138-kV electric generation line that will connect to a utility-owned switchyard. (*Id.* at 12.) The Project will occupy approximately 1,200 acres within the approximately 1,500-acre Project boundary area. (ICN Test., Stickney Direct Testimony p. 2, Kingwood Ex. 6; ICN Test., Stickney Rebuttal Testimony p. 10, Kingwood Ex. 107.)

As outlined in the application, underground electrical interconnections at a voltage of 34.5-kV will be used to transmit generated electricity from the inverters to the Project substation, where it will be stepped up to 138-kV. (ICN 5, Application p. 3, Kingwood Ex. 1.) From there, a short 138-kV gen-tie will connect the Project substation to the utility switchyard to transmit the Project's electrical output to the existing American Transmission Systems Inc. ("ATSI") Greene-Clark 138-kV transmission line. (*Id.*) The ATSI Greene-Clark 138-kV transmission line routes through the Project Area, as does a 345-kV transmission line that will not be utilized by the Project. (*Id.* at pp. 10, 74; ICN Test., Stickney Direct Testimony p. 3, Kingwood Ex. 6.)

The Project is structurally the same as two other solar projects proposed by Angelina Solar I, LLC and Alamo Solar I, LLC, which were approved by the Board and recently upheld by this Court. *See In re Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 2.

B. The application was deemed complete and proceeded to the fact-finding stage with no objection from any party.

By letter filed and dated June 15, 2021, Kingwood's application was deemed "to comply with Chapters 4906-01, et seq., of the Ohio Administrative Code[.]" (ICN Corres., June 15, 2021 Correspondence.) And it was determined that Staff had "sufficient information" to begin reviewing and investigating the application. (*Id.*) Importantly, no objection was filed to these findings. On August 26, 2021, following proper service of the application, the Administrative Law Judge found that Kingwood's "accepted, complete application" was deemed filed as of August 26, 2021. (ICN 51, Aug. 26, 2021 Entry.) Again, no objections were filed as to this finding.

Staff then proceeded to review and investigate the application. During this fact-finding stage, Kingwood also continued to narrow the scope of the Project and negotiate with the other parties in an effort to jointly propose a stipulation to the Board. (*See* ICN Test, Stickney Supplemental Testimony pp. 2, 21-22, Kingwood Ex. 7.)

C. Although Board Staff did not find any technical deficiencies, it changed its recommendation at the last minute and ultimately recommended that the Board deny the certificate.

Staff filed its Staff Report on October 29, 2021. (ICN 57, Staff Report, Staff Ex. 1.) In its Report, Staff, taking into account Staff's recommended conditions, failed to find any technical issues with the Project that would prevent the issuance of a certificate. (*Id.* at pp. 10, 19, 23, 30, 33, 36, 39, 45, 46.) Specifically, Staff concluded that the Project will not present an adverse impact to existing land use, cultural and recreational resources; noise would be minimal; no traffic changes

were expected; the Project Area's geological features are not incompatible to the project; there was no evidence of any issues with the injection of power into the transmission grid; and Kingwood identified an appropriate decommissioning plan. (*Id.*)

- **Staff found in its Staff Report that the Project would provide significant benefits.**

Staff further recognized that the Project will have significant economic benefits to the State and to the local communities. (*Id.* at pp. 15–16.) Staff stated in the Staff Report that the Project is projected to have a positive impact on the local community and the state of Ohio in general. (*Id.* at 31.) Staff noted that the Project will generate between $1.2 million and $1.5 million annually for Greene County taxing districts. *(Id.*) Staff also recognized that direct, indirect and induced earnings would total $32.7 million during construction and $7.7 million in annual earnings during facility operations. (*Id.*)

- **Yet Staff recommended denial because of a last second County resolution.**

Despite this clear benefit to the general public, Staff recommended that the Board deny Kingwood's certificate based solely on its perception that the Project did not meet the public interest, necessity, and convenience criteria under R.C. 4906.10(A)(6).(ICN 57, Staff Report pp. 43–44, Staff Ex. 1.) Staff based its recommendation on its perception that there was "general opposition to the project from the local citizens and local governmental bodies." (ICN 57, Staff Report p. 44, Staff Ex. 1). The only stated opposition to the Project at that time, however, was a Greene County resolution passed just the day before the Staff report was issued. (*Id.*) Kingwood pointed out this error, along with other errors, by Staff in the Staff Report by correspondence from Kingwood to Staff, but Staff refused to correct the errors. (ICN Corres., Nov. 9, 2021 Corres., Kingwood Ex. 89.)

- **The Board's Executive Director directed Staff to solicit local governmental input at the last minute**

The Staff Report was procedurally odd for two reasons. First, Staff failed to consider the Project's statewide benefits when evaluating the criteria under R.C. 4906.10(A)(6). (*See* TR VII at 1893–95.) Second, the Board's Executive Director (Ms. White) directed a subordinate to solicit the local governmental entities' position on the Project the day before the Staff Report was issued. (TR VIII at 1931, 1938–42.) That solicitation was successful as it resulted in Greene County submitting a resolution against the project. (*See* ICN 57, Staff Report p. 44, Staff Ex. 1). The reason for this solicitation was never permitted to be entered into the record because the Board refused to allow Kingwood to subpoena Ms. White to testify. (TR VIII at 1962–63; ICN 146, Dec. 15, 2022 Opinion & Order ¶ 79.) Yet, it caused Staff to reverse its decision on the Project at the eleventh hour before the Staff Report was issued, changing the recommendation from grant to deny.

D. Kingwood reduced the Project layout and increased setbacks.

Subsequently, to address specific concerns raised by intervening parties and the public, Kingwood voluntarily reduced the Project layout and removed more than 300 acres from consideration for above-ground project equipment. (ICN Test., Stickney Rebuttal Testimony pp. 12–14, Kingwood Ex. 107.) Setbacks were also increased from residences (250 feet between non-participating residences and the projects' fence line and 500 feet between non-participating residences and inverters) and designated cultural resources and heavily-trafficked roadways (200 feet and 300 feet between the project's fence line and Clifton Road and OH-72, respectively). (ICN 97, Joint Stipulation p. 4, Jt. Ex. 1.) These acreage reductions and increased setbacks mitigate any potential viewshed of the Project from neighboring residences, travelling tourists or vehicle passengers. (ICN Test., Stickney Rebuttal Testimony p. 13, Kingwood Ex. 107.) The increased

setbacks also address concerns about noise, if any, and alleviate concerns about impacts to tourism with regard to the John Bryan State Park, Glen Helen Nature Preserve, and Clifton Gorge. (*Id.* at pp. 13–14.)

Additionally, Kingwood voluntarily committed to an additional 4,000 linear feet of vegetative screening since the original landscape screening plan was proposed, which now totals more than 47,000 linear feet. (ICN Test., English Supplemental Testimony p. 2, Attach. A, Kingwood Ex. 18.) As such, a large portion of the Project will be screened either by natural buffers or the proposed buffers. (*Id.*)

All of these commitments and many others were incorporated into a stipulation submitted to the Board in this proceeding (ICN 97, Joint Stipulation, Jt. Ex. 1.)

E. Kingwood and the Ohio Farm Bureau Federation entered into a joint stipulation that includes thirty-nine protective conditions.

On March 4, 2022, Kingwood and the Ohio Farm Bureau Federation ("OFBF") proposed a joint stipulation that would subject the Project to thirty-nine conditions. (ICN 97, Joint Stipulation, Jt. Ex. 1.) Many of these conditions have been previously approved by the Board in prior solar project proceedings. Additionally, the joint stipulation enhances several conditions recommended by Staff in the Staff Report filed on October 29, 2021, as a result of discussions with intervening parties. Furthermore, the joint stipulation included additional conditions proposed by Kingwood intended to address specific concerns raised by the other intervening parties and the general public.

- **Kingwood commits to involve all local governmental entities.**

Several conditions in the joint stipulation require Kingwood to directly engage with local public entities, including the Greene County Board of County Commissioners, the Cedarville Township Board of Trustees, the Xenia Township Board of Trustees, the Miami Township Board

of Trustees, the Greene County Engineer, In Progress, LLC, and the Greene County Soil & Water Conservation District. (ICN 97, Joint Stipulation pp. 3, 6, 7, 10, 11, Jt. Ex. 1.) Local governmental officials can choose to attend preconstruction conferences. (*Id.* at p. 3.) Kingwood will make pre- and post-construction stormwater calculations and will submit the calculation, along with a copy of any stormwater submittals made to the Ohio Environmental Protection Agency ("EPA"), to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.* at p. 6.) If post-construction stormwater best management practices are required, Kingwood will submit construction drawings, detailing any stormwater control measures, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.*)

- **Such commitments include seed mixes, road controls and drainage matters.**

Prior to commencement of construction, Kingwood will consult with the Greene County Soil & Water Conservation District regarding seed mixes for the Project and shall provide the tags on such seed mixes to the agency. (*Id.* at p. 7.) Kingwood will coordinate with public officials such as the Greene County Engineer and local law enforcement for temporary road closures, road use agreements, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed Project. (*Id.*) Kingwood will also consult with the Greene County Soil & Water Conservation District and the Greene County Engineer to determine the location of any tile located in a county maintenance ditch to ensure that parcels adjacent to the Project area are protected from unwanted drainage problems due to construction and operation of the Project. (*Id.* at p. 10.)

The conditions in the joint stipulation coupled with the facility layout, associated setbacks, and vegetative screening reflect a well-designed facility. These conditions are similar, and in many

instances far exceed, the conditions for other solar projects that the Board has approved and this Court has affirmed. *See generally Alamo Solar*, 2023-Ohio-3778.

F. The Board issued an order rejecting the stipulation and denying the certificate.

The Board held a public hearing on Kingwood's application on November 15, 2021, and convened the adjudicatory hearing on March 7, 2022. During the adjudicatory hearing, in addition to the testimony of the Project's sponsoring witness, Dylan Stickney, Kingwood presented twelve expert witnesses, each with significant experience in renewable generation, and solar facilities in particular.

On December 15, 2022, the Board issued an order rejecting the stipulation and recommendation between Kingwood Solar I LLC and the Ohio Farm Bureau Federation and denying the application of Kingwood Solar I LLC for a certificate of environmental compatibility and public need. (ICN 146, Dec. 15, 2022 Opinion & Order.) In the order, the Board determined that Kingwood's Project meets every applicable statutory requirement, except for the public interest, necessity and convenience criteria under R.C. 4906.10(A)(6). (*See id.*) As to this criteria, the Board relied exclusively on the perceived "unanimous opposition" to the Project. (*Id.* at ¶ 152.)

- **The Board relied only upon the opinion of the board of trustees of 3 out of 12 townships in Greene County and the Greene County Board of Commissioners.**

Indeed, the Board based its determination on the sole fact that the elected officials from Greene County, and the three intervening townships—Miami, Cedarville, and Xenia Townships—opposed certification by passing resolutions against the Project. (*Id.* at ¶¶ 146–51; *see also id.* at ¶ 145 (concluding "that the unanimous opposition of every local government entity that borders the Project **is controlling** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)" (emphasis added)).) The Board also relied on

comments from a very vocal minority, many of which were not admitted as evidence in the record, to claim that the comments reinforced the conclusions of the government bodies. (*Id.* at ¶ 151.)

G. The Board denies Kingwood's application for rehearing.

On January 17, 2023, Kingwood timely filed an application for rehearing, raising ten assignments of error.[1] (ICN 149, Kingwood Application for Rehearing.) After the ALJ impermissibly granted the application for rehearing for the sole reason of affording the Board additional time to consider the rehearing arguments raised (ICN 157, Feb. 7, 2023 Entry), the Board continued to pronounce its unlawful view of R.C. 4906.10(A)(6) and largely denied Kingwood's application for rehearing (ICN 165, Order on Rehearing). Specifically, the Board confirmed that despite finding no technical issues with the Project, the certificate is denied on the sole basis that the Board believed there to be unanimous opposition against the Project. (*Id.* at ¶¶ 30, 34, 38.) The Board did agree with Kingwood that the joint stipulation was the product of serious bargaining among capable and knowledgeable parties. (ICN 165, Order on Rehearing ¶ 52.) Yet, it still denied that assignment of error as moot. (*Id.*) Kingwood timely appealed. (ICN 168, Kingwood Notice of Appeal.)

III. ARGUMENT

The Board denied Kingwood's application solely due to the opposition of the board of trustees for three out of twelve townships in Greene County and the Greene County Board of Commissioners. By denying Kingwood's application and rejecting its application for rehearing, the Board bypassed the significant evidence in the record that the Project will positively impact

[1] Some of the intervening parties likewise filed applications for rehearing, some of which have filed cross appeals in this case. Kingwood will address the merits of their propositions of law in the briefing on the cross-appeal.

the local community, and the State of Ohio as a whole, by creating new jobs, increasing tax benefits, providing increased access to clean energy, reducing the dependency on fossil fuels, and preserving agricultural land while providing substantial and stable income to participating landowners. Ultimately, the Board held that because the governing bodies of the localities adjacent to and within the Project area "unanimously" opposed Kingwood's application, the Project must fail. (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 145; ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) This was the sole reason for the Board's denial. This decision was unreasonable and unlawful. For the following reasons—each of which warrants reversal on its own—the Court should reverse.

A. Standard of Review

"Pursuant to R.C. 4906.12, this Court must apply the same standard of review to power-siting determinations that it applies to orders of the Public Utilities Commission." *In re Buckeye Wind, L.L.C.*, 131 Ohio St. 3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 26. The Court may reverse, modify, or vacate an order of the Board where it is "unlawful or unreasonable." R.C. 4903.13; R.C. 4906.12. "The term 'unlawful' in the standard refers to [the Court's] review of legal questions. . . . [The Court's] review of questions of law is de novo. *In re Alamo Solar*, 2023-Ohio-3778, at ¶ 11 (citations omitted). The 'unreasonable' aspect of the standard of review comes into play when the Court reviews factual determinations of the Board. *Id.* at ¶ 15. The Court "may find [the Board's] decision unreasonable when the evidence clearly does not support it, or when [the Board's] decision is internally inconsistent. *Id.* at ¶ 16.

This appeal presents the Court with both legal and factual issues with the Board's Orders that require reversal.

B. <u>Proposition of Law 1</u>: Because the record, including hundreds of pages of exhibits and days of expert testimony, established that the proposed solar-powered electric generation facility meets all of the statutory criteria of 4906.10(A), including that the project will be in the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6), the Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio was unlawful and unreasonable.

The Board's decision to reject the joint stipulation and to deny Kingwood a certificate of environmental compatibility and public need was manifestly against the weight of the evidence and is unsupported by the record. As such, the Board's decision is unlawful and unreasonable and should be reversed.

1. The record contains overwhelming evidence that the Project is compliant with all statutory requirements and serves the public interest, convenience, and necessity.

The Board determined that the Project complied with all but one of the statutory requirements. Pursuant to the evidence submitted on the record, the Board found that the Project met and complied with each of the technical requirements outlined in R.C. 4906.10(A):

- The Project's "probable environmental impacts were properly evaluated and determined," and the Project, "subject to the conditions described in the Joint Stipulation, represents the minimum adverse environmental impact" in compliance with R.C. 4906.10(A)(2) and (3) (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 106; ICN 165, Order on Rehearing ¶¶ 72, 75–76);

- "[T]he Project will serve the interest of electric system economy and reliability and is consistent with regional plans for expansion of the electric power grid of the electric systems serving the state of Ohio and interconnected utility systems" in compliance with R.C. 4906.10(A)(4) (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 118; ICN 165, Order on Rehearing ¶¶ 72, 75–76);

- The Project "will comply with the air emission regulations in R.C. Chapter 3704, and the rules and laws adopted thereunder," "will comply with Ohio law regarding water pollution control," "will comply with R.C. Chapter 3734 and all rules and standards adopted thereunder," and "will not unreasonably impair aviation" in compliance with R.C. 4906.10(A)(5) (ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 122, 125, 128, 131, 132; ICN 165, Order on Rehearing ¶¶ 72, 75–76);

- The Project's impact on agricultural viability of any land in an existing agricultural district within the project area was properly evaluated and determined in compliance with R.C. 4906.10(A)(7) (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 156; ICN 165, Order on Rehearing ¶¶ 72, 75–76); and

- The Project "incorporates the maximum feasible water conservation practices, and, therefore, satisfies the requirements of R.C. 4906.10(A)(8)" (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 162; ICN 165, Order on Rehearing ¶¶ 72, 75–76).

As to R.C. 4906.10(A)(6), Kingwood presented significant evidence, including twelve expert witnesses, showing that the Project will "serve the public interest, convenience, and necessity". The following is a summary of the record evidence that shows the Project serves the public interest, convenience, and necessity based on the plain meaning of that term:

- **Creation of construction jobs and economic activity**: The Project will create 180 full-time construction jobs, 152 indirect jobs, and 112 induced jobs, for a total of 444 Ohio jobs during the 16-month construction period that are projected to generate $33.01 million of labor income and would sustain an estimated 299 Ohio households. (ICN Test., Stickney Rebuttal Testimony, Ex. A at 2, Kingwood Ex. 107.) During this construction time period, approximately $58.90 million is expected to be spent on Ohio-sourced goods and services, and construction activity will directly and indirectly support $112.93 million of economic activity in Ohio. (*Id.*)

- **Creation of permanent jobs and economic activity**: Ultimately, the Project will create 15 permanent jobs and approximately $6.75 million in new economic output annually in Ohio, most of which will be generated in Greene County, including $2 million in state and local annual taxes and approximately $1.5 million of annual PILOT payments. (*Id.*, Ex. A at 3.)

- **Increased tax revenue**: The Project is estimated to create between $55 million to $61 million over the course of the Project's 35-year operating life in new tax revenue for Greene County and local taxing jurisdictions. (ICN Test., Karim Rebuttal Testimony p. 2; *id.* at Ex. A at 3.) Specifically, local school districts alone are anticipated to gain between $28 million to $40 million in new tax revenues over the Project's 35-year operating life. (*Id.* at Ex. A at 3.)

- **No decrease in property values**: As Kingwood's expert appraiser testified, the Project will not negatively impact adjacent property values. (ICN 17, Property Value Impact Study p. 12; ICN 5, Application, Appx. F, Kingwood Ex. 1; TR II at 366–67.)

- **Creation of new income streams**: Kingwood will pay approximately $1,100,000 in annual land lease to local landowners, escalating each year of operation. (ICN Test., Stickney Rebuttal Testimony p. 10, Kingwood Ex. 107.)

- **Other monetary benefits**: The Project garnered community donations totaling $100,000 to local organizations and good neighbor agreements totaling $757,000 were offered to 65 non-participating property owners. (TR IX at 2130, 2152–53; ICN Test., Stickney Direct Testimony p. 8, Kingwood Ex. 6; ICN Test., Stickney Rebuttal Testimony p. 8, Ex. A at 1, Kingwood Ex. 107.)

- **Attractive to businesses looking to invest in Ohio**: As the Ohio Chamber of Commerce recognized, "[i]nvesting in clean energy in Ohio is also critical to attracting new businesses as many Ohio businesses, across a number of industry sectors, have chosen to implement entirely voluntary renewable energy procurement goals." (ICN Test., Stickney Direct Testimony, Attach. C, Kingwood Ex. 6.)

- **Reduce dependency on fossil fuels**: The Project will directly assist in replacing fossil-fuel power generation facilities in Ohio that have recently or are planned to retire, contributing to cleaner air and water for the southwest Ohio region. (ICN Test., Stickney Rebuttal Testimony p. 8, Kingwood Ex. 107.)

- **Preservation of farmlands**: Unlike residential or commercial development, the Project will preserve approximately 1,500 acres for the life of the Project. (*Id.* at 11.)

- **Timely addressment of complaints**: Will ensure that any complaints from the public are addressed expeditiously. (ICN 5, Application p. 32, Kingwood Ex. 1.)

- **Commitment to the community**: The Project will maintain communication with the community. (ICN 97, Joint Stipulation pp. 8–9, Jt. Ex.1.)

- **Assurance of safety**: The Project includes emergency response plans that are coordinated with local emergency services, health and safety trainings for construction contractors and employees, and compliance with all safety and equipment standards. (*Id.* at 8–11; ICN 5, Application pp. 51–52, Kingwood Ex. 1.)

The Board acknowledged these significant benefits that the Project will provide to the public welfare. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 142, 149; ICN 165, Order on Rehearing ¶¶ 72, 75–76.) The Board noted that the public benefits of the Project, "include:

(1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio,

(2) economic benefits relative to increased employment, tax revenues, and PILOT,

(3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels,

(4) protecting landowner rights, and

(5) preserving long-term agricultural land use."

(ICN 146, Dec. 15, 2022 Opinion & Order ¶ 49; ICN 165, Order on Rehearing ¶¶ 72, 75–76.)

- **The Board finds local governmental opposition controlling over all benefits.**

However, despite these acknowledged public benefits of the Project and the mountain of evidence as to the compliance of the Project, the Board held that "the unanimous opposition of every local government entity that borders the Project ***is controlling*** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 145; ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) Not only is this determination impermissible under the enabling statute as outlined above, it also overstates the government bodies' opposition and ignores the majority support that the Project received.

Simply put, the Board allowed the fact that the four local governmental entities opposed approval of the Project to outweigh the substantial evidence that the Project meets all of the R.C. 4906.10(A) requirements, including "public interest, convenience, and necessity". The Board did this even though it rejected all of the arguments the governmental entities raised through their participation as intervenors in the proceeding. The Board's determination was both unlawful and unreasonable. The Court therefore should reverse.

2. The vague opinions and unfounded statements of Greene County and the three townships cannot outweigh this significant evidence in the record.

The resolutions and statements made by the intervening local entities in opposition to the Project are merely vague and unsubstantiated opinions and therefore cannot provide a basis to outweigh the actual evidence of significant public benefit. The resolutions passed by the Greene County Board of Commissioners and the three townships outline **alleged issues which are already adequately addressed in Kingwood's Application and further through the joint stipulation conditions, and represent nothing more than politically motivated opposition**.

For example, the Greene County Resolution (filed October 29, 2021) declares the Project as "incompatible with the general health, safety, and welfare of the residents of Greene County" and "incompatible with the adopted policies for development of renewable energy and farmland preservation." (ICN 56, Greene County Resolution p. 2, Greene County Ex. 2.) However, land use planning codes are not applicable to the Project pursuant to R.C. 4906.13. Moreover, even if such codes were applicable, the original land use plan adopted by Greene County, "Perspectives 2020: A Future Land Use Plan for Greene County,"[2] does not address renewable energy installations in the County. (TR VII at 1705.) Instead, the core value of the land use plan is to preserve land that is best suited for farming. (ICN Ex., Kingwood Ex. 61, p. 53.) And the Project will do exactly that (unlike conversions to residential house subdivisions).

The resolutions from the three townships are likewise vague and irrelevant to the Board's inquiry. When they initially intervened, the Boards of Township Trustees of Miami and Cedarville

[2] While the Greene County Board of Commissioners passed an amendment to this plan on August 26, 2021, it was passed well after the Application was filed on April 16, 2021, and after the Application was deemed complete by the Board, all in an attempt to impact the Project's approval. (TR VII at 1704.) Even still, the record evidence establishes that the Project substantially complied with the amendment.

Townships were supported by resolutions that indicated no opposition to the Project. And the intervention notice for Xenia Township also notes no opposition and merely the desire for the township trustees to intervene in this proceeding. (ICN 31, Xenia Township Notice of Intervention, Kingwood Ex. 96.) Although all three townships later passed resolutions in opposition to the Project, these subsequent resolutions are vague and rely on generic statements stating the Project is "incompatible with the general health, safety, and welfare" of township residents or allude to issues that have been adequately addressed by the Applicant. (ICN Test., Direct Testimony of L. Stephen Combs, Attach. A, Xenia Ex. 1; ICN Ex., Kingwood ICN Ex. 69 (Cedarville) and ICN Ex., Kingwood Ex. 65 (Miami.)

- **Cedarville Township presented no substantive evidence other than alleged tension within the township.**

The townships' presentations at the hearing provided no clarity nor concrete evidence. For example, Jeff Ewry, the chair of the Board of Trustees of Cedarville Township, testified that the township trustees have not had a discussion on how the Project is incompatible with the general health of Cedarville Township residents, but stated the Project has caused "angst" and "high tensions" in the township. (TR VI at 1530–31.) Allegations of tensions in the community, without any evidence of actual harm to the community, should not be a reason for the Board to determine that the Project does not satisfy R.C. 4906.10(A). *See, e.g., In re Ross County Solar, LLC*, Opinion, Order, and Certificate (Oct. 21, 2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area).

Mr. Ewry further stated that the Project was incompatible with the safety and welfare of township residents because of traffic and potential contamination of water wells. (TR VI at 1532.) Both of these issues were adequately addressed by Kingwood in the Application and the expert

testimony of Kingwood's witnesses, including Dr. Brent Finley who testified on the lack of toxicity from panel use. (*See e.g.* ICN Test., Direct Testimony of Dr. Brent Finley, Kingwood Ex. 12.) **Indeed, the Board itself found that these alleged concerns are unfounded when it determined that the Project met each of the other statutory requirements**, including that the Project represents the minimum adverse environmental impact, minimal ecological impacts, minimal traffic impacts, and minimal drainage and runoff impacts. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 106, 118, 122, 125, 128, 131, 132, 142, 149, 156, 162; ICN 165, Order on Rehearing ¶¶ 72, 75–76.)

- **Miami Township's concerns were considered and rejected by the Board.**

Don Hollister, Trustee for Miami Township, testified that Miami Township is opposed to the Project because it violates the local zoning code, even though such codes are not applicable to the Project pursuant to R.C. 4906.13. (TR VI at 1467–69.) Although he also expressed concern about setbacks, fencing, noise, road damage, drainage, erosion, and environmental consequences, Mr. Hollister also admitted the township conducted no studies to support these alleged impacts nor even mentioned these concerns in their resolution opposing the Project. (*Id.* at 1457–59, 1461.) And again, the Board determined that the Project's technical specifications were adequate to address these alleged concerns. Of note, Mr. Hollister made clear his bias against the Project, admitting that he is personally opposed to the Project and has even followed and commented on the Citizens for Green Acres opposition Facebook group since 2018. (*Id.* at 1463–66.)

- **Xenia Township's concerns were considered and rejected by the Board.**

Stephen Combs, Trustee for Xenia Township, expressed that the township is concerned about the long-term effects of the Project, and identified a laundry list of issues the Board should

address including decommissioning, health effects, pollution, runoff, dust, wildlife, traffic, emergency response services, property values, and tourism. (*Id.* at 1310–19.) Again, the Board determined that **each of these alleged issues have been adequately addressed by the application when it determined that the Project is compliant as to each of the other statutory requirements**. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 106, 118, 122, 125, 128, 131, 132, 142, 149, 156, 162; ICN 165, Order on Rehearing ¶¶ 72, 75–76.) As with the other two townships and the county, Xenia Township did not conduct any independent studies or demonstrate any actual impacts to the township. (TR VI at 1305–08, 1315–16.) Notably, Xenia Township has not expressed any opposition to a 30 MW solar project being developed by another company in the township. (*Id.* at 1300–01.)

- **The Board considered and rejected all of the County's and townships' concerns about the Project.**

As the Board's determinations as to the other statutory criteria establish, none of the unsubstantiated concerns of the local governing bodies for Greene County or the three townships have any foundation in the record. That includes the County and Townships' concerns related to visibility, tourism, traffic, noise, and other ecological impacts. And the vague and conclusory statements within the resolutions—that the Project is incompatible with the general health, safety, and welfare of the local communities—without actual evidence should not carry any weight—let alone *controlling* weight—in the Board's decision.

To be sure, the Board rejected any actual substance underlying the townships' and County's statements. The Board did not find that the localities' unsubstantiated statements had any merit as to the Project's viability and probable impact. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 106, 118, 122, 125, 128, 131, 132, 142, 149, 156, 162; ICN 165, Order on Rehearing ¶¶ 72, 75–76.) Instead, the Board only viewed the fact that there was opposition in general terms

as dispositive for rejection of the Project. (ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 145–51.) The Board had no basis for such a conclusion. Accordingly, the Board's decision to deny the application and reject the joint stipulation contrary to the evidentiary record is unreasonable and unlawful. The Court should reverse.

3. The joint stipulation is beneficial to the public interest.

The Board further held that its R.C. 4906.10(A)(6) determination "necessitates findings that (1) the Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Stipulation would violate an important regulatory principle or practice." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 169; ICN 165, Order on Rehearing ¶¶ 56–57.) As outlined in Section III(C) *infra*, the Board's determination under R.C. 4906.10(A)(6) that the Project fails to serve the public interest, convenience, and necessity is unlawful and unreasonable. For the reasons outlined below, the record evidence establishes that the Project will serve the public interest, convenience, and necessity. As such, the Board's rejection of the joint stipulation based on that false determination is likewise unlawful and unreasonable.

- **The joint stipulation contains significant protections and commitments by Kingwood.**

Furthermore, the conditions in the joint stipulation represent additional aspects of the Project that serve the public interest and conform to important regulatory principles and practices. The stipulation includes documenting commitments that Kingwood has made to coordinate with the local government on safety issues, such as the coordination regarding the traffic management and the emergency response training with the local communities. (ICN 97, Joint Stipulation pp. 7–8, Condition 24, Jt. Ex. 1.) It includes further protections for local wildlife and ecology through restrictions on work in perennial streams and the inclusion of wildlife-friendly fencing. (*Id.* at pp. 5–7, Conditions 15, 20, 21, 23.) It includes substantial concessions by the Applicant to reduce the

Project footprint by increasing the setbacks, with significant setbacks in the areas identified by local stakeholders as being particularly important. (*Id.* at pp. 3–4, Condition 4.) It includes substantial commitments to prevent drainage issues that would impact adjacent homeowners or farmers such as allowing access for Greene County Soil & Water Conservation District inspectors to be present during certain construction activities. (*Id.* at pp. 9–10, Conditions 32, 33, 34). And it includes increased landscape screening to further minimize visual impacts than originally proposed in the Application. (*Id.* at pp. 5–6, Condition 16.)

- **The joint stipulation requires significant consultation with local governments on the Project's progress.**

Additional conditions in the joint stipulation also require Kingwood to directly engage with local decision makers, including the Greene County Board of County Commissioners, the Cedarville Township Board of Trustees, the Xenia Township Board of Trustees, the Miami Township Board of Trustees, the Greene County Engineer, In Progress, LLC and the Greene County Soil & Water Conservation District. (*Id.* at pp. 3, 6, 7, 10, 11.) Local governmental officials can choose to attend preconstruction conferences. (*Id.* at p. 3.) Kingwood will make pre- and post-construction stormwater calculations and will submit the calculation, along with a copy of any stormwater submittals made to the Ohio EPA, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.* at p. 6.) If post-construction stormwater best management practices are required, Kingwood will submit construction drawings, detailing any stormwater control measures, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.*)

Additionally, prior to commencement of construction, Kingwood will consult with the Greene County Soil & Water Conservation District regarding seed mixes for the Project and shall

provide the tags on such seed mixes to the agency. (*Id.* at p. 7.) Kingwood will also coordinate with public officials such as the Greene County Engineer and local law enforcement for temporary road closures, road use agreements, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed Project. (*Id.*) Kingwood will also consult with the Greene County Soil & Water Conservation District and the Greene County Engineer to determine the location of any drain tile located in a county maintenance ditch to ensure that parcels adjacent to the Project area are protected from unwanted drainage problems due to construction and operation of the Project. (*Id.* at p. 10.)

- **The Board ignored all of the benefits of the joint stipulation and the Project and bowed to local pressure.**

The Board ignored all of these conditions and safeguards for the public, declining to address them at all in its Order. Instead, faced with pressure from local government entities, the Board allowed the fact that the intervening county and townships opposed the Project to dictate its action altogether. (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 168; ICN 165, Order on Rehearing ¶¶ 56–57.) This was unlawful and unreasonable and should be reversed. To be sure, the Board consistently approves similar stipulations that include similar, or even less restrictive, conditions—including where not all parties to the proceedings join the stipulation. *See, e.g.*, *In re Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (June 24, 2021), *affirmed in Alamo Solar*, 2023-Ohio-3778, at ¶ 2; *In re Union Ridge Solar, LLC*, Case No. 20-1757-EL-BGN, Opinion, Order, and Certificate (Jan. 20, 2022); *In re Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021).

The evidence in the record shows that the joint stipulation is in the public interest and does not violate regulatory principles or practices. The record also overwhelmingly shows the Project is in the public interest, convenience and necessity. The Board therefore was unlawful and unreasonable in rejecting the Stipulation and declining to issue a certificate. This Court should reverse these determinations.

C. Proposition of Law 2: The Board's consideration of and reliance on the local governmental authorities' positions on the Project to determine that the Project is not in the public interest, convenience and necessity (R.C. 4906.10(A)(6)) exceeded the Board's statutory authority and therefore was unlawful and unreasonable.

"[T]he [B]oard is a creature of statute, it can exercise only those powers the legislature confers on it." *In re Black Fork Wind Energy, LLC*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. As such, "[t]he relevant requirements [to obtain a certificate of environmental compatibility and public need] are set by the General Assembly, not by the Board." *Accord TWISM*, 2022-Ohio-4677, at ¶ 50. A key question in this case, then, is whether the General Assembly through its enactment of R.C. 4906.10(A)(6) allows the Board to consider, and then exclusively rely upon, the opinions of the local governmental authorities to determine that the project is not in the "public interest, convenience and necessity."

1. The plain and unambiguous language of R.C. 4906.10(A)(6) does not allow local government officials to dictate power siting decisions.

As this Court has recently clarified, the determination as to what statutory authority the Board has is for the Court to determine without mandatory deference to the Board's own interpretation. *See TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 3 ("[T]he judicial branch is never required to defer to an agency's interpretation of the law.").

When interpreting a statute, the Court must begin with the plain text of the provision. *See Elliot v. Durrani*, 2022-Ohio-4190, ¶ 8. "If 'the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation,' because 'an unambiguous statute is to be applied, not interpreted.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8 (quoting *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus). Ambiguity exists only if the statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16. In interpreting the statutory text, words should be given their customary meaning. *Weiss v. Pub. Util. Comm'n of Ohio*, 90 Ohio St.3d 15, 17, 2000-Ohio-5, 734 N.E.2d 775. The Court "may not add words to a statute to achieve a desired construction." *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 49. Indeed, where the statute is silent, the Court cannot add requirements for certification. *See TWISM*, 2022-Ohio-4677, at ¶ 19.

- **The Board's statutory directive as to the "public interest, convenience and necessity" is unambiguous.**

Here, the language of R.C. 4906.10(A)(6) is plain and unambiguous. R.C. 4906.10(A)(6) states, in relevant part, that the Board "shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines . . . [t]hat the facility will serve the public interest, convenience, and necessity[.]" (emphasis added). The terms "public interest, convenience, and necessity" are not defined in the statute. However, common dictionaries define "public interest" as "the general welfare and rights of the public that are to be recognized, protected, and advanced" and as "the welfare or well-being of the general public." *Public Interest*, Dictionary.com, https://www.dictionary.com /browse/public-interest (last visited Jan. 11, 2023); *Public interest*,

Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/interest (last accessed Jan. 11, 2023). Similarly, Black's Law Dictionary defines the term as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question."

- **Courts view public interest as benefitting or protecting the public at large.**

Courts have likewise defined "public interest" to mean for the benefit or protection of the public at large. When contrasting R.C. 4906.10(A)(3) with 4906.10(A)(6), this Court held that section 4906.10(A)(6) "require[s] the [Board] to answer . . . how much [a project] will ***benefit the public***." *Ohio Edison Co. v. Power Siting Com.*, 56 Ohio St.2d 212, 215, 383 N.E.2d 588 (1978) (emphasis added). Courts have similarly defined "public interest" as including the "protection" of the public, "support of the poor," "[r]elief of the unemployed," and levying of taxes "to provide funds for the maintenance" law enforcement and other welfare activities. *See State ex rel. Ross v. Guion*, 161 N.E.2d 800 (8th Dist.1959) (collecting cases).

- **The Board previously approved other projects that faced unanimous local governmental opposition.**

Additionally, the Board has approved, and this Court has affirmed, prior projects that faced "unanimous opposition" from affected local governmental entities, further evidencing that R.C. 4906.10(A)(6) does not contain any language that allows the Board to rely on such opposition to deny a project. *See, e.g.*, *In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 5; *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 8. And it is probative that the General Assembly recently amended the Revised Code to expressly grant county board of commissioners the authority to prohibit the construction of large

wind or solar facilities in certain areas of their counties. R.C. 303.58(A). Had the Code, prior to amendment, already permitted local governments to have this say in where future solar facilities may be located, there would have been no reason for Senate Bill 52. *See State ex rel. Corrigan v. Barnes*, 3 Ohio App.3d 40, 49, 443 N.E.2d 1034 (8th Dist. 1982) (Markus, J. concurring) ("If the former law already so provided, there would have been no reason for that amendment."). Indeed, SB 52 would be merely superfluous.

Moreover, this Project is explicitly grandfathered under that legislation. *See* 2021 Sub. S.B. No 52, Section 4(A). (*See also* ICN 5, Application, Appx. C, Kingwood Ex. 1 (system impact study issued December 2018); *and see* TR I at 142–44 (noting facility study payment made prior to SB 52 effective date).) Indeed, SB-52 explicitly does not apply retroactively. Yet, the Board apparently ignored this and attempted to apply its force against the Project. The Board lacks any authority to do so.

- **Other states also view the public interest as benefitting or protecting the public.**

Finally, although the General Assembly did not provide a definition for "public interest," other states have done so, and those definitions uniformly align with the plain meaning outlined above. *See, e.g.*, D.C. Code 16-5501 (defining "[i]ssue of public interest" to mean "an issue related to health or safety; environmental, economic, or community well-being . . ."); 70 Ill.Comp.Stat. 1863/2 ("'Public interest' means the protection, furtherance, and advancement of the general welfare and of public health and safety and public necessity and convenience."); Okla.Stat. tit. 59, 15.1A ("'Public interest' means the collective well-being of the community of people and institutions the profession serves[.]"). In sum, the plain and ordinary meaning of "public interest" means for the public good or for the public's benefit.

2. The public interest is not synonymous with public opinion or perception.

The plain meaning of "public interest" does not include public opinion or perception. Instead of looking at the "public interest, convenience, and necessity," the Board added the additional requirement that a project must be supported, or at a minimum not opposed, by vote of the local governmental officials of the localities where the project area will be sited. Indeed, the Board explicitly stated that it considered "the local *perception* of the Project." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 151 (emphasis added); ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) Yet, as the plain and unambiguous language of the statute provides, there is no textual basis in the statute for the Board to add in this requirement. There is no language in R.C. 4906.10(A)(6), or any other part of R.C. 4906.10, that authorizes the Board to rely upon local governmental (and political) opinions to deny a certificate. Indeed, the term "public interest" is not synonymous to "public opinion" or "local perception."

- **Public opinion is only a view or attitude.**

As commonly defined, "public opinion" means "the collective opinion of many people on some issue, problem, etc., especially as a guide to action, decision, or the like." *Public Opinion*, Dictionary.com, https://www.dictionary.com/browse/public-opinion (last visited Jan. 11, 2023). An "opinion" is merely "a belief or judgment that rests on grounds insufficient to produce complete certainty" or "a personal view, attitude, or appraisal." *Opinion*, Dictionary.com, https://www.dictionary.com/browse/opinion (last visited Jan. 11, 2023). Likewise, "perception" means the "result of perceiving" or an "observation." *Perception*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/perception (last accessed Jan. 11, 2023).

- **An opinion is not the same as welfare and well-being.**

By their plain meaning, "public opinion" or "perception" do not include "the welfare or well-being of the general public." And what benefits the "public interest" is oftentimes not the popular view among a community. *See, e.g.*, *Wildwest Inst. & Friends of v. Bull*, No. CV 06-66-M-DWM, 2006 U.S. Dist. LEXIS 111495, at *25 (D. Mont. June 30, 2006) (finding two problems with reliance on public comments to show "public interest": (1) "the concepts of public opinion and the public interest [] are not necessarily the same," and (2) ascertaining actual "public opinion" is extremely difficult).

- **The Board found that "opinion" alone was enough to deny the Project's application.**

Of significance, the Board not only considered these unsubstantiated opinions, but it determined that those opinions alone are enough to defeat an entirely compliant project under R.C. 4906.10. The Board "acknowledge[d]" that the Project offers many public benefits, including "(1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels, (4) protecting landowner rights, and (5) preserving long-term agricultural land use." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 149; ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) Despite these numerous benefits, the Board held that "the unanimous opposition of every local government entity that borders the Project ***is controlling*** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 145.) As such, the Board not only disregarded the significant benefits that the Project will bring to the public, it also impermissibly focused on singular local issues rather than the statewide implications of the Project. Even locally, however,

there was not "unanimous opposition" as only three of the twelve townships of Greene County voiced opposition to the Project.

- **Allowing public opinion to override countywide and statewide benefits is unlawful and unreasonable.**

Interpreting R.C. 4906.10(A)(6) to include consideration of "local government opinion" and the broader "public opinion" is unlawful and unreasonable given the plain language of the statute. In other words, relying upon unfounded opinions by local government officials and a vocal minority, and allowing those opinions to outweigh the vast evidence of how the Project serves the actual public interest, convenience, and necessity falls far beyond the express statutory criterion. Accordingly, by including the additional requirement that the Project must be supported by at least some local governmental officials, the Board exceeded its statutory grant of authority.

The Board's denial of Kingwood's application for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio on the sole ground that the Project was opposed by some vocal minority and the local government entities is therefore unlawful and unreasonable. The Court therefore should reverse.

D. <u>Proposition of Law 3</u>: The Board's reliance on the positions of the local governing body of Greene County and the three intervening townships to deny Kingwood's certificate application was an impermissible delegation of the Board's decision-making authority to the local governing body of Greene County and the three intervening townships as to the determination required by R.C. 4906.10(A)(6) and consequently the determination of whether to issue a certificate of environmental compatibility and public need was impermissible, unlawful and unreasonable.

Expanding what may be considered as serving the public interest, convenience, and necessity to include public opinion and perception not only exceeds the Board's statutory authority, it also impermissibly delegates the Board's decision-making authority to local governing

bodies or a vocal minority. The enabling statute is again clear that "the [B]oard's authority to grant certificates under section 4906.10 of the Revised Code *shall not be exercised* by any officer, employee, *or body other than the board itself*." R.C. 4906.02(C) (emphasis added); *see also In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010 Ohio 1841, 928 N.E.2d 427, ¶¶ 20–21; *In re Buckeye Wind*, 2012-Ohio-878, at ¶ 13. As such, the power to oversee the siting, construction, and operation of major utility facilities, including solar facilities, has been given to one entity alone—the Power Siting Board. Local government entities, including elected representatives, zoning commissions, and county courts, have no say over whether, where, or how major utility projects may be built and run. *See* R.C. 4906.13(B).

- **The Board ruled in Kingwood's favor on all factual points but denied the application solely based on "opinion".**

In these proceedings, the Board went to great lengths to outline how Kingwood's Project met every technical criteria. (*See generally* ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 87–132, 153–62; ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) The Board further outlined the significant benefits that the Project would provide to the public good. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶ 149; ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) Despite this technical compliance and the Project's established benefits to the public interest, the Board denied Kingwood's application for **the sole reason** that the intervening local governmental entities passed "uniform" resolutions opposing the Project. (ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 150, 152; ICN 165, Order on Rehearing ¶¶ 30, 34, 38.) In effect, the Board abdicated its exclusive decision-making authority to these local entities.

Because the Board has the exclusive authority to grant certificates, its deference to the opinions of local government entities in denying Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility

in Greene County, Ohio is unlawful and unreasonable. The Court should reverse and make clear that the Board itself must exercise the discretionary function of siting solar facilities.

- **Local input must be more than "we just don't want it".**

To be clear, Kingwood is not suggesting that local governing bodies and members of the public cannot engage in the certification process. To the contrary, the Board has specific procedures that allow for an entity or individual to intervene in the proceedings and present evidence. *See* Ohio Admin. Code 4906-2-12. Admissible evidence presented by intervening parties may properly be considered by the Board. *See* Ohio Admin. Code 4906-2-13. However, unsubstantiated and inadmissible opinions from the public and the passage of resolutions by local governing bodies outlining vague opinions related to the Project or solar energy generally is not sufficient to establish whether the Project serves the public interest. To allow otherwise walks a dangerous path that leads to energy development in this State being determined not by the Board—the body tasked by the General Assembly to do so—but rather by the whims of politics at the local governmental entity level.

The General Assembly expressly delegated the authority to grant certificates of environmental compatibility and public need to the Board, thereby allowing the Board's expertise to drive energy development in Ohio and insulating, in part, the decision-making process from outside political motivations. The Board's decision in these proceedings and sole reliance on the opinion of local governmental entities abdicated the certification process from the Board's expertise and placed it in the hands of politically-motivated local bodies. That is unlawful and unreasonable and warrants reversal.

E. <u>Proposition of Law 4</u>: The Board's change of its interpretation for what is required to meet the "public interest, convenience, and necessity" criterion of R.C. 4906.10(A)(6) to now allow unanimous opposition by local governmental authorities within the project area to be a basis for the Board to deny a certificate without a reasonable basis for doing so is unlawful and unreasonable.

Even assuming *arguendo* that the "public interest, necessity, and convenience" criterion of R.C. 4906.10(A)(6) included a requirement for local and public support of a project or even was ambiguous as to such a requirement, the Board's long-standing precedent establishes that no such requirement exists. This Court has made clear that administrative agencies must respect their prior precedent. *Bernard v. Unemp. Comp. Rev. Comm.*, 136 Ohio St.3d 264, 2013-Ohio-3121, ¶ 12, 994 N.E.2d 437; *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16. Although the Board is allowed to change its prior interpretations, it may only do so with a reasonable basis. *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶¶ 16, 28.

- **The Board has historically found that project benefits outweigh strong unanimous local governmental opposition.**

For years, the Board, and this Court, has evaluated R.C. 4906.10(A)(6) broadly by considering whether a proposed project benefits the general public—as the plain language of the statute directs. *In re Application of Duke Energy Ohio, Inc.*, 158 Ohio St. 3d 1501, 2020-Ohio-2803, 144 N.E.3d 438, at ¶ 30 (noting that division (A)(6) requires the Board to account for the "public"); *see also In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Entry on Rehearing (Feb. 20, 2022), at ¶ 35 ("[t]he interests of the general public are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6)").

In making this determination, the Board considered various factors, including public interaction, economic benefits, public safety, energy generation, noise, electrical interference,

aesthetic impacts, and local natural resources. *See, e.g., In re Big Plain Solar, LLC*, Case No. 19-1823-EL-BGN, Opinion, Order, and Certificate (Mar. 18, 2021), at ¶¶ 65–67 (noting applicant's interaction with public and analyzing public safety); *In re Aquila Fulton Cty. Power, LLC*, Case No. 01-1022-EL-BGN, Opinion, Order, and Certificate (May 20, 2002), at ¶¶ 12–13 (public need, economic impact, public safety, noise, aesthetic impact, electrical interference, and impact to natural resources); *In re Duke Energy Madison, LLC*, Case No. 98-1603-EL-BGN, Opinion, Order, and Certificate (May 24, 1999), at 10–11 (public need, public safety, noise, and aesthetic impact).[3]

Indeed, the Board has taken the position in prior matters that local and/or political opposition, even strong "unanimous" opposition, is not sufficient to outweigh the benefits a project will generate for the public interest of the broader community and the State as a whole. *See e.g., In re Champaign Wind, LLC*, PUCO Case No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013), *affirmed by* 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142 (issuing certificate even though the county and townships in the project area unanimously opposed the project); *In re Buckeye Wind, LLC*, PUCO Case No. No. 08-666-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010), *affirmed by* 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869 (same); *see also In re The Ohio State University*, Case No. 19-1641-EL-BGN, Opinion, Order, and Certificate (Sep. 17, 2020), at ¶¶ 90–93 (noting applicant's public interaction and analyzing economic impacts and safety); *In re Willowbrook Solar I, LLC*, Case No. 18-1024-EL-BGN, Opinion, Order, and Certificate (Apr. 4, 2019), at ¶¶ 51–53 (public interaction and public safety);

[3] *See also In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area); *In re Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (June 24, 2021), at ¶ 293 (holding that despite local citizens' testimony, the project would not create more opportunity for crime in the locality and the applicant had proposed adequate safety measures and setbacks, risk mitigation plans, and that the amended joint stipulation benefited the public).

In re Guernsey Power Station, LLC, Case No. 16-2443-EL-BGN, Opinion, Order, and Certificate (Oct. 5, 2017), at ¶¶ 43–45 (public interaction and public safety); and *In re Clean Energy Future-Lordstown, LLC*, Case No. 14-2322-EL-BGN, Opinion, Order, and Certificate (Sep. 17, 2015), at 21–22 (public interaction, economic impact, and public safety).

- **Now the Board allows for "local veto" to outweigh a project's statewide and local benefits.**

Recently, however, the Board shifted course to allow local governmental entities the ability to effectively veto a project through their unsubstantiated opposition to a project. Specifically, the Board unreasonably changed its interpretation of R.C. 4906.10(A)(6) to allow local government opinions to control the decision whether the Project is in the public interest, convenience and necessity. *See In re Birch Solar I, LLC*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) at ¶ 72 ("Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)."); *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021), at ¶ 91 ("As part of the Board's responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, we must balance projected benefits against the magnitude of potential negative impacts on the local community."); *In re American Transmission Systems, Inc. (ATSI)*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022), at ¶ 81 (expanding its interpretation of R.C. 4906.10(A)(6) to include local public opinion).

The Board has not provided any reasonable basis for this departure from its prior precedent—indeed, no reasonable basis exists. As outlined above, there is no statutory hook for this new interpretation. And the enabling statute explicitly forbids the Board from delegating its

decision-making authority to local governmental entities. The Board has no justification for why one renewable energy facility that faced uniform opposition from the local governments in the project area was approved and issued a certificate, *see In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN, while Kingwood's proposed facility that faced similar uniform opposition from the intervening county and townships was denied. **Strong local opposition alone against a proposed project cannot trump the benefits it will generate for the general public or overshadow a fully compliant project.** Indeed, public opinion is often just that—opinion, not probative or admissible evidence. Because the Board unreasonably departed from precedent and its prior interpretation of R.C. 4906.10(A)(6), the Court should reverse.

F. Proposition of Law 5: The Board's consideration of and reliance in its Order on public comments that are not a part of the record in these proceedings violates R.C. 4906.10(A), and was therefore unlawful and unreasonable.

Even if the Board could consider public opinion and comments, it may only do so if those opinions and comments are in the record. In its Order, the Board gave substantial weight to "the overwhelming number of public comments filed in the case, which largely disfavor the Project." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 151; ICN 165, Order on Rehearing ¶ 42.) Despite acknowledging that these comments "fall short of being admitted evidence in the case," the Board "affirm[ed] that they add value to the Board's consideration of the local perception of the Project." (*Id.*) The Board also found that the "comments reinforce, rather than contradict, the conclusions of the government bodies[.]" (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 151). "Based on this supposed opposition and the opposition from the local government entities, the Board determined that the Project "fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 152; ICN 165, Order on Rehearing ¶ 42.)

- **Public comments submitted outside the public hearing are not in the record.**

By its own admission, the public comments relied on by the Board are not in the evidentiary record of these proceedings. (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 151; ICN 165, Order on Rehearing ¶ 42.) R.C. 4906.09 states that "[a] record shall be made of the hearing and of all testimony taken[.]" R.C. 4906.10(A) provides that the Board "shall render a decision ***upon the record*** either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate." (emphasis added). The rules governing the Board procedures further clarifies that "[w]ithin a reasonable time after the conclusion of the hearing, the board shall issue a final decision ***based only on the record***[.]" Ohio Admin. Code 4906-2-30 (emphasis added); *see also In re Champaign Wind*, 2016-Ohio-1513, at ¶ 24 ("The board must base its decisions in each case on the factual record before it."). Yet, the Board reviewed the public comments received, counted the comments, and relied on the comments in making its decision. (ICN 146, Dec. 15, 2022 Opinion & Order ¶¶ 38–43, 148, 150, 151; ICN 165, Order on Rehearing ¶ 42.)

- **The Board's reliance on public comments not in the record was unlawful.**

Because the Board relied on public comments that are outside of the record in these proceedings, it violated R.C. 4906.10(A) and Ohio Admin. Code 4906-2-30. Accordingly, its decision that the Project fails to serve the public interest based on these public comments is unlawful and unreasonable. The Court should reverse and remand with instructions that the Board render a decision based upon the record.

G. <u>Proposition of Law 6</u>: The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, was unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have complete and sufficient information on the nature of Staff's investigation including whether Staff's investigation was outcome determinative, in violation of R.C. 4906.07(C) and in violation of Kingwood's due process rights.

Transparency is an important component of any administrative proceeding. In this proceeding, however, the Board did not have all necessary information as to the nature of Staff's investigation of the application and of the proposed Project. Kingwood could have provided that information but for the Board's refusal to have its Executive Director Ms. White, testify on a major irregularity in regards to the Staff Report.

1. Absent Ms. White's testimony, the Board did not have complete information on the nature of Staff's investigation in violation of R.C. 4906.07(C).

In denying Kingwood's interlocutory appeal and affirming the ALJ's refusal to issue a subpoena for the Board's Executive Director to testify, the Board failed to rectify the failure of the Staff's Report and Recommendation to comply with R.C. 4906.07(C). That statute requires the chairperson of the Board to investigate the application and prepare a written report to the Board and the applicant with recommended findings on the statutory criteria and importantly, that report becomes part of the record. R.C. 4906.07(C). Among other specific requirements, the statute explicitly states that the "report *shall* set forth the nature of the investigation." *Id.* (emphasis added).

There is no dispute that the Staff Report and Recommendation, as submitted on October 29, 2021, **does not** set forth the nature of the investigation. The record of the hearing clearly shows that Staff reached out to each of the local governments the day prior to the issuance of the report.

(TR VIII at 1942.)[4] That late outreach and the reason for that late outreach is not, however, included anywhere in the Staff Report. It should be undisputed that the Staff Report failed to comply with the statute because it did not detail the full nature of the investigation. (*See* ICN 57, Staff Report.) The ALJ and then the Board refused to allow Kingwood to present evidence on why Staff conducted that outreach and the extent of that outreach, evidence that would have been elicited through the testimony of the Board's Executive Director, Theresa White. (TR VIII at 1962–63; ICN 146, Dec. 15, 2022 Opinion & Order ¶ 79; ICN 165, Order on Rehearing ¶ 61.) That refusal was unlawful and unreasonable.

- **The Board's Executive Director's directive to Staff to solicit local governmental input impermissibly changed the outcome of the Staff Report.**

Ms. White's testimony was very important to Kingwood's presentation to challenge the basis for and validity of Staff's recommendation that the Project did not satisfy the public interest, convenience and necessity criteria of R.C. 4906.10(A). A day before the Staff Report was due to be issued, the Executive Director directed at least one subordinate, Ms. Juliana Graham-Price, to solicit various intervening local public entities on their position on the project. (TR VIII at 1942.) Hours after those solicitations, the Greene County Board of Commissioners issued a resolution against the Project and then filed it with the Board on the same day that Staff reversed its recommended approval to a recommended denial. (TR VII at 1785, 1842–43.) And while the County passed a resolution against the Project, as of that date none of the three townships had issued a resolution opposing the Project.

[4] Note, the Order states that Ms. Graham-Price reached out to the local governments on both October 21 and October 28, 2021. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶ 77; ICN 165, Order on Rehearing ¶ 61.) While Ms. Graham-Price testified that she was directed to reach out (and did reach out) on October 28, the Order does not include a reference to the October 21 outreach.

- **Yet Kingwood was prevented from examining the Board's Executive Director on the last minute outreach.**

As established from other testimony in the proceedings, particularly from Ms. Juliana Graham-Price, Ms. White's involvement was central to Staff's investigation and last-minute change in recommendation. Indeed, Ms. White is the *only* person who knew why the Staff made last-minute outreach to the local entities. Yet, Kingwood was precluded on multiple occasions from being able to call Ms. White to testify in these proceedings.

In its Order, though the Board claims "the record is clear as to Staff's investigation of the positions of local government entities," the record reveals otherwise. (ICN 146, Dec. 15, 2022 Opinion & Order ¶ 79; ICN 165, Order on Rehearing ¶ 61.) Nothing in the record indicates 1) what prompted Ms. White to initiate the outreach at the very last minute and after the Staff Report had been drafted to recommend approval of the project; 2) that Ms. Graham-Price was the only staff member or staff representative directed by Ms. White to reach out to the local government entities; or 3) if Ms. White directed any other staff member or representative (including counsel) to reach out to the local government entities or their representatives (including counsel), what those conversations included. By restricting Kingwood's ability to question Ms. White about the reason for and the full extent of local outreach, the Board allowed the Staff Report to be presented to the Board and included in this record as evidence without transparency on the full nature of the Staff investigation (*see* R.C. 4906.07(C) mandating the Report automatically becomes part of the record). That was unlawful and unreasonable.

Accordingly, if the Court otherwise would affirm the Board's decision, it should reverse and remand with instructions to the Board to allow Kingwood to call Ms. White to the stand to ensure full transparency of the Staff investigation and to shed light on what has been withheld from the Board.

2. Absent Ms. White's testimony, the Board did not have sufficient information on why the OPSB Staff was soliciting the local governmental authorities positions on the Project on the eve of the date the Staff's Report and Recommendation was due and after the Staff had already recommended approval of the Project in the current draft of the Staff Report and Recommendation.

In a Board proceeding, the Staff Report is a watershed moment. As Staff witness Grant Zeto agreed, a Staff recommendation to approve or deny an application can impact the entire trajectory of the proceeding. (TR VII at 1903.) A recommendation to approve a project may cause project opponents to consider reasonable compromises to improve the project in a way that addresses specific impacts. On the other hand, a recommendation to deny an application can embolden project opponents and severely curtail the ability of a project to effectively address those opponents' reasonable concerns. Such was the case in this proceeding. Staff's recommendation in the Report to deny the application severely limited any opportunity for Kingwood to effectively negotiate with various Project opponents.[5]

In this case, Kingwood worked diligently to develop a complete record of Staff's investigation and the irregularities that surfaced with each question. Kingwood, during pre-hearing discovery, identified that at least one Greene County staff member had spoken with Board Staff. (*See, e.g.*, TR IV at 807; *see also* TR V at 1086–94.) By following the thread, which included subsequent subpoenas, Kingwood was able to establish that Ms. Graham-Price, at the

[5] In the Order, the Board clearly identifies that opposition to the Project picked up and coalesced *after* the Staff Report was issued:

> Following the issuance of the Staff report, additional local government opposition included (1) the adoption of Project opposition resolutions by all three affected townships, (2) active participation in opposition to the Project by all four government entities in the evidentiary hearing.

(ICN 146, Dec. 15, 2022 Opinion & Order ¶ 139; ICN 165, Order on Rehearing ¶ 65.)

explicit direction of Ms. White, had reached out to the local governments the day before the Staff Report was issued to solicit their input. (TR VIII at 1942.) Kingwood further established that the initial recommendation to approve the Project was reversed on October 29, the same day the Staff Report was issued. (TR VII at 1785; 1842–43.) However, because Kingwood was prevented from subpoenaing Ms. White, her explanation about why the outreach was initiated and whether that outreach was for a reason other than investigating Kingwood's application are not included in the record.

- **The Board found "no impropriety" despite admitting contact was made, but did not allow for any examination to challenge this finding.**

Instead of directly addressing the lack of information about this process in the Order, the Board relied on the "collective testimony" of Staff and summarily concluded that Staff did not act with impropriety. (*See* ICN 146, Dec. 15, 2022 Opinion & Order ¶ 79 ("Further we find no impropriety as to the nature and timing of Staff's communications" and "we find no impropriety as to similar communications[.]"); ICN 165, Order on Rehearing ¶ 65.) But nowhere in the Order does the Board conclude that all relevant information was included in the record. Because Kingwood was unable to question Ms. White, it was unable to ask what prompted such outreach—outreach which was highly irregular. It was imperative for the Board to hear Ms. White's testimony to actually evaluate the true impetus for the outreach at the eleventh hour, and then evaluate the irregularity of Staff's solicitation based on that information to determine whether Staff's recommendation was improperly influenced.

Only Ms. White can testify about why she directed at least one subordinate to solicit local officials the day prior to when the Staff Report issued. Likewise, only Ms. White can testify on whether other representatives of the Commission or the Board communicated with the local

governmental officials or their counsel. Again, Kingwood discovered new information with every overturned stone as it pursued this issue at the hearing. Kingwood was then blocked from overturning another stone—which would have been Ms. White's testimony. Without her testimony, the record is incomplete. As a result, the Board's decision to affirm the ALJs' refusal to issue a subpoena for Ms. White to testify was unlawful and unreasonable.

3. The denial of the subpoena requests constitutes a violation of due process as Kingwood was unable to put on evidence that the Staff's Report and Recommendation, which set the tone for the remainder of the proceeding, was outcome determinative and not based on an analysis of Kingwood's application.

Staff and the Board's failure to allow Kingwood to call on the Executive Director to testify infringed on Kingwood's right to due process. The right to due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *Youngstown v. Traylor*, 123 Ohio St.3d 132, 2009 Ohio 4184, ¶ 8, 914 N.E.2d 1026. "Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution require that administrative proceedings comport with due process." *Richmond v. Ohio Bd. of Nursing*, 10th Dist. No. 12AP-328, 2013-Ohio-110, ¶ 10 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 554 N.E.2d 97 (1990)).

At a minimum, due process requires notice and the opportunity to be heard. *Krusling v. Ohio Bd. of Pharmacy*, 12th Dist. No. CA2012-03-023, 2012 Ohio 5356, ¶ 13, 981 N.E.2d 320 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L. Ed. 865 (1950)). Such an opportunity to be heard requires the "full opportunity to present all evidence and arguments which the party deems important[.]" *Reed v. Morgan*, 12th Dist. No. CA2011-03-065, 2012 Ohio 2022, ¶ 11.

- **Kingwood was denied the opportunity to challenge the unusual last minute outreach that changed the outcome of the Staff Report.**

In this case, Kingwood sought to elicit additional evidence to fully understand why the Board's Executive Director ordered a subordinate to solicit the positions of the intervening local governmental entities on the eve of the issuance of a Staff Report that, as then drafted, recommended approval of the Project. Kingwood also sought to elicit evidence on whether the process to finalize the Staff report was improperly influenced and whether the recommendation was influenced by interests outside Board Staff. Only Ms. White could explain the actual reason for the highly irregular, eleventh-hour outreach to the local governmental entities. Kingwood's requests for Ms. White's testimony to complete the record, however, were consistently denied. (TR VII at 1912-13; TR VIII at 1962–63.)

There is no dispute that the Board has the authority to grant Kingwood's subpoena. *See, e.g., In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 48, 2013-Ohio-5478, 3 N.E.3d 173. And there is no dispute that Kingwood availed itself of this authority by requesting the subpoena. (*See, e.g.*, TR VIII at 1962–63; ICN 146, Dec. 15, 2022 Opinion & Order ¶ 79; ICN 165, Order on Rehearing ¶ 69.) Yet, the ALJs and the Board denied the request by explaining that Ms. White's testimony is "unwarranted." (TR VIII at 1962–63; ICN 146, Dec. 15, 2022 Opinion & Order ¶ 79; ICN 165, Order on Rehearing ¶ 69.) This is not a valid reason to deny or quash a subpoena. The ALJ and Board may only do so if the subpoena "is unreasonable or oppressive." Ohio Admin. Code 4906-2-23(C). Neither the ALJ nor the Board made any such determination and her testimony was relevant because if the Staff's investigation was shown to be outcome determinative, then that fact would have been of consequence to the Board's consideration of Kingwood's application and its consideration of the Staff's recommendation and testimony.

The Executive Director's testimony was critical to allow Kingwood to fully present the arguments it deemed important and necessary. The Board's refusal to allow Kingwood to call the Executive Director constitutes a due process violation. Accordingly, the Board's decision to deny Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony Ms. White is unlawful and unreasonable and requires reversal.

IV. CONCLUSION

An administrative agency has ignored the plain language of its governing statute at the expense of the rights of landowners to use their property for lawful purposes. Allowing an agency to ignore the law based on political whims creates an opening for the destruction of the balance between the citizenry and the government it has formed. To ensure compliance with the plain language of R.C. 4906.10(A) and protect separation of powers principles, the Court should reverse the Board's Order and remand with instructions to approve the joint stipulation and issue Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio. The Ohio Power Siting Board cannot ignore its governing statutes to reach a desired result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 2023, a copy of the foregoing brief was served by electronic mail on the following:

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APPENDIX

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

OPINION AND ORDER

Entered in the Journal on December 15, 2022

I. SUMMARY

{¶ 1} The Ohio Power Siting Board (1) rejects the stipulation and recommendation between Kingwood Solar I LLC and the Ohio Farm Bureau Federation and (2) denies the application of Kingwood Solar I LLC for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio.

II. INTRODUCTION

{¶ 2} In this Opinion and Order, the Ohio Power Siting Board (Board) denies the application of Kingwood Solar I LLC (Kingwood or Applicant) to construct, maintain, and operate the proposed solar-powered electric generation facility. Specifically, the Board concludes that Kingwood does not satisfy R.C. 4906.10(A)(6), which requires that, in order to receive Board certification, a project must serve the public interest, convenience, and necessity.

III. PROCEDURAL BACKGROUND

{¶ 3} All proceedings before the Board are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906-1, et seq.

{¶ 4} Kingwood is a person defined in R.C. 4906.01.

{¶ 5} On March 11, 2021, Kingwood filed a pre-application notification letter with the Board regarding its proposed solar-powered electric generation facility in Cedarville,

Miami, and Xenia townships, Greene County, Ohio with up to 175 megawatts (MW) of electric generating capacity (Project or Facility).

{¶ 6} On March 30, 2021, Applicant held both an internet-based and a telephonic public informational meeting for the Project. On March 30, 2021, Kingwood filed proof of its compliance with Ohio Adm.Code 4906-3-03(B), requiring that notice of the public informational meeting be sent to each property owner and affected tenant and be published in a newspaper of general circulation in the project area.

{¶ 7} On April 16, 2021, Kingwood filed (1) an application with the Board for a certificate of environmental compatibility and public need to construct and operate the Facility, and (2) a motion for protective order and memorandum in support.

{¶ 8} Between April 27, 2021 and August 5, 2021, notices of intervention or motions to intervene were filed separately by Cedarville Township Board of Trustees (Cedarville Township), Xenia Township Board of Trustees (Xenia Township), Miami Township Board of Trustees (Miami Township), In Progress LLC (In Progress), Tecumseh Land Preservation Association (Tecumseh), Citizens for Greene Acres (CGA), Greene County Board of Commissioners (Greene County), and Ohio Farm Bureau Federation (OFBF). No memoranda contra were filed in opposition to the intervention requests.

{¶ 9} On August 26, 2021, the administrative law judge (ALJ) granted intervention to Cedarville Township, Xenia Township, Miami Township, In Progress, Tecumseh, CGA, Greene County, and OFBF.

{¶ 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. By letter dated June 15, 2021, the Board's Executive Director (1) notified Kingwood that its application was compliant and provided sufficient information to permit Staff to commence its review and

investigation, (2) directed Kingwood to serve appropriate government officials and public agencies with copies of the complete, certified application and to file proof of service with the Board, and (3) instructed Kingwood to submit its application fee pursuant to R.C. 4906.06(F) and Ohio Adm.Code 4906-3-12.

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

{¶ 12} On June 28, 2021, Kingwood filed notice of its intent to hold an in-person public information meeting on June 29, 2021, which was intended to supplement the remote public information meetings that were conducted on March 30, 2021.

{¶ 13} By Entry issued August 26, 2021, the ALJ (1) established the effective date of the application as August 26, 2021, (2) set a procedural schedule, including scheduling a local public hearing for November 15, 2021, and setting an adjudicatory hearing to begin on December 13, 2021, (3) directed Kingwood to issue public notices of the application and hearings pursuant to Ohio Adm.Code 4906-3-09 indicating that petitions to intervene would be accepted by the Board up to 30 days following service of the notice or by October 8, 2021, whichever was later, and (4) provided deadlines for all parties to file testimony, as well as for the filing of any stipulation.

{¶ 14} On September 8, 2021, Applicant filed proof of publication of its accepted, complete application in the *Yellow Springs News*, the *Xenia Gazette*, and the *Fairborn Daily Herald*.

{¶ 15} On September 27, 2021, Applicant filed a motion for a protective order regarding its archaeological study, which was being provided to Staff in response to a data request on May 17, 2021.

{¶ 16} On October 29, 2021, Staff filed its Report of Investigation (Staff Report) pursuant to R.C. 4906.07(C).

{¶ 17} On November 3, 2021, Applicant filed proof of second public notice and publication of second public notice of its accepted, complete application.

{¶ 18} On November 10, 2021, the ALJ (1) granted Applicant's motion for protective order from September 27, 2021, and (2) converted the evidentiary hearing to a remote format in response to the continuing COVID-19 pandemic.

{¶ 19} The local public hearing was conducted as scheduled on November 15, 2021.

{¶ 20} On November 22, 2021, Applicant and OFBF filed a joint motion to continue procedural deadlines and to convert the evidentiary hearing to a status conference in order to allow for the parties to present the ALJ with a settlement status update.

{¶ 21} On November 24, 2021, the ALJ granted the motion to continue the procedural deadlines and convert the evidentiary hearing to a status conference.

{¶ 22} On December 13, 2021, the ALJ called and continued the evidentiary hearing. Further, the parties updated the ALJ regarding the status of settlement negotiations among the parties.

{¶ 23} On December 22, 2021, the ALJ (1) ordered that the evidentiary hearing reconvene, virtually, on March 7, 2022, and (2) established a revised procedural schedule.

{¶ 24} On February 9, 2022, Applicant filed a motion for protective order regarding an addendum to its archaeological study, which was being provided to Staff in supplemental response to a data request on May 17, 2021. Applicant's motion was not opposed.

{¶ 25} On February 15, 2022, Applicant and OFBF filed a joint motion to continue deadlines, including the evidentiary hearing on March 7, 2022, based on the potential for ongoing settlement negotiations in the case. Joint movants represented that Staff and In Progress did not oppose the motion.

{¶ 26} On February 16, 2022, intervenors Xenia Township, Miami Township, Cedarville Township, and CGA filed a memorandum in opposition to the joint motion to continue deadlines, in which the opponents described that their negative view of the Project is such that extending the time for settlement negotiations is unreasonable.

{¶ 27} On February 17, 2022, the ALJ denied the joint motion for continuance and ordered that the hearing proceed as scheduled on March 7, 2022.

{¶ 28} On March 4, 2022, a joint stipulation (Stipulation) was filed by Kingwood and OFBF (Jt. Ex. 1).

{¶ 29} The adjudicatory hearing commenced as scheduled on March 7, 2022, and concluded at the close of rebuttal witness testimony on April 26, 2022. During the hearing, 12 witnesses testified on behalf of Applicant[1], 13 witnesses testified on behalf of intervenor CGA, 11 witnesses testified on behalf of Staff, 5 witnesses testified on behalf of Greene County and the three intervenor townships, and 1 witness testified on behalf of Tecumseh.

{¶ 30} On June 13, 2022, Kingwood, Staff, Xenia Township, Miami Township, Cedarville Township, Greene County, CGA, and In Progress timely filed initial post-hearing briefs.

{¶ 31} On July 22, 2022, Kingwood, Staff, CGA, and Greene County timely filed post-hearing reply briefs. Additionally, Miami Township, Xenia Township, and Cedarville Township filed a timely joint reply brief.

{¶ 32} On August 15, 2022, Kingwood filed a motion to strike portions of the initial post-hearing briefs filed by CGA and Cedarville Township claiming that the briefs relied on information that was outside of the record of the case. On August 26 and August 29, 2022, CGA and Cedarville Township filed responses to Kingwood's motion to strike, respectively.

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1 Kingwood also presented witness Nicole Marvin, a CGA member, as on cross examination pursuant to a subpoena (Tr. IV at 865).

On September 6, 2022, Kingwood filed a reply to the response to strike filed by Cedarville Township.

{¶ 33} On August 26, 2022, Kingwood filed notice of additional authority, which was the decision of the Supreme Court of Ohio in *In re Application of Icebreaker Windpower, Inc.*, Slip Opinion No. 2022-Ohio-2742 (Aug. 10, 2022).

IV. PROJECT DESCRIPTION

{¶ 34} Kingwood intends to construct a 175 MW solar-powered electric generating facility in Cedarville, Miami, and Xenia townships in Greene County. The Project will consist of large arrays of photovoltaic modules (solar panels), totaling approximately 410,000, which will be ground-mounted on a tracking rack system. The Project will occupy approximately 1,200 acres of private land secured by Kingwood through agreements with landowners. The Project will include associated facilities such as 11.3 miles of new access roads, an operations and maintenance building, underground and aboveground electric collection lines, a 20-foot-tall weather station, inverters and transformers, a collection substation, and a 138 kilovolt (kV) gen-tie electric transmission line. The Project will be secured by perimeter fencing which will be seven-feet tall and accessed through gated entrances. Applicant will ensure that solar modules are setback a minimum of (1) 250 feet from adjacent non-participating property lines, and (2) 500 feet from the Project's inverter stations to adjacent non-participating property lines. (Staff Ex. 1 at 6-8; Jt. Ex. 1 at 1-4.)

{¶ 35} If approved, construction was anticipated to begin in the second quarter of 2022 and be completed by the fourth quarter of 2023. According to Applicant, delays could impact project financing. (Staff Ex. 1 at 8.)

V. CERTIFICATE CRITERIA

{¶ 36} Pursuant to R.C. 4906.10(A), the Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless it finds and determines all of the following:

(1) The basis of the need for the Facility if the facility is an electric transmission line or a gas or natural gas transmission line;

(2) The nature of the probable environmental impact;

(3) The Facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that the Facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the Facility will serve the interests of electric system economy and reliability;

(5) The facility will comply with R.C. Chapters 3704, 3734, and 6111, as well as all rules and standards adopted under those chapters and under R.C. 4561.32;

(6) The Facility will serve the public interest, convenience, and necessity;

(7) The impact of the Facility on the viability as agricultural land of any land in an existing agricultural district established under R.C. Chapter 929 that is located within the site and alternate site of any proposed major facility; and

(8) The facility incorporates maximum feasible water conservation practices as determined by the Board, considering available technology and the nature and economics of various alternatives.

VI. SUMMARY OF LOCAL PUBLIC HEARING TESTIMONY, PUBLIC COMMENTS, AND STAFF REPORT

A. Public Participation/Public Input

{¶ 37} Before reviewing the evidence presented at the adjudicatory hearing regarding the statutory certification criteria, the Board will address the testimony provided during the local public hearing and the public comments filed to the record.

{¶ 38} During the nearly six-and-one-half-hour local public hearing that was held on November 15, 2021, opposition testimony (76 percent) outweighed support testimony (24 percent), with 51 of the 68 witnesses expressing opposition to the Project and 16 supporting it.[2]

{¶ 39} Those in favor of the Project argued generally regarding (1) the importance of landowner rights and autonomy over their land (Pub. Tr. at 27-28, 37, 181, 191, 202, 204), (2) the diversification of income that Project participation will bring local famers (Pub. Tr. at 20-21, 26-27, 31-32, 93-94, 181, 204), (3) the benefits of solar energy as a renewable, clean energy source (Pub. Tr. at 172-173, 175-176, 180, 189, 199), and (4) the economic benefits to the community, such as revenue going to local schools and government entities and employment opportunities created by the Project (Pub. Tr. at 38, 106, 149-150). A number of supporters expressed the opinion that the Project will provide environmental benefits as well, as it will preserve the land from more permanent development and allow it to be returned to agricultural uses following decommissioning. Further, some witnesses pointed out that less chemical usage at the Project site and the planting of pollinator friendly vegetation could also improve the land and mitigate any negative side effects. (Pub. Tr. 32, 172, 173, 175-177, 190-191, 196-197, 235-236.) Participating landowners providing testimony stressed that the income they would derive from leasing land to the Project will ensure that their land can be maintained and passed on to future generations. Without this

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2 In one circumstance, the Board was unable to determine the witness' position as to the Project.

diversification, witnesses felt that they would likely need to sell their land rather than pass it on to descendants. (Pub. Tr. at 38-39, 197, 202, 204.)

{¶ 40} The overarching issue from Project opponents was a concern that the Project is incompatible with local land use plans and would unalterably change the rural nature of the community (Pub. Tr. at 74-75, 140-141, 146, 161, 166, 183, 206-207, 239, 251, 265, 273-274). Related to this concern, numerous community members disagree with the Project's plan to remove large tracts of land used in agriculture and worry about the implications that such development could have on food supplies (Pub. Tr. at 49-50, 70, 78, 98, 103, 121, 138, 140-141, 144, 166, 207, 222, 233, 245-246). Most opposing witnesses also expressed much concern with negative aesthetics and noise impacts that they anticipate will result from the Project (Pub. Tr. at 41-42, 74-75, 80, 86, 109, 114, 119, 125-126, 155, 219, 230, 260-261). With respect to noise pollution and the potential destruction of natural views, several witnesses were particularly worried about these effects on local state parks and recreational areas, such as Glen Helen Nature Preserve, John Bryan State Park, and others. These witnesses felt that the additional noise and destruction of viewshed would deter people from visiting these popular outdoor recreational areas. (Pub. Tr. at 51-52, 55-56, 58-61, 64-67, 77-78, 112, 194, 257, 260-261, 272.) Witnesses also worried about the negative impact that the Project, and a change to the environment, would have on local wildlife such as deer, bats, foxes, and numerous wild birds (Pub Tr. at 41-42, 96-97, 122, 202, 252, 257, 275). With respect to altering the local environment, some witnesses also highlighted the historically significant nature of much of the project area, with sites tied to the Underground Railroad and Native Americans prevalent in the area (Pub. Tr. at 75, 121-122, 261).

{¶ 41} Opponents of the Project also spoke about the potential for chemicals and other toxins to be released into the surrounding area. In particular, witnesses voiced concern that released chemicals could contaminate local waterways such as the Little Miami River, along with wells and drinking water sources used by local residents. (Pub. Tr. at 50, 54-55, 96-97, 109, 129-130, 154-155, 162, 168, 210-211, 243, 252, 273.) According to many of these witnesses, the weather of the region could exacerbate these potential issues, as severe

weather and tornadoes are common in the area (Pub. Tr. at 55, 84-85, 101-103, 109, 114, 122, 168-169). Numerous witnesses also voiced concern that released chemicals and other side effects from construction at the Project site, along with exposure to electromagnetic fields during operation, could create public health issues for nearby residents (Pub. Tr. at 97, 110, 122, 168-169, 190, 191, 252).

{¶ 42} Opponents of the Project also expressed distrust of the Project developer and skepticism about the Project's alleged benefits. Multiple witnesses argued that Vesper has acted unethically in its dealings or attempted to intimidate landowners into supporting the Project (Pub Tr. at 16, 91, 108, 246, 278, 282). Some witnesses asserted that the proposed Project, and the division between participating and non-participating residents, was creating tremendous strife in a previously tightknit community (Pub. Tr. at 17, 127, 143-144). Opponents responded to property rights arguments made by supporters of the Project by countering that a landowner's property rights are not unlimited (Pub. Tr. at 254-255, 274). Witnesses were also unconvinced about the alleged benefits that the Project would bring to the community, questioning the amount of money that would flow to local schools and governments and the number of jobs that would be created. Some of these witnesses argued that not only were the alleged benefits below the level claimed by Kingwood, but that the Project would harm local agricultural-related businesses. (Pub Tr. at 97-98, 137-138, 160, 170, 211, 219, 242, 247, 256, 269-270, 274-275.) Witnesses also expressed concern about a decrease in property values following construction and operation of the proposed Project (Pub. Tr. at 96-97, 154, 160-161, 219-220, 252, 283, 284). Finally, with respect to the end of the useful life of the Project, multiple witnesses remained skeptical that proper decommissioning will occur and that the land can truly be restored to agricultural use (Pub. Tr. at 42-43, 49, 96, 135, 155, 168, 240, 261-262).

{¶ 43} In addition to testimony provided at the local public hearing, there have been 222 filings in the public comments of the case docket as of November 15, 2022.[3] Within these filings, the arguments for and against the Project generally mirror the statements made at the local public hearing. Further, the filings reflect that opposition to the Project exceeds support for it at a ratio of approximately 63 percent to 37 percent. Though we note that the public comment ratios are skewed by the single-issue (local construction employment) mass filing on behalf of IBEW on September 20, 2021. Absent that filing, the Project's opposition-to-support ratio is 78 percent to 22 percent, which is generally consistent with the ratio of those who testified at the local public hearing.

B. Staff Report

{¶ 44} Pursuant to R.C. 4906.07(C), Staff completed an investigation into the application, which included recommended findings regarding R.C. 4906.10(A). The Staff Report, filed on October 29, 2021, was admitted into evidence as Staff Exhibit 1. The following is a summary of Staff's findings.

1. BASIS OF NEED

{¶ 45} R.C. 4906.10(A)(1) requires an applicant for an electric transmission line or gas pipeline to demonstrate the basis of the need for such a facility. In its review of the application under R.C. 4906.10(A)(1), Staff notes that the Project is a proposed electric generation facility, not a transmission line or gas pipeline. Accordingly, Staff recommends that the Board find that this consideration is inapplicable. (Staff Ex. 1 at 10.)

2. NATURE OF PROBABLE ENVIRONMENTAL IMPACT

{¶ 46} R.C. 4906.10(A)(2) requires that the Board determine the nature of the probable environmental impact of the proposed Facility. As a part of its investigation, Staff

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[3] We note that the actual positions of the commenters are closer to 400 in number as (1) 76 comments that were filed as one on September 20, 2021, by individuals on behalf of the International Brotherhood of Electrical Workers (IBEW) Local 182 were included in the case docket as one comment, and (2) the 97 individuals who signed opposition (and the 5 who signed support) rosters at the local public hearing were also included as singular comments when filed on the case docket on March 3, 2022.

reviewed the nature of the probable impact of the solar Facility and the following is a summary of Staff's findings:

a. Community Impacts

{¶ 47} Staff's review of community impacts from the Project focused on land use, regional planning, recreation, aesthetics, cultural resources, economic impacts, glare, decommissioning, safety concerns regarding wind velocity, road and bridge impacts, and noise concerns. While Staff cited to concerns as to the Project's regional planning compliance and aesthetics, Staff did not find that these concerns warrant denying the application. Moreover, Staff highlighted the significant economic impacts including job creation, local employment earnings, and annual revenue to the state and Greene County taxing districts during the construction and operation of the Facility. (Staff Ex. 1 at 11-20.)

b. Geology

{¶ 48} Staff's review of geologic impacts from the Project focused on soil types, oil and gas mining, seismic activity, and construction geotechnical and engineering analyses. Staff highlighted significant aspects of the Project including (1) Applicant worked with the Ohio Department of Natural Resources (ODNR) in compliance with Staff's request to procure an engineering constructability report (ECR) in response to concerns of latent oil and gas wells that could be negatively impacted by the Project, (2) the Project is in an area of low-risk for seismic hazard, (3) Applicant intends to implement a soils management plan to account for potentially encountering soil that has been contaminated by historic oil and gas activity, and (4) Applicant's geotechnical soil analysis, subject to ongoing testing, supports that the Project can be safely constructed and operated. (Staff Ex. 1 at 20-23.)

c. Ecological Impacts

{¶ 49} Staff's review of the ecological impacts from the Project focused on public and private water supplies, surface waters, threatened and endangered species, and vegetation. Relative to water supplies, Staff recommends installation distancing from potable water wells, and that spill prevention and response measures be implemented with

respect to source water protection areas. Relative to surface water issues, Staff recommends that Kingwood construct and operate the Project in accordance with permitting requirements of the Unites States Army Corps of Engineers (USACE) and the Ohio Environmental Protection Agency (OEPA). Relative to threatened and endangered species, Staff notes that, in assessing potential Project impacts, Kingwood (1) consulted with the United States Fish and Wildlife Service (USFWS) and the ODNR, (2) conducted field assessments, and (3) conducted literature reviews. Based on Kingwood's analysis, Staff recommends that the Project be subject to seasonal tree cutting, and that Kingwood be required to interact with Staff, USFWS, and the ODNR if listed plant and animal species are unexpectedly encountered during the Project's construction. Relative to vegetation, Staff concludes that the Project, subject to Kingwood's pollinator-friendly habitat installation plan, would be expected to reduce the environmental impact as compared to the current agricultural plant production. In summary, Staff determines that Applicant has (1) committed to construction and operation planning, in coordination with the OEPA, such that there is a low risk of any adverse impact to (a) public and private drinking water supplies and (b) surface water management, and (2) committed to management practices in consultation with ODNR, OEPA, and the USFWS to sufficiently evaluate potential impacts to (a) threatened and endangered species and (b) vegetation. (Staff Ex. 1 at 24-29.)

{¶ 50} Based on its review of the community, geology, and ecological considerations, Staff recommends that the Board find that Applicant has determined the nature of the probable environmental impact of the Project and, therefore, the Project complies with the requirements of R.C. 4906.10(A)(2) provided that any certificate issued by the Board includes the conditions set forth in the Staff Report (Staff Ex. 1 at 30).

3. MINIMUM ADVERSE ENVIRONMENTAL IMPACT

{¶ 51} Pursuant to R.C. 4906.10(A)(3), the proposed facility must represent the minimum adverse environmental impact, considering the state of available technology and

the nature and economics of the various alternatives, along with other pertinent considerations.

{¶ 52} As a part of its investigation, Staff reviewed minimum adverse impact considerations with respect to existing land use, as well as cultural, recreational, and wildlife resources. Staff noted that the Project reasonably (1) aligns with cultural resources, (2) benefits the state and local economies, (3) avoids impacts to (a) oil and gas and (b) public and private drinking water supplies, (4) limits impacts to (a) surface waters, (b) threatened and endangered species, and (c) vegetation, (5) limits noise impacts, (6) addresses transportation and road maintenance concerns, (6) reduces visual impacts upon non-participating landowner through the required use of landscape and lighting plans, and (7) mitigates farmland impacts through drain tile repair and decommissioning planning. (Staff Ex. 1 at 31-33.)

{¶ 53} Based on its review of the Project's expected impact to (1) existing land use and (2) cultural, recreational, and wildlife resources, Staff recommends that the Board find that the Project represents the minimum adverse environmental impact and, therefore, complies with the requirements of R.C. 4906.10(A)(3) provided that any certificate issued by the Board includes the conditions set forth in the Staff Report (Staff Ex. 1 at 33).

4. ELECTRIC POWER GRID

{¶ 54} Pursuant to R.C. 4906.10(A)(4), the Board must determine that the proposed Facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems. Under the same authority, the Board must also determine that the proposed Facility will serve the interest of the electric system economy and reliability.

{¶ 55} As a part of its investigation of the Project, Staff reviewed electric power grid considerations with respect to planning by (1) the North American Electric Reliability Corporation (NERC), and (2) PJM Interconnection (PJM). Staff noted that Applicant has

obtained PJM review as to (1) a Feasibility Study Report and (2) a System Impact Study Report. Based on PJM's review, the Project is not expected to cause deliverability concerns that cannot be mitigated by Applicant through system upgrades or operational limitations. (Staff Ex. 1 at 34-36.)

{¶ 56} Based on these determinations, Staff recommends that the Board find that the Facility complies with the requirements of R.C. 4906.10(A)(4) provided any certificate issued for the proposed Facility includes the conditions specified in the Staff Report (Staff Ex. 1 at 36).

5. Air, Water, Solid Waste, and Aviation

{¶ 57} Pursuant to R.C. 4906.10(A)(5), the Facility must comply with Ohio law regarding air and water pollution control, withdrawal of waters of the state, solid and hazardous wastes, and air navigation. As part of its investigation of the Project, Staff reviewed the Project's impacts to air quality, water quality, solid waste, and aviation. Staff concluded that, outside to minimal dust impacts during construction, the Project is not expected to cause any air quality impacts. Similarly, Staff reviewed the Project's water quality impacts and determined that the Project was subject to USACE and OEPA guidance, including the requirement of complying with a stormwater pollution prevention plan, such that the Project would comply with state water quality regulations. Relative to solid waste considerations, Staff notes that the Project is expected to primarily generate only construction-related solid waste, and that Applicant has committed to solid waste recycling and disposal plans that conform with state regulations. Further, relative to aviation considerations, Staff reviewed potential aviation impacts from the Project in coordination with the Ohio Department of Transportation Office of Aviation (ODOT), and concluded that there are no expected impacts to local aviation. (Staff Ex. 1 at 37-39.)

{¶ 58} Staff recommends that the Board find that the proposed Facility complies with the requirements specified in R.C. 4906.10(A)(5), provided that any certificate issued include the conditions specified in the Staff Report (Staff Ex. 1 at 39).

6. **PUBLIC INTEREST, CONVENIENCE, AND NECESSITY**

{¶ 59} Pursuant to R.C. 4906.10(A)(6), the Board must determine that the Facility will serve the public interest, convenience, and necessity. In assessing the Project's compliance with this determination, Staff reviewed the application in terms of the Project's safety, electromagnetic fields (EMF), public interaction and participation, and public comments. (Staff Ex. 1 at 40-44.)

{¶ 60} Relative to safety and EMF considerations, Staff describes that the Project would be (1) constructed using reliable equipment that is certified by recognized standards entities, (2) subject to specific fencing, gate, signage, and setback requirements that are, as applicable, (a) compliant with recommendations of ODOT, (b) conforming with the National Electric Safety Code, and (c) consistent with fencing that the Board has approved as to other solar projects. Further, Staff describes that Kingwood intends to develop a plan for responding to emergencies that might arise from the Facility. Further, Staff describes that the Project does not create EMF concerns because (1) the proposed gen-tie transmission line is not within 100 feet of an occupied residence, and (2) the transmission facilities would be designed and installed according to NESC requirements. (Staff Ex. 1 at 41.)

{¶ 61} Relative to public interaction and participation, Staff describes that Kingwood (1) acted to educate the public about the Project by hosting virtual and in-person informational meetings to address issues such as financial benefits, visibility concerns, property value impacts, stormwater quality, and wildlife concerns , (2) commissioned a property value impact study, which concluded that adverse impacts from the Project are not anticipated, (3) prepared a preliminary complaint resolution program, (4) committed to notify affected local residents prior to the start of the Project's construction and operation, and (5) committed to providing Staff with quarterly complaint summary reports. In spite of these commitments, Staff describes that eight parties filed to intervene in the case, including Cedarville Township, Xenia Township, Miami Township, Greene County, and CGA. Further, (1) the Miami Township and Cedarville Township notices of intervention

describe concerns as to the Project's adverse impact on roads, properties, and citizens, and (2) Greene County filed a unanimous resolution on the public docket on October 29, 2021, in which the county stated its opposition to the Project. Staff further described that the public comments in the case included an email from the Village of Clifton expressing opposition to the Project and correspondence from CGA describing concerns as to the public information meeting and the application's completeness. Staff also summarized opposition comments from the public docket, which expressed concerns as to decommissioning, as well as impacts to agricultural land use, wildlife and the environment, drinking and groundwater, property values, public health, aesthetics and viewshed, fencing and vegetative screening, noise, glare, roads, siting, and setbacks. (Staff Ex. 1 at 41-44.)

{¶ 62} In consideration of the public interaction and participation surrounding the Project, Staff concludes that it does not serve the public interest, convenience, and necessity due to the general opposition from local citizens and government bodies. Staff emphasizes that the interests of the impacted local governmental bodies were especially compelling given the responsibility those entities bear for preserving the health, safety, and welfare of their citizenry. Accordingly, Staff concludes that the Project will create negative local community impacts that outweigh its benefits. (Staff Ex. 1 at 44.)

7. AGRICULTURAL DISTRICTS

{¶ 63} Pursuant to R.C. 4906.10(A)(7), the Board must determine the Facility's impact on the agricultural viability of any land in an existing agricultural district within the project area of the proposed utility facility.

{¶ 64} Staff's review of the Project describes that it would remove approximately 1,027 acres of agricultural land, including 205 acres of agricultural district land, from service during its operational lifespan. Further, the Project will temporarily disturb existing soil and may result in drain tile damage. Though Staff describes that drain tile and soil impacts are temporary and will be restored to their original use by Applicant. (Staff Ex. 1 at 45.)

{¶ 65} Staff recommends that the Board find that the impact of the proposed Facility on the viability of existing agricultural land in an agricultural district has been determined and, therefore, complies with the requirements specified in R.C. 4906.10(A)(7), provided that any certificate issued by the Board for the proposed Facility include the conditions specified in the Staff Report (Staff Ex. 1 at 45).

8. WATER CONSERVATION PRACTICE

{¶ 66} Pursuant to R.C. 4906.10(A)(8), the proposed Facility must incorporate maximum feasible water conservation practices, considering available technology and the nature and economics of the various alternatives.

{¶ 67} Construction of the proposed Facility would not require the use of significant amounts of water. Water may be utilized for dust suppression and control on open soil surfaces such as construction access roads, as needed. Similarly, operation of the proposed Facility will not require the use of significant amounts of water. Applicant states that the only expected water usage would relate to the potential for cleaning the panels up to two times per year depending on weather conditions and dust control. If cleaning is needed, Applicant estimates approximately 282,875 gallons of water may be used annually. (Staff Ex. 1 at 46.)

{¶ 68} Staff recommends that the Board find that the proposed Facility would incorporate maximum feasible water conservation practices, and, therefore, complies with the requirements specified in R.C. 4906.10(A)(8). Staff further recommends that any certificate issued by the Board for the proposed Facility include the conditions specified in the Staff Report. (Staff Ex. 1 at 46.)

9. RECOMMENDATIONS

{¶ 69} As noted above, Staff recommends a finding that the Project be determined not to be in the public interest, convenience, and necessity. Though should the Board not accept that recommendation, Staff recommends that various conditions set forth in the Staff

Report be made part of any certificate issued by the Board for the proposed Facility. (Staff Ex. 1 at 47-53.) Many of the recommended conditions found in the Staff Report, some with modifications, are adopted in the Stipulation. The Stipulation and conditions are discussed below in this Order.

VII. ADJUDICATORY HEARING

{¶ 70} At the evidentiary hearing, Kingwood presented testimony from its sponsoring witness, Dylan Stickney, and 12 expert witnesses who testified in support of the Stipulation as to environmental and viewshed impacts, property valuation, noise impacts, toxicity, geology, groundwater impacts, landscaping mitigation measures, transportation, public opinion polling, financial analyses, and architectural and cultural resources impacts (App. Ex. 6, 7, 8, 10-19, 101-109).

{¶ 71} Staff initially presented ten witnesses who testified in support of their conclusions as described in the Staff Report. Further, as described below, Staff witness Julie Graham-Price testified pursuant to Kingwood's subpoena as to Staff's communications with local government entities as to their positions regarding the Project in relation to the issuance of the Staff Report. (Staff Ex. 2-11.)

{¶ 72} CGA presented testimony from four experts regarding economic impacts, property values, farmland impacts, cultural and historic resources, viewshed and setback concerns, noise impacts, and ecological impacts (CGA Ex. 3, 5, 9, 12). Further, CGA presented testimony from several lay witnesses as to the community's perception of the Project, including its expected impacts upon farming and neighboring residents in the Project area (CGA Ex. 1, 2, 4-10, 11). Tecumseh also presented testimony regarding the Project's impact upon farmland production (Tecumseh Ex. 1).

{¶ 73} Additionally, each of the four government entities presented testimony from an elected official as to the basis and manner for determining the formal governmental opposition to the Project (Xenia Ex. 1; Miami Ex. 3; Cedarville Ex. 1; Greene County Ex. 1,

2). Further, Miami Township presented an expert landscape architect to address the Project's adverse impacts on soils, vegetation, surface water, and regional planning (Miami Ex. 1).

VIII. STIPULATION AND CONDITIONS

{¶ 74} At the adjudicatory hearing, Kingwood presented the Stipulation entered into by Kingwood and OFBF (Signatory Parties), in which Signatory Parties agree only that, should the Board issue a certificate for the Project, the certificate should be subject to the 39 conditions contained in the Stipulation (Jt. Ex. 1 at 1; Tr. I at 237).

{¶ 75} The following is a summary of the 39 conditions agreed to by the Signatory Parties and is not intended to replace or supersede the actual Stipulation:

(1) Applicant shall install the Facility, utilize equipment and construction practices, and implement mitigation measures as described in the application and as modified and/or clarified in supplemental filings, replies to data requests, and recommendations in the Staff Report, as modified by this Stipulation.

(2) Applicant shall conduct a preconstruction conference prior to the commencement of any construction activities. Staff, Applicant, and representatives of the primary contractor and all subcontractors for the Project shall attend the preconstruction conference. The conference shall include a presentation of the measures to be taken by Applicant and contractors to ensure compliance with all conditions of the certificate, and discussion of the procedures for on-site investigations by Staff during construction. Prior to the conference, Applicant shall provide a proposed conference

agenda for Staff review and shall file a copy of the agenda on the case docket. Prior to the conference, Applicant shall also provide notice of the meeting to Greene County, Cedarville Township, Xenia Township, and Miami Township, the Greene County Engineer, In Progress, and the Greene County Soil & Water Conservation District should representatives wish to attend the conference for informational purposes. Applicant may conduct separate preconstruction conferences for each stage of construction.

(3) Within 60 days after the commencement of commercial operation, Applicant shall submit to Staff a copy of the as-built specifications of the entire Facility. If Applicant demonstrates that good cause prevents it from submitting a copy of the as-built specifications for the entire Facility within 60 days after commencement of commercial operation, it may request an extension of time for the filing of such as-built specifications. Applicant shall use reasonable efforts to provide as-built drawings in both hard copy and as geographically referenced electronic data.

(4) Separate preconstruction conferences may be held for the different phases of civil construction and equipment installation. At least 30 days prior to the preconstruction conference, Applicant shall submit to Staff, for review and acceptance, one set of detailed engineering drawings of the final Project design for that phase of construction and mapping in the form of PDF, which Applicant shall also file on the docket of this case, and geographically referenced data (such as shapefiles or KMZ files) based on final engineering

drawings to confirm that the final design is in conformance with the certificate. The final design shall incorporate minimum setback from the Project's fence line of at least 250 feet from non-participating residences as of the application filing date, and a minimum setback from the Project's inverter stations of at least 500 feet from non-participating residences as of the application filing date. Mapping shall include the limits of disturbance, permanent and temporary infrastructure locations, areas of vegetation removal and vegetative restoration as applicable, and specifically denote any adjustments made from siting detailed in the application. The detailed engineering drawings of the final Project design for each phase of construction shall account for geological features and include the identity of the registered professional engineer(s), structural engineer(s), or engineering firm(s), licensed to practice engineering in the state of Ohio, who reviewed and approved the designs. All applicable geotechnical study results shall be included in the submission of the final Project design to Staff.

(5) At least 30 days prior to each preconstruction conference, Applicant shall submit to Staff, for review and acceptance, the final geotechnical engineering report. This shall include a summary statement addressing the geologic and soil suitability.

(6) At least 30 days prior to the preconstruction conference, Applicant shall provide Staff, for review and acceptance, an Unanticipated Discovery Plan. This shall include detailed

plans for remediation of any oil and gas wells within the Project area.

(7) If any changes are made to the Facility layout after the submission of final engineering drawings, Applicant shall provide all such changes to Staff in hard copy and as geographically-referenced electronic data. All changes are subject to Staff review for compliance with all conditions of the certificate, prior to construction in those areas.

(8) Should karst features be identified during additional geotechnical exploration or during construction, Applicant shall avoid construction in these areas when possible. If mitigation measures are used in lieu of avoidance, Applicant's consideration of adequate mitigation measures shall include potential hydrogeological impact.

(9) The certificate shall become invalid if Applicant has not commenced a continuous course of construction of the proposed Facility within five years of the date of journalization of the certificate unless the Board grants a waiver or extension of time.

(10) As the information becomes known, Applicant shall file on the public docket the date on which construction will begin, the date on which construction was completed, and the date on which the Facility begins commercial operation.

(11) Prior to the commencement of construction activities in areas that require permits or authorization by federal or state laws and regulations, Applicant shall obtain and comply with such

permits or authorizations. Applicant shall provide copies of permits and authorizations, including all supporting documentation, to Staff no less than seven days prior to the applicable construction activities and shall file such permits or authorizations on the public docket. Applicant shall provide a schedule of construction activities and acquisition of corresponding permits for each activity at the preconstruction conference(s).

(12) Subject to the application of R.C. 4906.13(B), the certificate authority provided in this case shall not exempt the Facility from any other applicable and lawful local, state, or federal rules or regulations nor be used to affect the exercise of discretion of any other local, state, or federal permitting or licensing authority with regard to areas subject to their supervision or control.

(13) The Facility shall be operated in such a way as to assure that no more than 175 megawatts would be injected into the Bulk Power System at any time.

(14) Applicant shall not commence any construction of the Facility until it has executed an Interconnection Service Agreement and Interconnection Construction Service Agreement with PJM Interconnection, which includes construction, operation, and maintenance of system upgrades necessary to integrate the proposed generating facility into the regional transmission system reliably and safely with PJM. Applicant shall docket in the case record a letter stating that the Agreement has been signed or a copy of the executed

Interconnection Service Agreement and Interconnection Construction Service Agreement.

(15) Prior to commencement of construction, Applicant shall submit to Staff its design for the perimeter fence for confirmation that the design complies with this condition. Project perimeter fencing shall be designed to be both small-wildlife permeable and aesthetically fitting for a rural location, taking into account applicable codes and NERC requirements. To the extent modifications can be made to a code compliant fence, Applicant shall install a fence that: has the lowest height possible; has frequent openings in the bottom rows in the fence not more than 500 feet apart and that must be at least nine inches wide and seven inches high to allow the passage of mammalian predators and other wildlife species. This condition shall not apply to substation fencing.

(16) Prior to commencement of construction, Applicant shall prepare a landscape and lighting plan in consultation with a landscape architect licensed by the Ohio Landscape Architects Board that addresses the aesthetic and lighting impacts of the Facility with an emphasis on any locations where an adjacent non-participating parcel contains a residence with a direct line of sight to the Project area at any time of the year. The plan shall also address potential aesthetic impacts to nearby communities, the traveling public, and recreationalists by incorporating appropriate landscaping measures such as shrub plantings or enhanced pollinator plantings. The plan shall also include measures such as fencing, vegetative screening, or good neighbor

agreements. Unless alternative mitigation is agreed upon with the owner of any such adjacent, non-participating parcel containing a residence with a direct line of sight to the fence of the facility, the plan shall provide for the planting of vegetative screening designed by the landscape architect to enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area. Subject to any project area reductions, vegetative screening shall at a minimum consist of screening in the locations shown on the attached screening plan using the identified levels of screening from the Landscape Plan attached to Applicant's application in this proceeding. Applicant shall maintain vegetative screening for the life of the Facility and Applicant shall substitute and/or replace any failed plantings so that, after five years, at least 90 percent of the vegetation has survived. Applicant shall maintain all fencing along the perimeter of the Project in good repair for the term of the Project and shall promptly repair any damage as needed. Lights shall be motion-activated and designed to narrowly focus light inward toward the Facility, such as being downward-facing and/or fitted with side shields. Applicant shall provide the plan to Staff and file it on the public docket for review and confirmation that it complies with this condition.

(17) Applicant shall contact Staff, ODNR, and USFWS within 24 hours if state and/or federal listed threatened or endangered species are encountered within the construction limits of disturbance during site construction activities. Construction

activities that could adversely impact the identified plants or animals shall be immediately halted until an appropriate course of action has been agreed upon by Applicant, Staff, and the appropriate agencies.

(18) If Applicant encounters a new listed plant or animal species or suitable habitat of these species prior to construction, Applicant shall identify avoidance areas or alternatively explain appropriate mitigation measures for these species to accommodate construction activities. This information will be included in the final engineering drawings and associated mapping, as required in Condition 4. Applicant shall avoid impacts to these species and explain how impacts would be avoided during construction. Coordination with the ODNR and USFWS may also allow a different course of action.

(19) Applicant shall incorporate post construction stormwater management under OHC00005 (Part III.G.2.e, pp.19-27) in accordance with the OEPA's Guidance on Post-Construction Storm Water Controls for Solar Panel Arrays (dated October 2019). Following the completion of the final Project engineering design, Applicant shall perform pre- and post-construction stormwater calculations to determine if post-construction best management practices are required, based on requirements contained in OEPA's Construction General Permit. The calculations along with a copy of any stormwater submittals made to the OEPA shall be submitted to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. If post-construction stormwater best management practices are

required, Applicant will submit construction drawings detailing any stormwater control measures to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District, as applicable, no less than seven days prior to the applicable construction activities.

(20) Applicant shall have an environmental specialist on site during construction activities that may affect sensitive areas, to be mutually agreed upon by Applicant and Staff. Sensitive areas which would be impacted during construction shall be identified on a map provided to Staff, and may include, but are not limited to, wetlands, streams, and locations of threatened or endangered species habitat. The specialist shall be familiar with water quality protection issues and potential threatened or endangered species of plants and animals that may be encountered during project construction. The environmental specialist mutually agreed upon by Staff and Applicant shall be authorized to report any issues simultaneously to Staff and Applicant. To allow time for Applicant and Staff to respond to any reported issues, the environmental specialist shall have the authority to stop construction activities in or near the impacted sensitive area(s) for up to 48 hours if the construction activities are creating unforeseen environmental impacts into sensitive areas identified on the map.

(21) Applicant shall adhere to seasonal cutting dates of October 1 through March 31 for the removal of trees three inches or greater in diameter to avoid potential impacts to Indiana bats,

northern long-eared bats, little brown bats, and tricolored bats, unless coordination with ODNR and USFWS allows a different course of action. If coordination with these agencies allows clearing between April 1 and September 30, Applicant shall docket proof of completed coordination on the case docket prior to clearing trees.

(22) Applicant shall take steps to prevent establishment and/or further propagation of noxious weeds identified in Ohio Adm.Code 901:5-30-01 during implementation of any pollinator-friendly plantings, as well as during construction, operation, and decommissioning. This would be achieved through appropriate seed selection, and annual vegetative surveys consistent with the vegetative management plan included in the application. If noxious weeds are found to be present, Applicant shall remove and treat them with herbicide as necessary, and shall follow all applicable state laws regarding noxious weeds. Applicant shall also remove and treat with herbicide as necessary any noxious weeds upon notice from a board of township trustees that noxious weeds exist on the Project property. Prior to commencement of construction, Applicant shall consult with the Greene County Soil & Water Conservation District regarding seed mixes for the Project and shall provide the tags on such seed mixes to the Greene County Soil & Water Conservation District.

(23) Applicant shall conduct no in-water work in perennial streams from April 15 through June 30 to reduce potential impacts to indigenous aquatic species and their habitat,

unless coordination efforts with ODNR allows a different course of action. If coordination with ODNR allows in-water work in perennial streams between April 15 and June 30, Applicant shall file proof of such coordination on the docket prior to conducting such work.

(24) Applicant shall obtain transportation permits prior to the commencement of construction activities that require them. Applicant shall coordinate with the appropriate regulatory authority regarding any temporary road closures, road use agreements, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed Facility. Coordination shall include, but not be limited to, the Greene County Engineer, ODOT, local law enforcement, and health and safety officials. Applicant shall detail this coordination as part of a final transportation management plan submitted to Staff prior to the preconstruction conference for review and confirmation by Staff that it complies with this condition and then file the plan in the public docket. This final transportation management plan shall address the methodology for monitoring all local, county, and township roads used for construction traffic during construction to ensure these roads remain safe for local traffic. Any damaged local public roads, culverts, and bridges would be repaired promptly to their previously or better condition by Applicant tuned the guidance of the appropriate regulatory authority. Any temporary improvement would be removed unless the

appropriate regulatory authority requests that it remain in place.

(25) At least 30 days prior to the preconstruction conference, Applicant shall provide the status (i.e., avoidance, mitigation measures, or capping) of each water well within the Project area. Applicant shall indicate to Staff whether the nearest solar components to each uncapped well within the Project area meets or exceeds any applicable minimum isolation distances outlined in Ohio Adm.Code 3701-28-7. Applicant shall relocate the solar equipment at least 50 feet from each active water well. Applicant may demonstrate the well is for nonpotable use and relocate solar equipment at least 10 feet from that nonpotable use water well, or seal and abandon the water well.

(26) At least 30 days prior to the preconstruction conference, Applicant shall submit its emergency response plan to Staff for review and acceptance. That plan shall include a provision(s) to keep the Village of Yellow Springs (e.g., city administrator or water department) and the Camp Clifton Day Camp informed of the status of any spills, significant panel damage, and repair/clean-up/decommission schedule.

(27) At least 30 days prior to the preconstruction conference, Applicant shall demonstrate that the substation equipment are outside of the inner management protection zone(s) for the Camp Clifton Day Camp source water protection area.

(28) At least 30 days prior to the preconstruction conference, Applicant shall demonstrate that its solar panels to be

installed at the solar facility, including over the outer management zones of the Village of Yellow Springs and Camp Clifton Day Camp, do not exhibit the characteristics of toxicity through analysis with the USEPA's toxicity characteristics leachate procedure test.

(29) At least 30 days prior to the start of construction, Applicant shall file a copy of the final complaint resolution plan for the construction and operation of the Project on the public docket. At least seven days prior to the start of construction and at least seven days prior to the start of the Facility operations, Applicant shall notify via mail affected property owners and tenants who were provide notice of the public information meeting; attendees of the public informational meeting who requested updates regarding the Project; and any other person who requests updates regarding the Project; all residents, airports, schools, and libraries located within one mile of the Project area; parties to this case; and county commissioners, township trustees, and emergency responders. These notices shall provide information about the Project, including contact information and a copy of the complaint resolution program. The start of construction notice shall include a timeframe for construction and restoration activities. The start of Facility operations notice shall include a timeline for the start of operations. Applicant shall file a copy of these notices on the public docket, including written confirmation that Applicant has complied with all preconstruction-related conditions of the certificate. During construction and operation of the Facility, Applicant

shall submit to Staff a complaint summary report by the fifteenth day of April, July, October, and January of each year through the first five years of operations. The report shall include a list of all complaints received through Applicant's complaint resolution program, a description of the actions taken toward the resolution of each complaint, and a status update if the complaint has yet to be resolved. Applicant shall file a copy of these complaint summaries on the public docket.

(30) General construction activities shall be limited to the hours of 7:00 a.m. to 7:00 p.m., or until dusk when sunset occurs after 7:00 p.m. Impact pile driving shall be limited to the hours between 9:00 a.m. and 6:00 p.m. Impact pile driving may occur between 7:00 a.m. and 9:00 a.m. and after 6:00 p.m. or until dusk when sunset occurs after 6:00 p.m., if the noise impact at the non-participating receptors is not greater than daytime ambient Leq plus 10 dBA. If impact pile driving is required between 7:00 a.m. and 9:00 a.m. and after 6:00 p.m. or until dusk when sunset occurs after 6:00 p.m., Applicant shall install a noise monitor in a representative location to catalog that this threshold is not being exceeded. Hoe ram operations, if required, shall be limited to the hours between 10:00 a.m. and 4:00 p.m., Monday through Friday. Construction activities that do not involve noise increases above ambient levels at sensitive receptors are permitted outside of daylight hours when necessary. Applicant shall notify property owners or affected tenants within the meaning of Ohio Adm.Code 4906-3-03(B)(2) of upcoming

construction activities including the potential for nighttime construction.

(31) If the inverters or substation transformer chosen for the Project has a higher sound power output than the models used in the noise model, Applicant shall submit, 30 days prior to construction, the results from an updated noise model for the Project using the expected sound power output from the models chosen for the Project, to show that sound levels will not exceed the average daytime ambient level in dBA for the nearest sound monitoring location for the Project Noise Evaluation attached to the application as Exhibit K plus five dBA at any nonparticipating sensitive receptor. If transformer manufacture data is not available, the model will be updated with sound emission data following the NEMA TR1 standard. If inverter manufacturer data is not available, a similar inverter model will be used to update the sound propagation model prior to construction. Once constructed, sound level measurements will be made in close proximity to the inverter to determine the sound power level of the installed inverter. If the sound power level of the installed inverter is 2 dBA or more over the sound power level used in the updated preconstruction model, then the sound propagation model will be updated to ensure project-wide compliance with the applicable sound level limit. If the sound power level is determined to be less than 2 dBA above the corresponding level used in the updated preconstruction model, then the project will be deemed in-compliance. If the equipment chosen for the Project are at the same (or lower)

sound power output as the models used in the noise model, no further action is needed for compliance with this condition.

(32) Applicant shall avoid, where possible, or minimize to the extent practicable, any damage to functioning field tile drainage systems and compaction to soils resulting from the construction, operation, and/or maintenance of the Facility in agricultural areas. For the purposes of the condition in this Stipulation, "field tile drainage systems" or "drainage system" includes both mains and laterals within the Facility footprint. Damaged field tile systems shall be promptly repaired or rerouted to at least original conditions or modern equivalent at Applicant's expense to ensure proper drainage. However, if the affected landowner agrees to not having the damaged field tile system repaired, they may do so only (i) if the field tile systems of adjacent landowners remain unaffected by the non-repair of the landowner's field tile system and (ii) the damaged field tile does not route directly to or from an adjacent panel. In accordance with Applicant's complaint resolution plan, Applicant shall consult with any landowner that submits a complaint to Applicant related to drainage issues on the landowner's property.

(33) If a main drain tile is impacted due to the construction of the Facility, the damaged field tile drainage system shall be promptly repaired and/or rerouted no later than 10 days after such damage is discovered, pending weather and contractor availability, and returned to at least original condition or their modern equivalent. If a main drain tile is found to be

impacted during the operation, and/or maintenance of the Facility, the damaged filed tile drainage system shall be promptly repaired and/or rerouted no later than 45 days after such damage is discovered, pending weather and contractor availability, and returned to at least original conditions or their modern equivalent at Applicant's expense. Any tile installation or repairs shall be performed in accordance with the applicable provision of Standard Practice for Subsurface Installation of Corrugated Polyethylene Pipe for Agricultural Drainage of Water Table Control, ASTM F499-02 (2008), to the extent practicable.

(34) Applicant shall ensure that parcels adjacent to the Project area are protected from unwanted drainage problems due to construction and operation of the Project. Applicant shall ensure this by (1) conducting a search of the Project as necessary to locate drain tiles between the Project area properties and adjacent parcels; (2) consulting with owners of all parcels adjacent to the properties making up the Project as to locations of drain tiles on those parcels, (3) consulting with the Greene County Soil & Water Conservation District and the Greene County Engineer to determine the location of any tile located in a county maintenance ditch; and (4) subsequently documenting benchmark conditions of surface and subsurface drainage systems prior to construction, including the location of laterals, mains, grassed waterways, and county maintenance ditches. During the time Applicant is conducting any field searches for drain tile or conducting construction work that could affect field tile drainage systems

within the Project area and for up to twelve months after completing construction, Applicant will allow a District inspector to help determine, inspect, and, as necessary, require Applicant's contractor to cause repairs to be made to necessary project field tile drainage systems that have been damaged.

(35) At least 30 days prior to the preconstruction conference, Applicant shall submit an updated decommissioning plan and total decommissioning cost estimate without regard to salvage value on the public docket that includes: (a) a provision that the decommissioning financial assurance mechanism include a performance bond where the company is the principal, the insurance company is the surety, and the Board is the obligee; (b) a timeline of up to one year for removal of the equipment after the Project permanently ceases commercial operations; (c) a provision to monitor the site for at least one year to ensure successful revegetation and rehabilitation subject to landowner permission to access the site; (d) a provision where the performance bond is posted prior to the commencement of construction; (e) a provision that the performance bond is for the total decommissioning cost and excludes salvage value; (f) a provision to coordinate repair of public roads damaged or modified during the decommissioning and reclamation process; (g) a provision that the decommissioning plan be prepared by a professional engineer registered with the state board of registration for professional engineers and surveyors; (h) and a provision

stating that the bond shall be recalculated every five years by an engineer retained by Applicant.

(36) At the time of solar panel end of life disposal, retired panels that will not be recycled and that are marked for disposal shall be sent to an engineered landfill with various barriers and methods designed to prevent leaching of material into soils and groundwater.

(37) At least 30 days prior to the preconstruction conference, Applicant shall demonstrate that it has implemented a setback of at least 50 feet from the solar Facility fence line to the public roads edge of right -of-way. Specific to OH-72 and Clifton Road on the eastern portion of the Project, Applicant shall implement a setback of 300 feet from the edge of the public road right-of-way. Specific to Clifton Road on the western portion of the Project, Applicant shall implement a setback of 200 feet from the edge of the public road right-of-way.

(38) Applicant shall provide an emergency response plan to Staff prior to construction of the Project that includes a provision to provide annual training to the Xenia Township, Cedarville Township, Miami Township, and Greene County emergency response services in addition to providing those agencies with emergency contacts for the Project during construction and operation. Applicant shall develop the plan in coordination with the emergency response service agencies for the townships. Such annual training shall include training on addressing personal injury incidents and fires. The annual

training shall commence prior to the start of operation and continue until the Project is decommissioned. Emergency contact information shall be posted at the primary entrance to the Project.

(39) Applicant shall provide a summary report to Staff within 60 days of the occurrence of any material damage to the Facility resulting from high wind events and shall file a copy of the report in the case docket. The report shall describe Applicant's plan for repairing the damage and the timeline for the repairs. In the event any portion of the Facility is rendered inoperable by the damage and Applicant elects not to repair the damage, that portion of the Facility shall be decommissioned following Applicant's decommissioning plan.

(Jt. Ex. 1 at 3-11.)

IX. PROCEDURAL ISSUES

A. *Interlocutory Appeal/Subpoena Denial*

{¶ 76} On May 2, 2022, following the conclusion of the adjudicatory hearing, Kingwood filed an interlocutory appeal of the ALJ's denial of its renewed motion to compel the appearance of the Board's Executive Director, Theresa White, to testify as a witness in the case. Kingwood described that it first sought to compel Ms. White's hearing testimony pursuant to a motion for subpoena filed on February 25, 2022. While that motion sought testimony from the witness regarding several issues, Kingwood ultimately focused its assertion on its claim that Ms. White's testimony was necessary as to communications between Staff and representatives from Greene County regarding the county's position as to the Project. (*See*, Motion for Subpoenas (Feb. 25, 2022); Interlocutory Appeal (May 2, 2022); App. Br. at 99-101.) In response to Staff's memorandum contra on March 4, 2022,

Kingwood requested in its reply filing on March 8, 2022, that the ALJ defer ruling on Kingwood's motion until after Staff's ten witnesses testified in the case.[4] After the presentation of Staff's scheduled witnesses, the ALJ determined that (1) Kingwood was entitled to compel the testimony of additional Staff witness Juliana Graham-Price in order to explore the nature of communications between Ms. Graham-Price and the affected local government entities surrounding the Project, and (2) Kingwood was not entitled to compel the testimony of Executive Director White in the case. (Tr. VII at 1912-1913.)

{¶ 77} On April 25, 2022, Ms. Graham-Price testified in the case. The salient facts of her testimony were that (1) her position at the time of her actions in this case was "Community Liaison," which involved interacting with local government officials regarding the Board's process for considering renewable energy certification applications, (2) at the direction of Executive Director White, Ms. Graham-Price contacted the Greene County Commissioners and the three local township trustees on October 21 and October 28, 2021, to determine their respective positions regarding the Project, and (3) following these communications, Ms. Graham-Price informed Executive Director White on October 28, 2022, that Greene County, Cedarville Township, and Xenia Township[5] expressed their opposition to the Project. Further, Ms. Graham-Price related that (1) Greene County intended to adopt a resolution opposing the Project, (2) Cedarville Township explained the apparent intention of the three townships to adopt a joint resolution opposing the Project, and (3) Xenia Township was opposed to the Project, but would not be able to deliver a resolution declaring such ahead of Staff's stated deadline of October 29, 2021. (Tr. VIII at 1928-1945.)

{¶ 78} Following Ms. Graham-Price's testimony, Kingwood renewed its motion to compel Executive Director White's testimony claiming that the testimony is critical to the Board's consideration of the case. The ALJ denied Kingwood's renewed motion for

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4 In spite of the ALJ ruling that granted Kingwood's reply request, Kingwood later claims that the ALJ "inexplicably held the ruling in abeyance" (App. Br. at 100).

5 Ms. Graham-Price indicated that she left a message with a Miami Township representative on October 28, 2021, but that she did not receive any return communication from the township prior to the issuance of the Staff Report on October 29, 2021.

subpoena finding that Ms. Graham-Price's testimony as to her investigative actions in the case was clear such that further testimony was unwarranted. (Tr. VIII at 1962-1963.)

{¶ 79} With respect to Kingwood's arguments in favor of compelling the testimony of Executive Director White, the Board finds that Kingwood's subpoena request is unwarranted and should be denied. In reaching this conclusion, we note that the record is clear as to Staff's investigation of the positions of local government entities that are impacted by the Project, which is certainly a relevant consideration in terms of whether the Project will serve the public interest, convenience, and necessity, as required by R.C. 4906.10(A)(6). We reject Kingwood's claims that the timing of Staff's inquiry or the manner in which its findings were incorporated into the Staff Report create the need to compel further testimony in the case. Instead, the collective testimony of Ms. Graham-Price, Mr. Zeto, and the remaining Staff witnesses make clear that (1) the Staff Report was the collective work of Staff "as a whole," and (2) there is no indication from any witness as to disagreement with its contents, including the recommendation that the Project did not serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Further, we find no impropriety as to the nature and timing of Staff's communications with the local government entities in the manner described by Ms. Graham-Price and others. In preparing the Staff Report, Staff should ascertain the position of local government entities that are impacted by a project in order to determine whether a project complies with the public interest, convenience, and necessity. Further, just as Staff and Applicant communicate directly as to exchanging information relevant to the consideration of a pending project throughout Staff's analysis of an application, we find no impropriety as to similar communications occurring between Staff and local government entities ahead of the preparation of the Staff Report. Accordingly, we find no error in the ALJ determination to deny Applicant's subpoena request with respect to compelling testimony from Executive Director White at the evidentiary hearing. As a result, we deny Kingwood's interlocutory appeal regarding this determination.

B. ***Kingwood's Motion to Strike***

{¶ 80} On August 15, 2022, Kingwood filed a motion to strike (1) two statements from Cedarville Township's initial brief, and (2) one statement from CGA's initial brief. As to each request, Kingwood claims that the proffering party seeks to argue from documents that have not been admitted as evidence in the case.

{¶ 81} In response to Kingwood's motion, CGA consents to Kingwood's request to strike the information at issue, which related to an excerpt from a Xenia Township Zoning Resolution. Accordingly, the Board grants Kingwood's request as to the CGA briefing reference at issue.

{¶ 82} Relative to the Cedarville Township briefing references, Kingwood seeks to strike the township's statistical statements about the percentages of public comments that were made in the case docket and at the local public hearing. Kingwood claims that the township does not support these statements through evidence that has been admitted in the case, and that the evidence at issue was expressly stricken by the ALJ during the course of the evidentiary hearing based on hearsay considerations. Cedarville Township rebuts the motion to strike by claiming that the information was compiled directly from the public comments in the case docket and local public hearing such that it is entitled to evidentiary consideration.

{¶ 83} As to the Cedarville Township briefing references at issue, the Board finds that they are also stricken from record consideration as they are not supported by record evidence in the case. Consistent with the ALJ's ruling during the hearing, the information referenced as Ex. B in Cedarville's initial brief is barred because it contains hearsay. Further, the printout of public comments from the case docket, which is referenced as Ex. A in Cedarville's initial brief is also stricken, as it is not evidence in the case.

{¶ 84} While the Board grants Kingwood's motion to strike Cedarville Township's exhibit references, we stress that this ruling does not impact our consideration of (1) the

public comments in the case, and (2) the testimony from the local public hearing. As described herein, the Board finds that both the public comments and the local public hearing testimony are significant in terms of assessing whether the Project complies with the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Accordingly, the Board has evaluated both of these areas of public input in deciding the case. Though we stress that our consideration is limited to the sworn testimony from the local public hearing and the general public perception about the Project as gleaned from the public comments, as we have independently determined, and not the exhibits referenced by Cedarville Township in its briefing.

C. *Motion for Protective Order*

{¶ 85} As described above, on February 9, 2022, Applicant filed a motion for protective order regarding an addendum to its archaeological study, which was being provided to Staff in supplemental response to a data request on May 17, 2021. Applicant's motion was not opposed.

{¶ 86} Consistent with Ohio Adm.Code 4906-2-21, the Board has reviewed the information that Applicant seeks to protect and finds that the motion is reasonable and should be granted. As a result, the Addendum Phase 1 Archaeological Investigation Report that Kingwood filed under seal on February 9, 2022, shall be kept confidential and not subject to public disclosure.

X. CONSIDERATION OF CERTIFICATE CRITERIA

{¶ 87} Consistent with R.C. 4906.10(A), the Board has reviewed the record and made determinations regarding each of the statutory criterion.

{¶ 88} The Board notes that opposition to Kingwood's application focuses generally on whether the Project complies with R.C. 4906.10(A)(2), R.C. 4906.10(A)(3), and R.C. 4906.10(A)(6). As the opposition arguments reference overlapping criteria, the Board's analysis of party positions is reflected under the criterion deemed most applicable to a

party's argument. To the extent a party's argument is discussed under one criterion but not all, the Board has nevertheless given the argument full and careful consideration.

A. R.C. 4906.10(A)(1): Basis of Need for Electric, Gas, or Natural Gas Transmission Lines

{¶ 89} R.C. 4906.10(A)(1) requires that the Board consider the basis of the need for the facility if the facility is a gas pipeline or an electric transmission line.

{¶ 90} Staff concluded that R.C. 4906.10(A)(1) is not applicable to this proceeding, given that the Facility is not a gas pipeline or an electric transmission line (Staff Ex. 1 at 10). Moreover, no party raised any concern as to this issue. Accordingly, the Board finds that R.C. 4906.10(A)(1) is not applicable in this proceeding.

B. R.C. 4906.10(A)(2); Nature of the Probable Environmental Impact, and R.C. 4906.10(A)(3); Minimum Adverse Environmental Impact

{¶ 91} R.C. 4906.10(A)(2) requires that the Board determine the nature of the probable environmental impact of the proposed Facility. Further, R.C. 4906.10(A)(3) requires that the Facility represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives and other pertinent conditions. As arguments of the parties generally address these considerations in an overlapping manner, the Board will consider these arguments collectively.

{¶ 92} Kingwood argues both that (1) the Board has adequate evidence to determine the nature of the probable environmental impact, and (2) the environmental impacts from the Project are, if conditioned in the certificate as recommended in the Stipulation, minimally adverse when considering the state of available technology and the nature and economies of the various alternatives (App. Br. at 49-85).

{¶ 93} In terms of socioeconomic impacts, Kingwood asserts that the Project's impact to land use, cultural resources, and visual resources will be minimal. Moreover,

Kingwood emphasizes that the Project's limited viewshed impacts are successfully mitigated by Kingwood's commitments to enhanced landscaping and vegetative screening. (App. Br. at 50-59.)

{¶ 94} In terms of ecological impacts, Kingwood asserts that the Project's impact to surface waters, threatened and endangered species, other wildlife, vegetation, and soil and water will be minimal (App. Br. at 60-70).

{¶ 95} Further, in terms of public services, facilities, and safety impacts, Kingwood asserts that the Project's impacts on traffic, noise, EMF, decommissioning liabilities, and drainage and surface water management will be minimal (App. Br. at 70-85).

{¶ 96} As described above, Staff's review of the application found that (1) Kingwood adequately assessed the Project's impact in compliance with R.C. 4906.10(A)(2), and (2) the environmental impacts from the Project are, subject to Staff's recommended certificate conditions, minimally adverse when considering the state of available technology and the nature and economies of the various alternatives in compliance with R.C. 4906.10(A)(3) (Staff Ex. 1 at 30, 33).

{¶ 97} In opposing the Project, CGA argues that Kingwood fails to adequately assess and mitigate the Project's adverse environmental impact with respect to the viewshed, wildlife and plants, water conservation, noise, surface water management, and pollution (CGA Br. at 22-44). Further, citing to concerns that often overlapped CGA's, (1) an elected official from each of the four government entities testified as to the bases for determining the formal governmental opposition to the Project, and (2) Miami Township presented expert testimony regarding the Project's environmental impacts, including upon soils, noxious weeds, and surface water management (Xenia Ex. 1; Miami Ex. 1, 3; Cedarville Ex. 1; Greene County Ex. 1, 2).

1. VIEWSHED ANALYSIS

{¶ 98} CGA's viewshed arguments focus on four main points; (1) the application is deficient in terms of its depiction of the Project's impact on neighboring properties, (2) the Project's irregular shape causes it to adversely impact excessive property owners, (3) the rolling terrain of the properties in and around the Project area prohibit construction that will not unreasonably impact the viewshed, and (4) Kingwood's plan for mitigating visual impacts is deficient. In terms of the application, CGA notes that 50 nonparticipating residences are within 250 feet of the Project, and an additional 95 nonparticipating residences are within 1,500 feet of the Project. Further, CGA stresses that all 145 of these residences will have clear views of the Project despite Kingwood's vegetation screening plans. According to CGA, in spite of these substantial impacts, Kingwood's application fails to provide photographic simulations or pictorial sketches that are needed to assess these impacts, as required by Ohio Adm.Code 4906-4-08(D)(4)(e). CGA also claims that the Project's visual impact is magnified by the fact that the Project boundary is nearly nine miles long, which CGA attributes, in part, to its irregular shape. Further, CGA claims that elevation changes surrounding the Project exacerbate visual impacts due to nonparticipating residences having viewshed disturbances that are not reasonably mitigated by vegetative screening plans. CGA also claims that the Project's vegetative screening plans, as modified in the Stipulation, fail to reasonably protect nonparticipating residences, many of which are uniquely impacted by the Project. (CGA Br. at 22-38.)

{¶ 99} In rebutting CGA's viewshed claims, Kingwood stresses that the Project is prudently sited on agricultural land, is subject to reasonable protective setbacks, and does not create unreasonable viewshed impacts because of the vegetative screening that will be implemented. Kingwood notes that the Board has approved several other solar projects on farmland and that agricultural land is the most common for siting such projects across the country. (App. Reply Br. at 32-33.) With respect to setbacks, Kingwood points out that minimum setbacks for the Project have expanded since the filing of the application such that the minimum distance that can occur between panels and a nonparticipating residence is

now 270 feet, which is (a) longer than the setback limits in recent cases where the Board has issued certificates, and (b) longer than Staff's setback recommendations. Moreover, Kingwood notes that the Project's design has been modified to increase the rights-of-way along OH-72 and Clifton Road in order to reduce its visibility on routes that are used most commonly by tourists who visit the area's attractions. (App. Reply Br. at 51-54.) Further, Kingwood argues that any viewshed impacts are mitigated through existing and supplemental vegetative screening, emphasizing that the Project will add more than 47,000 linear feet of vegetative screening (App. Ex. 18; Joint Ex. 1 at 5).

{¶ 100} In addition to its fact arguments, Kingwood argues that CGA is estopped from contesting the quality of its viewshed evidence because such arguments were required to be asserted as objections to Staff's determination that Kingwood's application was complete (App. Reply Br. at 8-11). Further, Kingwood asserts that its viewshed evidence complies with Ohio Adm.Code 4906-4-08(D)(4)(e) in that the seven viewpoints depicted in its visual impact analysis report are representative of the Project's impacts in a manner that allows the Board to determine this issue (App. Reply Br. at 57-59; App. Ex. 1, Appx. Q at 25-30).

2. WILDLIFE, PLANT, AND WATER CONSERVATION ANALYSIS

{¶ 101} CGA's wildlife, plant, and water conservation analysis focus on claims that Kingwood (1) failed to conduct appropriate literature and field surveys of the plant and animal species in the Project area, as required by Ohio Adm.Code 4906-4-08(B), and (2) failed to provide water conservation measures for the Project, as required by Ohio Adm.Code 4906-4-07(C)(3). With respect to the plant and wildlife analysis claims, CGA argues that Kingwood failed to conduct both (1) literature searches beyond confirming state-listed threatened and endangered species, which resulted in field studies that were deficient in terms of potential impacts to other plant and wildlife, and (2) field studies that were broad enough in terms of both the area of the Project and the potential impacts across various seasons. In addition, CGA claims that Kingwood's field studies were deficient in that they failed to describe wildlife that area citizens described as being present in the area. With

respect to water conservation, CGA alleges that Kingwood failed to adequately describe the Project's anticipated water usage, including whether such usage could be potentially damaging to the needs of local citizens, who utilize up to 473 water wells that are drilled within one mile of the Project area. (CGA Br. at 38-44.)

{¶ 102} Miami Township joined in CGA's arguments based on the testimony of Eric Sauer, a registered landscape architect, who testified as to concerns regarding the Project's impacts on soil compaction and erosion, noxious weeds, and surface water management. According to Mr. Sauer, the Project's expected impacts in these areas are not minimal in terms of the diminished soil performance, loss of stormwater control, and increased erosion and noxious weed proliferation. (Miami Ex. 1.)

{¶ 103} In rebutting the CGA and Miami Township claims, Kingwood focuses on (1) the quality of its environmental impact studies, particularly with respect to other solar projects the Board has certificated, (2) the Project's design, which was developed in a manner that is ecologically favorable, and (3) claims that the Project will not materially impact local water supplies or quality. Relative to the environmental impact studies, Kingwood describes that the studies in support of the Project are (1) consistent with those relied upon by the Board in evaluating similar solar projects, and (2) reasonably focused on threatened and endangered species, as supported by the USFWS and ODNR. Kingwood maintains that the Project's design purposefully mitigates environmental impacts because it (1) is sited largely on active agricultural fields, which are lower quality habitat that do not support diverse species and are abundant in the area of the Project, and (2) avoids impacts to wetlands and streams. Further, Kingwood describes agreement with Staff's conclusion that the Project will decrease the environmental impact from the current land usage due to the inclusion of permanent pollinator-friendly plantings and increased vegetative screenings. (App. Br. at 60-69; App. Reply Br. at 64-67.)

3. NOISE, SURFACE WATER, AND POLLUTION ANALYSIS

{¶ 104} CGA claims that Kingwood's noise analysis in support of the application is flawed because the baseline measuring data inflated background sound by unreasonably focusing on public roads instead of residential properties. As a result, CGA argues that the Project should not be certificated unless Kingwood is required to install inverter enclosures, which are available at an added Project cost of 15 percent. (CGA Br. at 59-60.) CGA further argues that Kingwood fails to properly quantify expectations about the Project's impact on surface water drainage and water pollution in violation of Ohio Adm.Code 4906-4-07(C). CGA claims that drainage issues impacting the Project are especially important because the area is prone to flooding. As such, CGA asserts that hydrology studies of the Project's impact on overflow waterways and drainage tiles is needed in order to understand impacts and mitigate damage to neighboring properties. Further, CGA makes similar arguments in terms of the Project's potentially causing runoff water quality disturbances. (CGA Br. at 60-65.)

{¶ 105} Kingwood counters CGA's arguments based on (1) the results of its acoustic testing, (2) the results of its surface water consultant, and (3) the requirement that the Project must comply with discharge and erosion control as regulated by the OEPA in accordance with a National Pollutant Discharge Elimination System (NPDES) permit. Relative to the noise, Kingwood argues that the analysis of CGA's noise expert, Robert Rand, is fatally flawed because he did not conduct a thorough study and his comparative sound measurements from a project at Hardin Solar were unreliable. Further, Kingwood claims that should the Project result in noise above the Board's customary tolerance measure of Leq plus 5, the exceedance would merely subject the Project to mitigation measures such as a noise barriers or exhaust controls. (App. Reply Br. at 69-76.) Relative to surface water management, Kingwood claims that the Project (1) will not materially impact surface grades, (2) is subject to impact measures that are jointly regulated by Greene County authorities, (3) is compliant with the OEPA's stormwater management guidance, and (4) will reasonably avoid and properly restore any drain tiles in the area. (App. Reply Br. at 76-

78.) Relative to water pollution concerns, Kingwood describes that the Project, due to its minimal surface disturbance and use of restorative ground cover, is not expected to materially discharge water into neighboring waterbodies. Further, Kingwood claims that its application, as supplemented, is compliant with statutory requirements that are intended to protect local water quality because the Project is not expected to discharge surface waters other than as to stormwater runoff. (App. Reply Br. at 78-79.)

4. BOARD CONCLUSION

{¶ 106} Upon review of the record, the Board finds that (1) the Facility's probable environmental impacts have been properly evaluated and determined, and (2) the Facility, subject to the conditions described in the Stipulation, represents the minimum adverse environmental impact. R.C. 4906.10(A)(2) and (A)(3).

{¶ 107} As discussed in the Staff Report, after its thorough investigation into the community, geological, and ecological impacts of the Project, Staff concluded that the Project meets the requirements in R.C. 4906.10(A)(2) and (A)(3) (Staff Ex. 1 at 30, 33). Staff's recommendation is supported by Kingwood's evidence regarding the Project's limited impacts to (1) land use, cultural resources, and viewshed, (2) surface waters, threatened and endangered species, other wildlife, vegetation, and soil and water, and (3) traffic, noise, EMF, decommissioning liabilities, and surface water management.

{¶ 108} Consistent with Staff's evaluation, the Board finds that the record in this case demonstrates that Kingwood has determined the Facility's probable environmental impact. In reaching this conclusion, we emphasize that the Project is not expected to cause any significant environmental impacts and that such impacts are mitigated through Kingwood's construction and operation plans, as modified by the Stipulation conditions. The Board is satisfied with the studies that Kingwood provided as to the Project's impacts to surface waters, soil and water resources, and vegetation and wildlife in the Project area. In general, we agree with Kingwood's claim that siting the Project on agricultural land aids in minimizing its ecological impacts because these areas (1) do not require substantial grading

alterations, and (2) are able to support groundcover that mitigates surface water impacts. (App. Ex. 8 at 6-7,10; Staff Ex. 1 at 29.) Further, we emphasize that the Project is subject to postconstruction monitoring in conjunction with Greene County regulators and the OEPA, and that Kingwood has committed to protecting existing drainage infrastructure, such that adverse drainage impacts are not expected. Moreover, we accept Kingwood's studies as to the wildlife and vegetation impacts, which are based on consultations with the USFWS and ODNR, as supplemented by Kingwood's field surveys. As Kingwood argues, such studies are common as to similar projects in which the Board has issued certificates and consistent with the rules that apply to the Board's consideration of the Project. Further, as the Project is expected to use water resources only for the limited purpose of cleaning the solar panels up to twice per year, we reject arguments that such water usage is inadequately calculated or not in line with maximum feasible water conservation practices. (App. Ex. 1 at 45.)

{¶ 109} Additionally, we find that the Project's operational noise impacts have been reasonably determined and that, should any unanticipated noise concerns arise from the Project, they will be mitigated through post-construction measures. As Kingwood notes, the Board has, when evaluating solar project noise tolerances, routinely accepted the Leq plus 5 standard that Kingwood proposes. Accordingly, we accept Kingwood's proposal to limit the Project's noise impacts within these tolerances. Further, we accept Kingwood's evidence as to the ability to economically implement operational noise controls such as barrier walls or acoustic enclosures in the unlikely event that noise impacts exceed preconstruction estimates. (App. Ex. 102 at 2; App. Ex. 10 at 6.)

{¶ 110} Further, we find that the Project's viewshed studies are reasonable and describe reasonable mitigation measures as to impacts to nonparticipating residents. We note that the Project is not expected to visually impact local recreation areas, as confirmed by (1) Kingwood's primary consultant and architectural historian, and (2) CGA's visual impact witness, Susan Jennings. The Project will, however, impact the viewsheds of nonparticipating residents. In spite of these impacts, we conclude that the viewshed considerations do not preclude the Project, as Kingwood's use of enhanced vegetative

screening and setback distancing reasonably mitigates the visual impacts in line with similar projects for which we have issued certificates. (App. Reply Br. at 59-62.)

{¶ 111} Finally, CGA's contention that the Board cannot determine that the Project represents the minimum adverse environmental impact because a number of plans submitted with the application are labeled "preliminary" is also without merit. (CGA Br. at 4, 5, 47.) The Board agrees with Kingwood's contention that the Stipulation obligates Applicant to construct the Facility "as described in the application" and that failing to honor commitments or studies included with the application will be a violation of the terms of the Stipulation (Jt. Ex. 1 at 3, Condition 1). Further, the ability of the Board to condition certificates upon the submission and approval of final plans or studies has been affirmed by the Ohio Supreme Court (*In re Application of Buckeye Wind, L.L.C.*, 2012-Ohio-878, ¶¶ 13-14, 16).

{¶ 112} In summary, the Board finds that the record establishes that (1) the nature of the probable environmental impact from construction, operation, and maintenance of the Project has been established by Applicant, as required under R.C. 4906.10(A)(2), and (2) the environmental impacts from the Project are, subject to the certificate conditions recommended in the Stipulation, minimally adverse when considering the state of available technology and the nature and economies of the various alternatives.

C. R.C. 4906.10(A)(4): Consistency with Regional Plans

{¶ 113} R.C. 4906.10(A)(4) provides that, in the case of an electric transmission line or generating facility, the Board must ensure that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that such facility will serve the interests of electric system economy and reliability.

{¶ 114} NERC is responsible for the development and enforcement of the federal government's approved reliability standards, which are applicable to all owners, operators,

and users of the BPS. As an owner, operator, and/or user of the BPS, Applicant is subject to compliance with various NERC reliability standards. These standards are included as part of the system evaluations conducted by PJM. PJM is the regional transmission organization charged with planning for upgrades and administrating the generation queue for the regional transmission system in Ohio. Generators wanting to interconnect to the bulk electric transmission system located in the PJM control area must submit an interconnection application for review by PJM. (Staff Ex. 1 at 34-36.)

{¶ 115} PJM analyzed the bulk electric system, with the Facility interconnected to the BPS, for compliance with NERC reliability standards and PJM reliability criteria. The PJM studies indicated that no new system reinforcements would be needed due to the addition of Applicant's Project and that no overloading or network impacts on earlier projects in the PJM Queue would result from the addition of the proposed Facility. Additionally, PJM determined that upgrades to mitigate any future operational restrictions are not required for the Facility to be operational and are at the discretion of Applicant. The short circuit analysis identified no circuit breaker problems resulting from the proposed generation addition. (Staff Ex. 1 at 35-36.)

{¶ 116} Staff recommends that the Board find that the proposed Facility is consistent with regional plans for the expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, and that the Facility would serve the interests of electric system economy and reliability. Accordingly, Staff recommends that the Board find that the Facility complies with the requirements of R.C. 4906.10(A)(4), provided any certificate issued for the proposed Facility includes the conditions specified in the Staff Report. (Staff Ex. 1 at 36.)

{¶ 117} Kingwood echoes Staff's recommendation, submitting that the Facility is consistent with plans for expansion of the regional power system and will serve the interests of the electric system economy and reliability. Kingwood further points out that the results of PJM's reports together with Applicant's own transmission analysis shows that the Facility

can be constructed and operated without causing any reliability violations during single or multiple contingences and that no potential violations were found during the short circuit analysis. Kingwood also submits that the record reflects that the Facility will provide additional grid reliability by providing "on peak" power during the high demand period of mid-day and late afternoon. Further, Kingwood believes that the Facility will help meet general electricity demand in the region, particularly with the planned retirements of existing coal-fired generating assets in Ohio and the PJM network. (App. Br. at 90 citing App. Ex. 1, Appx. C; App. Ex. 6 at 4; App. Ex. 107 at 8.)

{¶ 118} The evidence provided by Staff and Kingwood regarding this criterion is compelling and unrefuted. The Board therefore finds that the Project will serve the interest of electric system economy and reliability and is consistent with regional plans for expansion of the electric power grid of the electric systems serving the state of Ohio and interconnected utility systems in accordance with R.C. 4906.10(A)(4).

D. R.C. 4906.10(A)(5): Air, Water, Solid Waste, and Aviation

{¶ 119} Pursuant to R.C. 4906.10(A)(5), the Facility must comply with Ohio law regarding air and water pollution control, solid and hazardous wastes, and air navigation.

1. AIR

{¶ 120} Kingwood states that solar facilities generate electricity without releasing pollutants into the atmosphere; therefore, state and federal air pollution permits are not required for the Project. Kingwood contends that the Project will not produce any air pollution, with the exception of controllable dust emissions during construction. Kingwood contrasts this with traditional electric generation methods such as combusting coal and natural gas, which emit air pollutants. Kingwood asserts that the Project will provide electricity to the surrounding region without exacerbating ozone issues created by pollution. Over time, according to Kingwood, a transition to clean energy sources such as solar facilities like the Project, could help all of Ohio attain and maintain air quality standards. (App. Br. at 32, 91.)

{¶ 121} Staff's analysis aligns with that of Kingwood. According to Staff, air quality permits are not required for construction or operation of the proposed Facility because the Facility will not use fuel and will not emit any air pollution. Fugitive dust rules, adopted under R.C. Chapter 3704 may be applicable to the construction of the proposed Facility. Applicant expects the amount of dust to be low because little topsoil will be moved and there will be minimal grading and earth work activities. Applicant would control temporary and localized fugitive dust by using best management practices such as using water to wet soil and/or dust suppressants on unpaved roads as needed to minimize dust. This method of dust control is typically used to comply with fugitive dust rules. The Project would not include any stationary sources of air emissions and, therefore, would not require air pollution control equipment. (Staff Ex. 1 at 37.)

{¶ 122} Based on the record in this case, the Board finds that both the construction and operation of the Project, subject to the conditions set forth in the Stipulation, will comply with the air emission regulations in R.C. Chapter 3704, and the rules and laws adopted thereunder.

2. WATER

{¶ 123} Kingwood submits that the Project will use relatively little water, particularly in comparison with conventional methods of electric generation. As discussed above, Kingwood states that the Project will generate no point-source wastewater and will observe federal and Ohio law to properly manage stormwater flows. Further, Kingwood has committed to adhere to the OEPA's Guidance on Post-Construction Storm Water Controls of Solar Panel Arrays. Kingwood states that the Project's post-construction stormwater controls will be designed and constructed in coordination with the Greene County Soil & Water Conservation District. (App. Br. at 67-69; Jt. Ex. 1 at 6, Condition 19.)

{¶ 124} Staff agrees that Kingwood will mitigate potential water quality impacts associated with aquatic discharges by obtaining an NPDES construction storm water general permit from the OEPA. Staff also notes that the OEPA has developed guidance on

post-construction storm water controls for solar panel arrays and recommends that Kingwood construct the Facility in such a manner that incorporates the OEPA guidance. Staff agrees with Kingwood's assessment that the Project will not require significant amounts of water. (Staff Ex. 1 at 37-38.)

{¶ 125} Upon review of the record, the Board finds that the Project will comply with Ohio law regarding water pollution control. As noted by Applicant, potential water quality impacts are unlikely and, to the extent they occur, will be mitigated through compliance with applicable required permits. The Board further notes that there is no record evidence submitted to dispute this conclusion.

3. Solid Waste

{¶ 126} Kingwood submits that the Project is not expected to generate any hazardous waste. Further, Applicant states that the limited amounts of solid waste generated during construction and operation will be reused, recycled, or disposed of in accordance with applicable law. Further, at the end of a solar panel's useful life, Kingwood has committed to send any retired panel material that is not recycled to an engineered landfill with various barriers or another appropriate disposal location at the time of decommissioning. (App. Br. at 92; App. Ex. 1 at 45-46; Jt. Ex. 1 at 11.)

{¶ 127} Staff agrees with Kingwood's description of the solid waste that might be generated at the Facility. Staff approves of Kingwood's solid waste disposal plans and states that the plans comply with the requirements set forth in R.C. Chapter 3734. (Staff Ex. 1 at 38.)

{¶ 128} Based upon a review of the record in this case, the Board finds that Kingwood has properly demonstrated that the Project will comply with R.C. Chapter 3734 and all rules and standards adopted thereunder. The application provides estimates of the amount of solid waste to be generated and a description of Kingwood's plans to manage and dispose of such waste. The Board, therefore, agrees with Kingwood and Staff that plans

outlined by Kingwood are reasonable and finds that the Project complies with the statutory criterion.

4. AVIATION

{¶ 129} Regarding compliance with the requirements of R.C. 4561.32, Kingwood states that there are no public use airports or public use helicopter pads within two miles of the Project area. Further, Kingwood stresses that there are no private use landing strips or property used for aviation within or adjacent to the Project area. (App. Ex. 1 at 48; App. Br. at 94-95.)

{¶ 130} Staff's investigation revealed that the tallest above ground structure would be a 70-foot-tall lightning mast at the collector substation, which is below the height requirement from the FAA, pursuant to 14 C.F.R. Part 77.9(a), for filing a Form 7460-1. Staff contacted the ODOT, in accordance with R.C. 4906.10(A)(5), to coordinate a review of potential impacts of the Project on local airports. No concerns were identified by ODOT. Staff, therefore, recommends that the Board find that the Project complies with the requirements of R.C. 4906.10(A)(5) with respect to aviation. (Staff Ex. 1 at 38-39.)

{¶ 131} Based on our review of the record, we find that Kingwood has proven that the Project will not unreasonably impair aviation.

{¶ 132} In summary, the Board finds that the Project will comply with R.C. Chapters 3704, 3734, and 6111, as well as rules and standards adopted under those chapters and under R.C. 4561.32. Accordingly, the certification criteria found in R.C. 4906.10(A)(5) have been met.

E. R.C. 4906.10(A)(6): Public Interest, Convenience, and Necessity

{¶ 133} Pursuant to R.C. 4906.10(A)(6), the Board must determine that the Facility will serve the public interest, convenience, and necessity.

{¶ 134} Kingwood asserts that the Facility, if conditioned in the certificate as recommended in the Stipulation, will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) (App. Br. at 21-32, 96-99).

{¶ 135} In arguing that the Project serves the public interest, convenience, and necessity, Kingwood emphasizes that it: benefits the local and state economies in terms of job creation, tax payments, and PILOT; benefits schools via increased funding; preserves agricultural land by avoiding alternative development and increasing landowner incomes; reduces fossil fuel dependency; and increases renewable energy availability in satisfaction of the needs of the state's current and prospective business investors. (App. Br. at 21-32.)

{¶ 136} Kingwood's evidence supports that the Project will create 444 Ohio jobs during the 16-month construction period, and 15 permanent jobs over the life of the Project. The overall economic activity in the state from the construction of the Project is expected to be $112 million, and the annual net increase in economic activity from the Project is expected to be $6.75 million. Increased taxes and PILOT from the Project's economic impact, much of which will be dedicated to local government and schools, are estimated at $2 million per year over the Project's 35-year life expectancy. Further, Kingwood indicates that it expects to pay (1) approximately $1.1 million in annual lease payments, which is estimated as an increase of $800,000 from the annual income of the leased properties as used in their current agricultural operations, (2) approximately $750,000 in annual "good neighbor" agreement payments, and (3) $225,000 in annual payments to community benefit funds in each of the three townships that are impacted by the Project. (App. Br. at 21-32.)

{¶ 137} In addition to the Project's direct economic benefits, Kingwood argues that the Project addresses social needs in terms of (1) fostering the replacement of fossil-fuel energy reliance, which is an issue of heightened importance to the state as it pursues economic development from businesses that value renewable energy choices in their investment decision-making, and (2) preserving acreage from permanent non-agricultural usage in order to prevent urban sprawl (App. Br. at 32-34).

{¶ 138} Kingwood also asserts that local opposition to the Project is overstated and not attributable to any quantifiable impacts. Kingwood stresses that its actions to address local concerns about the Project included (1) meeting with local political leadership and citizens about the Project since 2017, including hosting five public meetings since October 2020, (2) offering $822,500 in "good neighbor" benefits to nonparticipating landowners, (3) engaging with the local community as to any complaints that arise from the construction and operation of the Project. Further, Kingwood claims that the local opposition to the Project is overstated, citing to (1) a local public opinion poll it commissioned, and (2) Kingwood's claims that the local government resolutions opposing the Project are unreasonably vague. (App. Br. at 21-36.) Specific to the poll, Kingwood claims that it demonstrates that county-wide support for the Project is at 63 percent. (App. Br. at 3, 42-44.) Additionally, Kingwood argues that unfounded opinions about a project's impact that are expressed by members in the community are not sufficient to determine that a project is against the public interest. [App. Br. at 18 citing *In re Ross County Solar,* Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21. 2021); *In re Alamo Solar I, LLC,* Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (June 24, 2021).]

{¶ 139} As indicated above, Staff recommends that the Board find that the proposed Facility does not serve the public interest, convenience, and necessity. In reaching its recommendation, Staff cites to the local opposition to the Project, especially as demonstrated by Greene County and the three townships affected by the Project. At the time the Staff Report was issued, Staff's measure of local government opposition was communicated via (1) a Greene County resolution in opposition to the Project dated October 28, 2021, and (2) calls between a Staff representative and local officials at the three affected townships. Following the issuance of the Staff report, additional local government opposition included (1) the adoption of Project opposition resolutions by all three affected townships, (2) active participation in opposition to the Project by all four government entities in the evidentiary hearing. (Staff. Ex. 1 at 40-44.)

{¶ 140} In addition to the unanimous opposition by the four local government entities, CGA joined in arguing that the Project fails to comply with R.C. 4906.10(A)(6). CGA argues that the unique characteristics of the area that lead to the high level of public opposition include (1) the higher density of nonparticipating residences within 500 feet of the Project, (2) the large number and unique characteristics of the wildlife, parks, and recreation areas in the region, and (3) the unique cultural and historic areas in the region. Further, CGA joins the remaining Project opponents in critiquing Kingwood's polling data because the poll was conducted (1) without any regard to emphasizing the local, rather than countywide, Project impacts, and (2) in such a manner that opposition was unlikely given that questions were aimed generally at (a) individual landowner rights, (b) benefits from increasing school funding, and (c) benefits to encouraging employment and business development. CGA and others claim that the polling approach renders the poll inadequate as to the positions of residents in proximity to the Project who are most impacted by it. (CGA Br. at 22-24, 55; CGA Reply Br.at 4-5.)

{¶ 141} Citing the Board's decision in *In re the Application of Republic Wind*, Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate (June 24, 2021), the Project's opponents collectively assert that the determination of public interest, convenience, and necessity must be examined through a broad lens that balances a project's expected benefits against the magnitude of potential negative impacts on the local community. The Project's opponents further submit that the Project impairs numerous cultural resources.

{¶ 142} As we have reinforced in recent decisions, the determination of public interest, convenience, and necessity must be examined through a broad lens and in consideration of impacts, local and otherwise, from the Project. *In re Birch Solar 1, LLC*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) at ¶68; *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate (June 24, 2021) at ¶91; *In re American Transmission Systems, Inc.*, Case No. 19-1871, Opinion, Order and Certificate (May 19, 2022) at ¶79. As we recently affirmed in *Birch Solar*, the Board acknowledges that there are numerous public benefits as to all proposed solar facilities, including (1) the public's interest

in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements relative to transitioning from fossil fuels to renewable energy resources, (4) protecting landowner rights, and (5) preserving agricultural land use. Juxtaposed against these benefits is the need to fully consider the impact on individuals who are most directly affected by a proposed project, primarily residents living near the project. Assessing these sometimes-competing interests is required in order to determine whether a project satisfies the requirement of R.C. 4906.10(A)(6). *Birch Solar* at ¶68.

{¶ 143} As in *Birch Solar*, the primary concern surrounding the Project results from the uniform public opposition expressed by the local government entities whose constituents are impacted by the Project.[6] As described above, all four government entities with physical contacts to the Project acted to oppose its certification. Moreover, there has been active opposition in this case from each of the four local government entities that participated in the evidentiary hearing.

{¶ 144} Based on our review of the record, the Board finds that the proposed Facility, subject to the conditions specified in the Stipulation, does not comply with the requirements specified in R.C. 4906.10(A)(6). In reaching this decision, we recognize that the need to determine whether the Facility will serve the public interest, convenience, and necessity should be examined broadly. For example, this factor should consider the public's interest in a power siting project that ensures continued utility services and the prosperity of the state of Ohio. At the same time, this statutory criterion regarding public interest, convenience, and necessity, must also encompass the local public interest, ensuring a

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6 The Board again acknowledges that this case is not impacted by SB 52, which subjects solar projects that are filed after October 11, 2021 to increased county-level and township-level review and participation in the Board's certification process. Still, as in *Birch Solar*, the Board stresses its continuing obligation to determine a project's compliance with the public interest, convenience, and necessity. R.C. 4906.10(A)(6). Accordingly, the Board must consider, independent of SB 52, the manner and degree of opposition of the local governments impacted by the Project as it relates to whether the Project is in the public interest, convenience, and necessity.

process that allows for local citizen input and consideration of local government opinions that reflect the citizenry that is impacted by the Project. As part of the Board's responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, we must balance projected benefits against the magnitude of potential negative impacts on the local community. See *Birch Solar; In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021) at 36.

{¶ 145} As in *Birch Solar*, we conclude that the unanimous opposition of every local government entity that borders the Project is controlling as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). In reaching this conclusion, our focus goes beyond merely counting local government resolutions to determine whether a certificate is warranted. Instead, we focus on the vigor and rationale of the local government opposition, which clearly serves as an indicator of this Project's lack of public support.

{¶ 146} Greene County began its opposition to the Project soon after learning of it in November of 2020. Initially, Greene County hosted a town hall to solicit local public opinion, which was, generally, that the Project was inconsistent with the area. Following the town hall, the county prepared proposed amendments to its land use plan, Perspectives 2020, to address plans for managing new development in the area. After conducting two public hearings on the proposed Perspectives 2020 amendments, Greene County adopted the amendments on August 26, 2021. Specific to the Project, the Perspectives 2020 amendments referenced concerns as to (1) its proximity to "a relatively densely, and growing, populated area" and (2) the fact that its five-mile viewshed would include "several other State and local cultural, historic, scenic, and recreational resources, including Clifton Gorge Dedicated Nature Preserve, Clifton Mill, Clifton River Road Reserve, John Bryan State Park, and numerous trails, with potential near-foreground visibility from Clifton Gorge Dedicated Nature Preserve, and John Bryan State Park." Based on these concerns, Greene County determined that the Project could be an economic detriment to tourism.

Thereafter, Greene County enacted another opposition resolution specific to the Project on October 29, 2021.[7] (Greene County Ex. 1 at 1-4.)

{¶ 147} Greene County's opposition was echoed by all three townships that are impacted by the Project. Miami Township adopted its resolution in opposition to the Project on November 15, 2021, citing to (1) land-use concerns, and (2) the Project's impact on three natural areas; Clifton Gorge State Nature Reserve, John Bryan State Park, and Glen Helen Nature Preserve. (Miami Ex. 3.) Cedarville Township adopted its resolution in opposition to the Project on December 9, 2021, citing to concerns including, but not limited to (1) land-use considerations, (2) agricultural impacts, (3) property value concerns, (4) issues of project sprawl and impacts to higher density housing, and (5) the opposition comments offered on the case docket and during the local public hearing (Cedarville Ex. 1). Xenia Township adopted its resolution in opposition to the Project on December 16, 2021, citing to concerns including, but not limited to (1) land-use considerations, (2) property value concerns, (3) impacts to the agricultural character of the area, (4) tourism impacts, and (5) wildlife impacts (Xenia Ex. 1).

{¶ 148} In addition to the unanimous opposition of all four local governments impacted by the Project, we find that the public comments in the case docket and expressed at the local public hearing refute Kingwood's contention that the Project is in the public interest, convenience, and necessity. Absent the public support from the IBEW union, public comments at the local public hearing and in the case docket reflect opposition to the Project at a ratio of approximately three to one.[8] Further, we reject Kingwood's claim that its polling reflects widespread support for the Project. Initially, we note that the poll was conducted with a county-wide focus instead of measuring the responses of those more

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7 We note that the rationale for the October 2021 resolution is consistent with that cited in the resolution that amended the Perspectives 2020 plan, which refutes Kingwood's claims that the resolution was prepared in response to an improper Staff request for formal opposition to the Project.

8 We do not discount the importance of the IBEW comments. But as they are generally single-issue focused and supportive of the temporal job creation from the Project, we see benefit to considering the ratio of support/opposition comments absent the IBEW block for purposes of gauging the local perception of the Project.

directly impacted by the Project (the local township residents). In support of our conclusion, we note that 73 percent of those polled knew little or nothing about the Project before participating in the poll, which is inconsistent with the attention that the Project has received at the local, township level. Additionally, we find that the polling questions were skewed in favor of the Project by focusing questions on areas of obvious public support such as (1) local communities and schools, (2) farmland preservation, (3) clean energy, (4) landowner rights, and (5) freedom from government interference. Based on the manner in which the poll questions were posed, we find that the poll serves no value as a measure of the public opinion of those most directly impacted by the Project.

{¶ 149} With respect to R.C. 4906.10(A)(6), the Board finds that the Project does not serve the public interest, convenience, and necessity. Consistent with our prior decisions, we acknowledge the general public benefits of solar facilities, which include (1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels, (4) protecting landowner rights, and (5) preserving long-term agricultural land use. And again, we note that these Project benefits must be considered with respect to the impact of the Project on individuals who are most directly affected by the Project, primarily those who live near it.

{¶ 150} The primary concern surrounding the Project, as it was in *Birch Solar*, is the uniform public opposition expressed by the local government entities whose constituents are impacted by the Project. As in *Birch Solar*, the Project is opposed by all four government entities with physical contact to it. Moreover, unlike in *Birch Solar*, the government entities supplemented the adoption of their individual opposition resolutions by actively participating in the evidentiary hearing. And the government entities were joined in opposing the Project throughout the evidentiary hearing by private parties, including CGA and its 92 members, In Progress, and Tecumseh.

{¶ 151} Additionally, the Board notes the overwhelming number of public comments filed in the case, which largely disfavor the Project. Consistent with our analysis in *Birch Solar*, we again find that these comments reinforce, rather than contradict, the conclusions of the government bodies that were formally considered at the local level, as well as those who testified at the local public hearing. Further, while we recognize that the public comments fall short of being admitted evidence in the case, we nonetheless affirm that they add value to the Board's consideration of the local perception of the Project. As described above, the public comments filed in the case certainly reinforce the outcomes of the local government opposition resolutions, which reinforces the level of community opposition to the Project.

{¶ 152} Based on the unanimous opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

F. R.C. 4906.10(A)(7): Agricultural Districts

{¶ 153} Pursuant to R.C. 4906.10(A)(7), the Board must determine the Facility's impact on agricultural viability of any land in an existing agricultural district within the project area of the proposed Facility.

{¶ 154} Kingwood contends that the presence of the solar Facility will help preserve agricultural land and support future generations of families having the option to return the land to agricultural use following decommissioning of the Project. Kingwood acknowledges that 205 acres of agricultural land will be impacted during the Facility's operation but avers that the impacts to this acreage will be temporary, because after decommissioning the land will be returned to substantially preconstruction condition. (App. Br. at 95.)

{¶ 155} Staff points out the commitments made by Kingwood to address potential impacts to farmlands, including repairing drainage tiles damaged during construction and

restoring temporarily impacted land to its original use. Further, Staff highlights that excavated topsoil will be used to establish vegetative cover for the Project and that, upon decommissioning, disturbed areas will be restored to agricultural use. Staff, therefore, recommends that the Board find that the impact of the Project on existing agricultural land in an agricultural district has been determined, and complies, subject to the agreed-upon conditions in the Stipulation, with the requirements of R.C. 4906.10(A)(7). (Staff Ex. 1 at 45.)

{¶ 156} Based on the record, the Board concludes that the Project satisfies the requirements specified in R.C. 4906.10(A)(7), provided the certificate issued incorporates the applicable provisions of the Stipulation and consistent with this Order.

G. R.C. 4906.10(A)(8): Water Conservation Practice

{¶ 157} Pursuant to R.C. 4906.10(A)(8), the proposed Facility must incorporate maximum feasible water conservation practices, considering available technology and the nature of and economics of the various alternatives.

{¶ 158} Signatory Parties state that the record establishes that the Facility will incorporate maximum feasible water conservation practices under R.C. 4906.10(A)(8).

{¶ 159} Kingwood states that the Stipulation and record in this proceeding support the finding and determination that the Facility incorporates the maximum feasible water conservation practices under the statute. In support of its position, Kingwood submits that the Project will use (1) only limited amounts of water for dust suppression during its construction, and (2) minimal amounts of water when panels are cleaned, up to twice per year. (App. Br. at 95.)

{¶ 160} Staff notes that in the event that cleaning is needed, Applicant estimates that a single instance of 282,000 gallons of water would be used, and that Applicant intends to obtain the water from local subsurface resources, truck in water, or both. Staff recommends that the Board find that the Project would incorporate maximum feasible water conservation practices and, therefore, complies with this criterion. (Staff Ex. 1 at 42.)

{¶ 161} As summarized in the context of the discussion of R.C. 4906.10(A)(2) and (A)(3) above, CGA contends that Kingwood failed to address how the proposed Facility incorporated maximum feasible water conservation practices considering available technology and the nature and economics of the various alternatives (CGA Br. at 43-44).

{¶ 162} Upon a review of the record, the Board finds that the Facility incorporates the maximum feasible water conservation practices, and, therefore, satisfies the requirements of R.C. 4906.10(A)(8), provided that the certificate issued incorporates the applicable provisions of the Stipulation. In making this determination, the Board recognizes the representation that construction and operation of the Facility will not require the use of significant amounts of water and that nearly no water or wastewater discharge is expected.

XI. CONSIDERATION OF STIPULATION

{¶ 163} Pursuant to Ohio Adm.Code 4906-2-24, parties before the Board are permitted to enter into stipulations concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding. In accordance with Ohio Adm.Code 4906-2-24(D), no stipulation is binding on the Board. However, the Board may afford the terms of the stipulation substantial weight. The standard of review for considering the reasonableness of a stipulation has been discussed in numerous Board proceedings. See, e.g. *In re Hardin Wind, LLC*, Case No. 13-1177-EL-BGN (Mar. 17, 2014); *In re Northwest Ohio Wind Energy, LLC*, Case No. 13-197-EL-BGN (Dec. 16, 2013); *In re AEP Transm. Co., Inc.*, Case No. 12-1361-EL-BSB (Sept. 30, 2013); *In re Rolling Hills Generating LLC*, Case No. 12-1669-EL-BGA (May 1, 2013); *In re American Transm. Systems Inc.*, Case No. 12-1727-EL-BSB (Mar. 11, 2013). The ultimate issue for the Board's consideration is whether the agreement, which embodies considerable time and effort by Signatory Parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Board has used the following criteria:

a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

b) Does the settlement, as a package, benefit ratepayers and the public interest?

c) Does the settlement package violate any important regulatory principal or practice?

{¶ 164} In support of the Stipulation, Kingwood presented the testimony of witness Mr. Stickney who testified as to the three-part test applicable to the Board's consideration of this case. Mr. Stickney testified that the Stipulation is the product of serious bargaining among capable parties stressing that (1) in response to settlement discussions with intervenors in the case who did not ultimately join in the Stipulation, the Project was modified in terms of its layout, screening, and stipulation criteria such that negotiations were meaningful and impactful and (2) all parties were represented by counsel and invited to an all-party negotiation on February 17, 2022, where Stipulation conditions were negotiated. Mr. Stickney details that the results of the negotiations are measurable in terms of (1) the proposed amendment of 22 of the conditions recommended by Staff in the Staff Report, (2) the addition of four new conditions, and (3) the deletion of two conditions that have either been completed or are incorporated into other conditions within the Stipulation. (App. Ex. 7 at 2, 16-18; App. Br. at 96-97.)

{¶ 165} In its reply brief, while maintaining its opposition to certificating the Project, Staff offers an alternative recommendation that, should the Project receive a certificate, the conditions in the certificate should be the conditions proffered in the Staff Report, as enhanced by the Stipulation (Staff Reply Br. at 21-26).

{¶ 166} Further, CGA argues that the Stipulation is unworthy of the Board's consideration because (1) only OFBF joined Applicant in the Stipulation, leaving Staff and seven other parties in opposition to it, and (2) even OFBF's joinder in the Stipulation is as to the recommended inclusion of the 39 conditions included within the Stipulation, rather than whether the Project should receive a certificate (CGA Br. at 2-3).

{¶ 167} Upon review, the Board finds that the Stipulation does not meet the criteria used by the Board to evaluate and adopt a Stipulation. Specifically, the Board's conclusion that the Project does not comply with R.C. 4906.10(A)(6) results in the conclusion that the Stipulation criteria are not fully satisfied.

{¶ 168} Initially, the Board concludes that the record evidence refutes a finding that the Stipulation meets the first part of the three-part test. While acknowledging Applicant's efforts at including the parties in settlement dialog as to seeking approval of the application and incorporating revisions to its conditions, the fact is that the Stipulation fails to describe agreement of any of the parties as to the core issue in this case - whether the Board should issue a certificate for the Project. Thus, while the Stipulation is technically a partial agreement of two parties in this case, we cannot conclude that it is the "product" of serious bargaining. As the Stipulation does not describe agreement of any parties as to the core issue in the case, we find that it is not the product of serious bargaining among capable, knowledgeable parties.

{¶ 169} Additionally, consistent with our decision in *Birch Solar*, we also find that the second and third criteria of the three-part test are not satisfied. As described above, our determination that the Project fails to comply with the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6) necessitates findings that (1) the Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Stipulation would violate an important regulatory principle or practice.

{¶ 170} As the Stipulation does not comply with any parts of the three-part test, the Board denies Kingwood's application for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of the solar-powered electric generation facility.

XII. CONCLUSION

{¶ 171} Accordingly, based on the record in this proceeding, the Board concludes that the required elements of R.C. Chapter 4906 for the construction, operation, and maintenance of the solar-powered electric generation facility described in Kingwood's application are not satisfied. The Board thus rejects the Stipulation filed in this case and hereby denies a certificate to Kingwood in accordance with R.C. Chapter 4906.

XIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 172} Kingwood is a person under R.C. 4906.01(A) and is licensed to do business in the state of Ohio.

{¶ 173} The proposed solar-powered electric generation facility is a major utility facility as that term is defined in R.C. 4906.01(B).

{¶ 174} The record establishes that the Facility is not an electric transmission line or gas pipeline and, therefore, R.C. 4906.10(A)(1) is not applicable.

{¶ 175} The record establishes the nature of the probable environmental impact from construction, operation, and maintenance of the Facility, consistent with R.C. 4906.10(A)(2).

{¶ 176} The record establishes that the Facility, subject to the conditions set forth in the Stipulation, represents the minimum adverse environmental impact, considering the available technology and nature and economics of the various alternatives, and other pertinent considerations, consistent with R.C. 4906.10(A)(3).

{¶ 177} The record establishes that the Facility, an electric generation facility, is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the Facility will serve the interests of electric system economy and reliability consistent with R.C. 4906.10(A)(4).

{¶ 178} The record establishes that the Facility, subject to the conditions set forth in the Stipulation, will comply with R.C. Chapters 3704, 3734, and 6111; R.C. 4561.32; and all

rules and regulations thereunder, to the extent applicable, consistent with R.C. 4906.10(A)(5).

{¶ 179} The record fails to establish that the Facility, subject to the conditions set forth in the Stipulation, will serve the public interest, convenience, and necessity, consistent with R.C. 4906.10(A)(6).

{¶ 180} The record establishes the impact of the Facility on agricultural lands and agricultural district land consistent with the requirements of R.C. 4906.10(A)(7).

{¶ 181} The record establishes that the Facility will not require significant amounts of water, will produce nearly no water or wastewater discharge, and incorporates maximum feasible water conservation practices. Accordingly, the Facility meets the requirements of R.C. 4906.10(A)(8).

{¶ 182} The evidence supports a finding that the criteria in R.C. 4906.10(A) for the construction, operation, and maintenance of the Facility as proposed by Applicant are not satisfied.

{¶ 183} Based on the record, the Board finds that Kingwood's application for a certificate, pursuant to R.C. Chapter 4906, for the construction, operation, and maintenance of the electric generation Facility is denied consistent with this Opinion and Order.

XIV. ORDER

{¶ 184} It is, therefore,

{¶ 185} ORDERED, That the interlocutory appeal filed by Kingwood on May 2, 2022, be denied as set forth above in Paragraph 79. It is, further,

{¶ 186} ORDERED, That the motion to strike filed by Kingwood on August 15, 2022, be granted as set forth in Paragraphs 81 and 83. It is, further,

{¶ 187} ORDERED, That the motion for protective order filed by Kingwood on February 9, 2022, is granted as described in Paragraph 86. It is, further,

{¶ 188} ORDERED, That the Stipulation filed on March 4, 2022, be denied. It is, further,

{¶ 189} ORDERED, That Kingwood's application for a certificate for the construction, operation, and maintenance of the solar-powered electric generation Facility be denied. It is, further,

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

BOARD MEMBERS:
Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Markee Osborne, Designee for Lydia Mihalik, Director
Ohio Department of Development

Damian Sikora, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

W. Gene Phillips, Designee for Bruce T. Vanderhoff, M.D., Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

Gregory Slone
Public Member

MLW/DMH/dmh

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

Summary: Opinion & Order rejecting the stipulation and recommendation between Kingwood Solar I LLC and the Ohio Farm Bureau Federation and denying the application of Kingwood Solar I LLC for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio. electronically filed by Ms. Mary E. Fischer on behalf of Ohio Power Siting Board

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**

ORDER ON REHEARING

Entered in the Journal on September 21, 2023

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies: (1) the application for rehearing filed by Kingwood Solar I LLC; (2) the application for rehearing filed by Citizens for Greene Acres; and (3) the application for rehearing filed by Greene County Commissioners.

II. PROCEDURAL BACKGROUND

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906-1, et seq.

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

{¶ 4} Pursuant to R.C. 4906.04, no person shall construct a major utility facility without first having obtained a certificate from the Board.

{¶ 5} On March 11, 2021, Kingwood filed a pre-application notification letter with the Board regarding its proposed solar-powered electric generation facility in Cedarville, Miami, and Xenia Townships, Greene County, Ohio with up to 175 megawatts (MW) of electric generating capacity (Project or Facility).

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

{¶ 7} On August 26, 2021, the administrative law judge (ALJ) granted intervention to Cedarville Township Board of Trustees (Cedarville Township), Xenia Township Board of Trustees (Xenia Township), Miami Township Board of Trustees (Miami Township), In Progress LLC (In Progress), Tecumseh Land Preservation Association (Tecumseh), Citizens for Greene Acres, Inc. and 14 members of the group (collectively, CGA), Greene County Board of Commissioners (Greene County or the Commissioners), and the Ohio Farm Bureau Federation (OFBF).

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

{¶ 9} On March 4, 2022, a joint stipulation (Stipulation) was filed by Kingwood and OFBF (Jt. Ex. 1).

{¶ 10} The adjudicatory hearing commenced as scheduled on March 7, 2022, and concluded at the close of rebuttal witness testimony on April 26, 2022.

{¶ 11} On June 13, 2022, Kingwood, Staff, Xenia Township, Miami Township, Cedarville Township, Greene County, CGA, and In Progress timely filed initial post-hearing briefs.

{¶ 12} On July 22, 2022, Kingwood, Staff, CGA, and Greene County timely filed post-hearing reply briefs. Additionally, Miami Township, Xenia Township, and Cedarville Township filed a timely joint reply brief.

{¶ 13} On December 15, 2022, the Board issued an Opinion and Order (Order) that denied Kingwood's application to construct, maintain, and operate the Facility. Specifically, the Order declared that Kingwood did not satisfy R.C. 4906.10(A)(6), which requires that, in

order to receive Board certification, a project must serve the public interest, convenience, and necessity.

{¶ 14} R.C. 4906.12 provides that R.C. 4903.02 to 4903.16 apply to any proceeding or order of the Board in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission). R.C. 4903.10 provides that any party to a proceeding before the Commission may apply for rehearing with respect to any matter determined in that proceeding within 30 days after entry of the order upon the journal of the Commission. The statute further directs that applications for rehearing be in writing and set forth specifically the ground or grounds on which the party seeking rehearing considers an order unreasonable or unlawful. Additionally, Ohio Adm.Code 4906-2-32 provides that any party may file an application for rehearing within 30 days after an order has been journalized by the Board in the manner, form, and circumstances set forth in R.C. 4903.10.

{¶ 15} On January 13, 2023, CGA, Cedarville Township, Miami Township, and Xenia Township (Joint Intervenors) filed an application for rehearing (Joint Application for Rehearing) from the Order.

{¶ 16} On January 17, 2023, Greene County filed an application for rehearing (Greene Application for Rehearing) from the Order.

{¶ 17} On January 17, 2023, Kingwood filed an application for rehearing (Kingwood Application for Rehearing) from the Order.

{¶ 18} On January 17, 2023, Kingwood also filed a motion for extension of the deadline to respond to the applications for hearing filed by Joint Intervenors and Greene County. The ALJ granted this motion via entry issued on January 18, 2023.

{¶ 19} On January 27, 2023, Greene County filed a memorandum contra the Kingwood Application for Rehearing (Greene Memo Contra).

{¶ 20} On January 27, 2023, Joint Intervenors filed a memorandum contra the Kingwood Application for Rehearing (Joint Intervenors Memo Contra).

{¶ 21} On January 27, 2023, Kingwood filed a separate memorandum contra in opposition to both the Greene Application for Rehearing (Memo Contra Greene County) and the Joint Application for Rehearing (Memo Contra Jt. Intervenors).

{¶ 22} By Entry issued February 7, 2023, the ALJ granted all three applications for rehearing for the express purpose of affording the Board more time to consider the issues raised in the applications pursuant to Ohio Adm.Code 4906-2-32(E).

III. DISCUSSION

{¶ 23} In the Kingwood Application for Rehearing, Applicant argues that the Project meets all of the statutory requirements that have been approved by the Board in earlier, similar cases. Kingwood believes that the Board gave undue weight to unsubstantiated opinions of local government entities and a vocal minority of citizens to deny the application under R.C. 4906.10(A)(6). Applicant submits that the Board now has an opportunity, on rehearing, to redirect its position and alter its Order to come back into compliance with the statutory framework provided by the General Assembly. Kingwood submits 10 grounds for rehearing as to why it believes the Order to be unlawful and unreasonable.

{¶ 24} Joint Intervenors support the decision of the Board to deny Kingwood's application but submit that the Order is in part unlawful and unreasonable because it failed to state that there are additional grounds for denying the certificate. Joint Intervenors request that the Board add these grounds to the Order as additional reasons for denying the application and outline 15 assignments of error.

{¶ 25} Greene County also supports the Board's decision to reject the Stipulation and deny a certificate of environmental compatibility and public need for the Project. However, the Commissioners also aver that there are additional or alternative grounds for

the Board's denial that should be incorporated into the Order. Greene County outlines three assignments of error in support of its application for rehearing.

{¶ 26} The Board will address each application for rehearing below. Any claim or argument raised in an application for rehearing that is not specifically discussed herein, was nevertheless thoroughly and adequately considered by the Board, and is denied.

A. Kingwood Application on Rehearing

1. FIRST GROUND FOR REHEARING: THE BOARD'S CONSIDERATION OF THE LOCAL GOVERNMENTAL AUTHORITIES' POSITIONS ON THE PROJECT TO DETERMINE WHETHER THE PROJECT IS IN THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY EXCEEDED THE BOARD'S STATUTORY AUTHORITY AND THEREFORE WAS UNLAWFUL AND UNREASONABLE.

{¶ 27} Kingwood cites established case law to reiterate that the Board is a creature of statute and can only act within the powers the legislature has conferred upon it. Based upon this universally accepted principal, Kingwood submits that the key question for its application for rehearing is whether the General Assembly, through its enactment of R.C. 4906.10(A)(6), permits the Board to consider the opinions of the local government authorities to determine whether a project satisfies that criterion. Kingwood avers that the language of R.C. 4906.10(A)(6) is unambiguous—the Board must determine whether a facility will "serve the public interest, convenience, and necessity." While the terms "public interest, convenience, and necessity" are not defined in the statute, Kingwood proffers that these terms require a more general understanding such that it is evaluated in terms of the benefit to the public at large rather than that of a particular area or municipality. Kingwood submits that prior projects before the Board, which faced similar alleged "unanimous opposition" from local governmental entities, were still approved and issued certificates of environmental compatibility and public need. Kingwood argues that the Board added an additional requirement that a project must be supported, or at least not opposed, by the local

governments where a project area is located. Kingwood believes that there is no textual basis in R.C. 4906.10(A)(6) for the Board to add such a requirement. In fact, Kingwood submits that there is no language in the statute that allows the Board to take into account local government opinions. In support of this, Kingwood asserts that the General Assembly would not have found it necessary to pass Senate Bill 52 to allow the counties to veto solar projects in their communities if the General Assembly believed the statute already provided local government with such authority. Kingwood states that the Board acknowledged the public benefits that the Project would supply but determined that the opinions of local government entities alone were enough to defeat the Project. Kingwood argues that including local government opinion and general public opinion from a "vocal minority" as part of the Board's analysis under R.C. 4906.10(A)(6) is unlawful and unreasonable. (Kingwood App. for Rehearing at 4-9.)

{¶ 28} In its memorandum contra the Kingwood Application for Rehearing, Joint Intervenors respond that Kingwood's arguments misread the Board's opinion. Joint Movants aver that the Board did not consider *only* the expression of local opposition in its analysis under R.C. 4906.10(A)(6) but balanced the alleged benefits and weighed them against the adverse impacts on the local community. Accordingly, Joint Intervenors believe that the Board considered the Project's effects on the entire public. Joint Intervenors are unmoved by Kingwood's arguments concerning Senate Bill 52. Whereas Senate Bill 52 allows counties to place a complete moratorium on solar projects, the Board's interpretation of R.C. 4906.10(A)(6) simply allows it to consider local support or opposition as part of the balancing test to determine if a project satisfies the public interest, convenience, and necessity. Joint Intervenors state that Greene County and the township trustees recognized opposition to the Project from their constituents and based on their positions in this case on these voiced concerns, as evidenced by the resolutions passed by all the governmental intervenors. In summary, Joint Intervenors aver that the Board's balancing of the local public interest against the Project's purported overall benefits is an appropriate procedure under R.C. 4906.10(A)(6). (Joint Intervenors Memo Contra at 6-13.)

{¶ 29} Greene County, in its memorandum contra, argues that the public interest provision of R.C. 4906.10(A)(6) does not confine the Board to any specific evidence or considerations and in no way excludes the Board from considering local government opposition as part of its analysis. Greene County submits that the Board correctly noted that Kingwood's arguments in support of the Project being in the public interest, convenience, and necessity (increased energy generation, potential job creation, tax revenues, air quality benefits, etc.) are arguments that apply in every solar case and if these alone were sufficient to issue a certificate, then there would be no need for an analysis under R.C. 4906.10(A)(6). Greene County emphasizes that the county commissioners and trustees of the intervening townships are elected officials that speak for residents of the county and townships. Greene County believes that the Board reasonably and lawfully considered the rationale presented by these elected officials and found it to be compelling and credible. (Greene Memo Contra at 2-5.)

{¶ 30} The Board finds Kingwood's first ground for rehearing to be without merit. We agree with Kingwood's uncontested proposition that the Board is a creature of statute and can only act within the powers conferred by the General Assembly. However, Kingwood's interpretation of R.C. 4906.10(A)(6) to somehow foreclose the Board's consideration of the opinions of local government entities when evaluating proposed projects is misguided. R.C. 4906.10(A)(6) charges the Board with determining whether a project will "serve the public interest, convenience, and necessity," but, as pointed out by Greene County, this language does not confine the Board to considering only particular evidence or viewpoints as part of its analysis. The Board views this factor through a broad lens, taking into account the general public's interest in energy generation and potential prosperity for the state of Ohio, while also considering the local public interest, local citizen input, and impact to natural resources (*See In re the Application of Republic Wind (Republic Wind)*, Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate (June 24, 2021) at 28; *In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021) at 36 *(Ross County Solar)*; *In re Harvey Solar I*, Case No. 21-164-EL-BGN, Opinion, Order, and

Certificate (Oct. 20, 2022) at 109). That is precisely what the Board did in this Order, recognizing certain benefits that could flow from the Project, while balancing those against the opposition of local citizens and government entities (Order at ¶¶ 149-150). The Board did not, as Kingwood alleges, add an additional requirement that a project must be supported by local governments in order to be approved. The opposition of local governments was simply one of the many factors contributing to the Board's analysis. The four elected government entities with physical contact to the Project all intervened in this proceeding and actively participated at hearing to voice their opposition. The Board found these arguments, made by entities comprised of elected officials, compelling as to the public interest of the Project. (Order at ¶¶ 150-152.) Nothing in R.C. 4906.10(A)(6), nor Board precedent, bars such a consideration of public opinion, and this ground for rehearing is denied accordingly.

2. SECOND GROUND FOR REHEARING: THE BOARD'S DELEGATION OF ITS DECISION-MAKING AUTHORITY TO THE LOCAL GOVERNING BODY OF GREENE COUNTY AND THE THREE INTERVENING TOWNSHIPS WAS IMPERMISSIBLE, UNLAWFUL AND UNREASONABLE.

{¶ 31} Kingwood submits that expanding the analysis of what constitutes as serving the public interest, convenience, and necessity to include "public opinion and perception" impermissibly delegates the Board's decision-making authority to local government bodies or a vocal minority. Kingwood points to R.C. 4906.02(C), which, states that the authority to grant certificates under R.C. 4906.10 shall not be exercised by any officer, employee, or body other than the Board itself. Kingwood argues that local governments, including elected representatives, have no say over the how major utility projects are to be built and run. Kingwood stresses that the Project met every "technical criteria" of R.C. 4906.10(A). However, Kingwood states that the Board denied the application solely because intervening local governmental entities passed resolutions opposing the Project. Kingwood argues that this amounts to the Board abdicating its

exclusive authority regarding the issuance of certificates under R.C. 4906.10. Kingwood avers that the Board has rules in place which allow local governing bodies and members of the public to engage in the certification process outside of R.C. 4906.10(A)(6). Kingwood believes that to allow otherwise would potentially lead to energy development in Ohio being determined not by the Board, but by political entities. (Kingwood App. for Rehearing at 9-11.)

{¶ 32} Joint Intervenors dismiss Kingwood's contention that the Board delegated its decision-making authority, as the opening paragraph of the Order states that "[t]he Ohio Power Siting Board … denies the application of Kingwood Solar I LLC …" Likewise, the conclusion states that the Board denies Kingwood's application. Therefore, the seven members of the Board, not local government officials, made the decision to deny Kingwood's application. (Joint Intervenors Memo Contra at 13-15.)

{¶ 33} Greene County also finds Kingwood's second grounds for rehearing to be illogical. Greene County points out that on one hand Kingwood states that the General Assembly expressly delegated the authority to grant certificates under R.C. 4906.10 to the Board, but then claims that the Board's decision to consider local government opposition to the Project is unlawful—Greene County submits that both of these propositions cannot be true. Greene County argues that nothing in the Revised Code prohibits the Board from considering local government opposition as part of the Board's analysis. Further, the fact that there have been previous cases where unanimous public opposition was overruled by the Board, and cases where unanimous local opposition has been upheld by the Board, prove that the Board has decision-making authority based on the statutory criteria and the individual circumstances of each case. (Greene Memo Contra at 5-6.)

{¶ 34} Largely for similar reasons as those outlined above in our denial of the first ground for rehearing, the Board finds this second ground for rehearing to be without merit. Having already determined above that nothing in R.C. 4906.10(A)(6) bars the Board from considering the opposition of local government entities as part of its analysis of this

criterion, we likewise disagree with Kingwood's assertion that considering arguments from such entities somehow equates to a delegation of authority. As pointed out by CGA, the Order clearly states that "**The Ohio Power Siting Board** … denies the application of Kingwood Solar I LLC …" (emphasis added) (Order ¶ 1). The views expressed by local elected officials, through government entities that intervened in the case, were prudently considered. The decision, however, was the Board's, and none of the local government entities possessed any form of approval or veto power as to whether a certificate would be issued for the Project. Kingwood's repeated assertion that its application met every "technical criteria" of R.C. 4906.10(A) is unavailing—the statute requires satisfaction of all criteria thereunder, including (A)(6). To interpret the statute as Kingwood desires would render R.C. 4906.10(A)(6) irrelevant. This second ground for rehearing is denied.

3. THIRD GROUND FOR REHEARING: THE BOARD'S CHANGE OF ITS INTERPRETATION OF WHAT IS REQUIRED TO MEET THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY" CRITERION OF R.C. 4906.10(A)(6) TO NOW ALLOW UNANIMOUS OPPOSITION BY LOCAL GOVERNMENTAL AUTHORITIES WITHIN THE PROJECT AREA TO CONTROL THE BOARD'S DECISION WITHOUT A REASONABLE BASIS FOR DOING SO IS UNLAWFUL AND UNREASONABLE.

{¶ 35} Kingwood states that the Supreme Court of Ohio has made clear that administrative agencies must respect their prior precedent and may only alter prior interpretations with a reasonable basis to do so. Kingwood submits that "for years" the Supreme Court and the Board have interpreted R.C. 4906.10(A)(6) by considering whether a proposed project benefits the general public. Kingwood points to prior decisions issued by the Board in which local opposition, even strong opposition, was deemed insufficient to outweigh the benefits of a project. Kingwood asserts that the Board has only recently shifted its interpretation of R.C. 4906.10(A)(6) to include local government opinion in its assessment, which, in Kingwood's opinion, effectively allows local governments to veto potential projects. Kingwood argues that the Board has not provided any reasonable basis

for the alleged departure from precedent. Kingwood believes that there is no justification for why a renewable energy project that faced uniform opposition from local governments was approved (*In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN), while Kingwood's application faced similar opposition from intervening governmental entities and was denied. Kingwood asserts that strong local opposition alone cannot outweigh the benefits that the Project would generate for the general public and, therefore, the Board should grant rehearing, approve the Project, and issue a certificate to Kingwood in accordance with the Board's prior precedent. (Kingwood App. for Rehearing at 11-14.)

{¶ 36} Joint Intervenors do not believe that the Order deviates from prior Board precedent. First, Joint Intervenors argue that the cases cited by Kingwood for the Board's precedent do not state that the Board ignores local opposition or local interests under R.C. 4906.10(A)(6). Joint Intervenors point to the Board's decision in *Ross County Solar*, as proving that the Board has considered local and non-local public interest in its (A)(6) analysis and found that the evidence supported approval of a project. Joint Intervenors also point to earlier Board decisions in which the Board found that prominent and one-sided local opposition to projects were key factors in denying applications for certificates. (*See* In re Birch Solar *I*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) (*Birch Solar I*); *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021) (*Republic Wind*); *In re American Transmission Systems*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022) (*American Transmission Systems*); *Ross County Solar*). Even if the Order did alter the Board's prior precedent, Joint Intervenors believe that the Board provided sufficient explanation for any such change enacted by the Order. Joint Intervenors argue that time and changing circumstances can show that the public interest is no longer being served by a particular interpretation. In addition, Joint Intervenors point out that the Supreme Court of Ohio has indicated that it will not second-guess any agency's divergence from precedence so long as there are reasons supporting it. (Joint Intervenors Memo Contra at 15-18.)

{¶ 37} Greene County also believes that the Board followed its precedents in considering local government opposition to a project as a criterion for determining satisfaction of R.C. 4906.10(A)(6), pointing to the analyses outlined in *Birch Solar I*, *Republic Wind*, and *American Transmission Systems*. Greene County submits that if the Board was as bound to past precedent as Kingwood claims, it would also need to consider local government opposition based on the opinions issued in *Birch Solar I*, *Republic Wind*, and *American Transmission Systems*. Because the Board has consistently reviewed local government opposition in recent years, this argument should be denied. (Greene Memo Contra at 6.)

{¶ 38} The Board finds this third ground for rehearing to be without merit. This ground for rehearing is largely a remix of the first two grounds, with Kingwood expressing its displeasure that the Board considered the opposition of local government entities within the Project area as part of its analysis under R.C. 4906.10(A)(6). As an initial point, the Board disagrees that this Order disregarded precedent, as there are previous cases in which the Board weighed local government opposition and denied a certificate in which the Board fielded local opposition and approved a certificate. (*See Birch Solar I, Republic Wind, American Transmission Systems*, *Ross County Solar*). In recent years, the Board has consistently considered local government opposition as part of its "broad lens" view of R.C. 4906.10(A)(6) and did nothing different in this case (Order at ¶¶ 142-145). Thus, like the first two grounds discussed above, the Board denies this third ground for rehearing.

4. FOURTH GROUND FOR REHEARING: THE BOARD'S RELIANCE ON PUBLIC COMMENTS THAT ARE NOT A PART OF THE RECORD IN THESE PROCEEDINGS VIOLATES R.C. 4906.10(A)(6), AND IS THEREFORE UNLAWFUL AND UNREASONABLE.

{¶ 39} Kingwood avers that the Board gave "substantial weight" to the public comments filed in opposition to the Project on the case docket. Kingwood concedes that the Order acknowledged that these public comments fall short of admitted evidence, but Applicant still takes issue with the Board acknowledging the value added by the public

comments in the Board's analysis under R.C. 4906.10(A)(6). Kingwood cites R.C. 4906.10(A) and Ohio Adm.Code 4906-2-30 in arguing that any decision made by the Board must be made "upon the record" or "based solely on the record." Kingwood stresses that these public comments are not in the evidentiary record of these proceedings and, therefore, the Board's review and reliance upon the sentiments expressed in the comments was unlawful and unreasonable. (Kingwood App. for Rehearing at 14-15.)

{¶ 40} Joint Intervenors respond to this ground for rehearing by pointing out that the overwhelming opposition to the Project seen in the docketed comments is observable in many pieces of evidence that are part of the record, for instance the Staff Report's discussion of the public comments. Joint Intervenors stress that the public's submission of comments is an integral part of the Power Siting process. According to Joint Intervenors, for the Board to solicit public comments from citizens and then simply ignore the comments would be misleading the public to engage in a meaningless process. Joint Intervenors also point out that one of Kingwood's own witnesses also discussed the public comments as part of his testimony. Joint Intervenors argue that an overwhelming number of public comments opposed to the Project simply serves to complement other substantial evidence to the Project contained within the record. (Joint Intervenors Memo Contra at 18-20.)

{¶ 41} Greene County finds Kingwood's characterization of the Board relying on the public comments as the basis for its decision to be disingenuous. Greene County states that the Board could not be clearer as to the basis for its denial of the application, which was: —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. The Board's acknowledgement of the public comments aligning with the opposition of local government entities is not unlawful, as the Board did not cite it as the basis for the decision. Rather, the Board simply acknowledged the comments as being in line with the opposition expressed by intervening government entities. Greene County also echoes Joint Intervenors in stating

that the public comment submittal and review is an important part of the Board's process and should not be disregarded. (Greene Memo Contra at 7.)

{¶ 42} The Board finds Kingwood's fourth ground for rehearing to be without merit. As an initial matter, the Board will point out that, despite Kingwood's characterization in its application for rehearing, nowhere in the Order is it stated that we gave "substantial weight" to the public comments filed in the case docket. We stated that the vast majority of public comments voiced opposition to the Project and noted that the comments reinforced the positions of the local government entities that intervened in the case. We explicitly acknowledged that these comments "fall short of being admitted evidence," but stated that they do add value to the Board's consideration as to the local perception of the Project. (Order at ¶ 151.) As pointed out by Greene County, the public comments are not cited as a basis for the decision, but rather a recognition of comments filed by members of the general public aligning with the views expressed by their elected representatives. Kingwood's fourth ground for rehearing is denied.

5. FIFTH GROUND FOR REHEARING: BECAUSE THE RECORD, INCLUDING HUNDREDS OF PAGES OF EXHIBITS AND DAYS OF EXPERT TESTIMONY, BEFORE THE BOARD ESTABLISHED THAT THE PROPOSED SOLAR-POWERED ELECTRIC GENERATION FACILITY MEETS ALL OF THE STATUTORY CRITERIA OF 4906.10(A), INCLUDING THAT THE PROJECT WILL BE IN THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY" UNDER R.C. 4906.10(A)(6), THE BOARD'S DECISION TO REJECT THE STIPULATION AND TO DENY KINGWOOD A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE A SOLAR-POWERED ELECTRIC GENERATION FACILITY IN GREENE COUNTY, OHIO IS UNLAWFUL AND UNREASONABLE.

{¶ 43} In this ground for rehearing, Kingwood asserts that the Order is unlawful and unreasonable for two primary reasons. First, Kingwood argues that the record contains overwhelming evidence that the Project is compliant with all statutory requirements and

serves the public interest, convenience, and necessity. Kingwood notes the Board found that the application complied with all the statutory criteria but one. With respect to R.C. 4906.10(A)(6), the lone criterion that the Board found Kingwood failed to satisfy, Kingwood argues that it presented significant evidence to show that the Project would serve the public interest, convenience, and necessity. Kingwood states that it submitted 12 expert witnesses to support compliance with (A)(6). Kingwood also outlines the benefits that it states demonstrate how the Project would serve the public interest, convenience, and necessity, "based on the plain meaning of that term." In support, Kingwood references jobs that would allegedly be created, increased economic activity, increased tax revenue, no decrease in property values, newly created income streams, and a number of other economic and environmental gains. Kingwood points out that the Board acknowledged many of the benefits of the Project. Kingwood argues that the Board erred, however, in finding that the unanimous opposition of the intervening government entities is controlling as to whether the Project satisfies R.C. 4906.10(A)(6). Kingwood believes that this overstated the local opposition and ignores the majority support that the Project received. (Kingwood App. for Rehearing at 16-19.)

{¶ 44} Second, Kingwood argues that the "vague opinions and unfounded statements" of Greene County and the three townships cannot outweigh the significant evidence in the record. Kingwood asserts that the resolutions passed by Greene County and the three townships deal with issues that are adequately addressed in the application and further through the Stipulation and represent nothing more than politically motivated opposition. Kingwood finds these resolutions to be vague and irrelevant to the Board's inquiry. While the resolutions and intervenor witnesses at hearing reference vague "angst" or "high tension" in the community, they do not provide any evidence of actual harm to the community. Kingwood dismisses the reasoning offered by the townships as either being irrelevant to these proceedings or as adequately addressed in the application and/or Stipulation. (Kingwood App. for Rehearing at 19-22.)

{¶ 45} Joint Intervenors state that the Board struck a reasonable balance between the Project's perceived benefits and the serious downsides to the local community. First, Joint Intervenors believe that Kingwood exaggerated the Project's supposed benefits, as many of these benefits are either temporary in nature or will have negative consequences for other surrounding businesses, properties, and citizens. Joint Intervenors are also skeptical of the overall economic impact of the Project alleged by Kingwood. Joint Intervenors argue that the detriments of the Project are severe and the alleged benefits doubtful and negligible and that the Board was correct to determine that the balance between these two factors weighed in favor of denying a certificate. In response to Kingwood's second argument in this section, Joint Intervenors state that the resolutions and testimony of local governments opposing the Project are based on reasonable concerns expressed by the constituents their members were elected to represent. Joint Intervenors point to specific grounds for opposition cited within the resolutions passed by Greene County and the three townships, as well as the reasonable concerns that were expressed to the representatives and served as the bases for the concerns. With respect to Kingwood's continued assertion that Applicant's satisfaction of all the "technical requirements" of R.C. 4906.10(A) demonstrates that it also satisfies R.C. 4906.10(A)(6), Joint Intervenors counter that such an interpretation would render (A)(6) meaningless. (Joint Intervenors Memo Contra at 20-25.)

{¶ 46} Greene County's response to this ground for rehearing is the same as that provided in opposition to Kingwood's first ground for rehearing. As outlined above, Greene County submits that the Board correctly noted that Kingwood's arguments in support of the Project being in the public interest, convenience, and necessity (increased energy generation, potential job creation, tax revenues, air quality benefits, etc.) are arguments that apply in every solar case and if these alone were sufficient to issue a certificate, then there would be no need for an analysis under R.C. 4906.10(A)(6). Further, Kingwood's continued reference to its "technical compliance" under other provisions of R.C. 4906.10(A) should not guarantee that an application serves the public interest,

convenience, and necessity. Otherwise, the application and hearing process would be unnecessary, as any applicant able to meet certain technical requirements would be granted a certificate. Greene County disagrees with Kingwood that the alleged job creation, increased tax revenue, and other economic output outweigh the public interest in preserving wildlife, parks, recreations areas, cultural areas, and the myriad other reasons expressed at the local public hearing and evidentiary hearing. Greene County asserts that nothing in R.C. 4906.10(A)(6) prevents the Board from weighing these considerations and that the Board reasonably did so in the Order. (Greene Memo Contra at 2-5.)

{¶ 47} The Board finds that Kingwood's fifth ground for rehearing is without merit. The Board is aware of, and considered, the benefits that Kingwood highlights as potentially flowing from the construction and operation of the Project. The Board acknowledged these benefits but noted that such Project benefits must be balanced against the impact of the Project on individuals who are most directly affected by the Project. (Order at ¶ 149.) The Board performed this analysis, considering all of the evidence which Kingwood cites as supporting its satisfaction of R.C. 4906.10(A)(6), and found that the potential benefits did not outweigh the local opposition to the Project within the local community (Order at ¶¶ 29, 141-152). To dismiss the arguments and evidence proffered by intervening local government entities as "vague and unfounded" is unwarranted. Each of the intervening entities passed resolutions in which they stated grounds for their opposition and all of them actively participated in this proceeding. Kingwood's continual reference to its satisfaction of all the "technical criteria" or R.C. 4906.10(A)(6) is a red herring. If such compliance were enough to be issued a certificate, then the entire application and hearing process would be meaningless, as any applicant that demonstrates some type of "technical compliance" would be guaranteed a certificate. R.C. 4906.10(A) states that the Board shall not grant a certificate unless it finds and determines satisfaction of *all* eight criteria outlined thereunder. As Kingwood later more accurately admits, it complied "with all but one of the statutory requirements" (Kingwood App. for Rehearing at 16). Not satisfying that lone criterion

requires a denial of the certificate application, as the Board correctly ruled. The fifth ground for rehearing is denied.

6. SIXTH GROUND FOR REHEARING: THE BOARD'S FINDING THAT THE STIPULATION WAS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES IS NOT SUPPORTED BY THE RECORD AND THEREFORE IS UNREASONABLE AND UNLAWFUL.

{¶ 48} Kingwood disagrees with the Board's finding that the Stipulation entered into by Kingwood and OFBF was not the product of serious bargaining. Kingwood takes particular exception to the Board's determination that a stipulation must resolve the core issue of whether an application is to be approved, arguing that this sentiment is contrary to the Board's rules and regulations. Kingwood points to Ohio Adm.Code 4906-2-24(A) permitting two or more parties in a case to enter into a stipulation concerning "some or all of the issues in a proceeding." Kingwood asserts that nothing in the Board's statutes or rules requires that a stipulation only be accepted if it addresses the core issue in a proceeding. Additionally, Kingwood asserts that the Board's implication that all parties must join a stipulation in order for it to be considered the product of serious bargaining is also unsupported by Board rules. Kingwood states that the Board has previously approved numerous stipulations that are only agreed to and signed by some parties in a case. Kingwood asserts that it engaged in significant settlement discussions with each of the intervening parties, each of which was represented by competent counsel. While these discussions were ultimately unsuccessful with all parties but OFBF, Kingwood states that it did amend the Project design in an effort to reach agreement among all the parties. (Kingwood App. for Rehearing at 22-24.)

{¶ 49} Joint Intervenors respond that Kingwood's invitation to all parties for negotiations does not signify that the Stipulation is the product of serious bargaining. Joint Intervenors point out that while Kingwood now claims that it incorporated feedback from parties after settlement discussions, the Stipulation itself makes no such representation.

Joint Intervenors also feel that the Stipulation does not adequately address the numerous problems associated with the Project. (Joint Intervenors Memo Contra at 26-27.)

{¶ 50} In response to this ground for rehearing, Greene County simply states that it agrees with the Board's assessment that because the Stipulation does not even recommend the grant of a certificate, it cannot be a "product" of serious bargaining among the parties (Greene Memo Contra at 8-9).

{¶ 51} The Board finds that Kingwood's sixth ground for rehearing has merit and that the Stipulation likely did result from serious bargaining. Pursuant to Ohio Adm.Code 4906-2-24, parties before the Board are permitted to enter into stipulations concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding. In accordance with Ohio Adm.Code 4906-2-24(D), no stipulation is binding on the Board. However, the Board may afford the terms of the stipulation substantial weight. The standard of review for considering the reasonableness of a stipulation has been discussed in numerous Board proceedings. (*See* Order at ¶ 163.) In considering a stipulation, the Board uses the following criteria:

a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

b) Does the settlement, as a package, benefit ratepayers and the public interest?

c) Does the settlement package violate any important regulatory principal or practice?

{¶ 52} While the Board still believes that the Stipulation did not speak to the core issue in this entire proceeding, the parties seem to concede that Kingwood did engage (or at least attempt to engage) in settlement discussions with each party, all of which were represented by experienced, competent counsel (Kingwood App. for Rehearing at 22; Joint Intervenors Memo Contra at 26). While the Stipulation ultimately entered into by two of the parties was lacking, Kingwood is correct that this criterion does not require that all

parties join in a stipulation for it to be considered as having been the product of serious bargaining. As will be addressed further below, however, the Board maintains that the Stipulation does not satisfy the second and third criteria in considering a Stipulation and, thus, cannot be adopted by the Board. Accordingly, while the Board agrees with the Applicant, this ground for hearing is dismissed as moot.

7. SEVENTH GROUND FOR REHEARING: THE BOARD'S FINDING THAT ITS DETERMINATION AS TO THE PROJECT'S NON-COMPLIANCE WITH R.C. 4906.10(A)(6) NECESSITATES FINDINGS THAT (1) THE STIPULATION, AS A PACKAGE, IS NOT BENEFICIAL TO THE PUBLIC INTEREST, AND (2) ADOPTION OF THE STIPULATION WOULD VIOLATE AN IMPORTANT REGULATORY PRINCIPLE OR PRACTICE IS NOT SUPPORTED BY THE RECORD OR LAW, AND THEREFORE IS UNREASONABLE AND UNLAWFUL.

{¶ 53} Kingwood restates its assertion that the Board's determination that the Project fails to serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) is unlawful and unreasonable. Based on an acceptance of this assertion, Kingwood then submits that the Board's rejection of the Stipulation based on such a false determination is likewise unlawful and unreasonable. Further, Kingwood argues that conditions contained within the Stipulation would ensure that additional aspects of the Project will serve the public interest and conform to important regulatory principles and practices. Kingwood highlights commitments in the Stipulation regarding coordination with local government, protections for local wildlife and ecology, increased setbacks, substantial commitments to prevent drainage issues, and increased landscape screening, among others. Kingwood argues that the Board ignored all of these conditions and safeguards for the public, declining to even address them in the Order. Kingwood avers that the Board regularly approves similar stipulations that include similar conditions. (Kingwood App. for Rehearing at 25-27.)

{¶ 54} Joint Intervenors respond that the Stipulation deserves no weight or deference from the Board, pointing out that only two parties agreed to the Stipulation and that one of the signatory parties (OFBF) does not even ask that the Board approve the Project. Further, nowhere in the Stipulation or the evidentiary record does OFBF offer any opinion as to whether the Project satisfies R.C. 4906.10(A)(6). In short, Joint Intervenors agree that the Stipulation does nothing to promote the public interest, convenience, and necessity. (Joint Intervenors Memo Contra at 26-27.)

{¶ 55} Greene County also focuses on the fact that although OFBF joined in the Stipulation, even OFBF offers no position as to whether a certificate should be issued in this case. Greene County states that Kingwood was unable to convince any party in this proceeding to sign a Stipulation recommending the grant of a certificate. Instead, it convinced one party, which was not a local government entity, to sign on to a Stipulation recommending 39 conditions. However, Greene County asserts that the problems to the public interest resulting from the Project are so comprehensive that not even these supposedly comprehensive 39 conditions could persuade one local government entity to join the Stipulation. Greene County states that the Stipulation is not beneficial to the public interest for the same reasons that Kingwood's application is not beneficial to the public interest and therefore any adoption of the Stipulation would violate important regulatory principles. (Greene Memo Contra at 8-9.)

{¶ 56} The Board finds that Kingwood's seventh ground for rehearing is without merit. As outlined in the Order, and affirmed within this Order on Rehearing, the Board does not believe that the Project satisfies R.C. 4906.10(A)(6), which states that no certificate shall be issued unless the Board finds that a project will serve the public interest, convenience, and necessity (Order at ¶¶ 149-150). Such a conclusion dictates a related finding that the proposed Stipulation, as a package, is not beneficial to the public interest, and adoption of the Stipulation would violate an important regulatory principle. The Board sees no argument to alter this finding—it seems unreasonable that a stipulation, joined by two of the ten parties in the case, in support of the Project would somehow serve the public

interest when the Board already determined that the Facility itself would not serve the public interest, convenience and necessity. Likewise, if the Board has determined that a Project does not satisfy R.C. 4906.10(A) and that a proposed stipulation is not in the public interest, it naturally flows that to certificate such a project would violate important regulatory principles. Kingwood asserts that the Stipulation contains conditions that represent "additional aspects" of the Project that would serve the public interest. However, none of these conditions overcome the Board's finding that the Project itself is not in the public interest, convenience, and necessity. This seventh ground for rehearing is denied. (Order at ¶ at 169.)

{¶ 57} Thus, even with our acknowledgement above that the Stipulation was the product of serious bargaining among the parties, the Stipulation still fails to satisfy the second and third criteria used by the Board in determining the reasonableness of a stipulation.

8. EIGHTH GROUND FOR REHEARING: THE BOARD'S DECISION TO DENY KINGWOOD'S INTERLOCUTORY APPEAL OF THE ALJ'S DENIAL OF ITS SUBPOENA REQUESTS TO COMPEL THE TESTIMONY OF THE EXECUTIVE DIRECTOR OF THE OHIO POWER SITING BOARD, MS. THERESA WHITE, IS UNLAWFUL AND UNREASONABLE BECAUSE, ABSENT MS. WHITE'S TESTIMONY, THE BOARD DID NOT HAVE COMPLETE INFORMATION ON THE NATURE OF STAFF'S INVESTIGATION IN VIOLATION OF R.C. 4906.07(C).

{¶ 58} Kingwood states that R.C. 4906.07(C) requires the chairperson of the Board to investigate an application and prepare a written report with recommended findings on the statutory criteria and that report becomes part of the record. Additionally, the statute states that the "report shall set forth the nature of the investigation." Kingwood argues that the Staff Report does not set forth the nature of the investigation. In support, Kingwood points to the outreach by Staff to local governments just prior to issuance of the Staff Report. Because this outreach is not outlined within the Staff Report, Kingwood submits that the Staff Report failed to comply with R.C. 4906.07(C). Kingwood contends that the ALJ and

the Board barred Kingwood from presenting evidence as to why Staff conducted this outreach because such evidence would have been elicited through the testimony of the Board's executive director, Theresa White. Kingwood asserts that Ms. White's testimony was important to its attempt to challenge the basis for Staff's recommendation that the Project did not satisfy R.C. 4906.10(A)(6). Kingwood argues that, as supported by the subpoenaed testimony of Juliana Graham-Price, Ms. White's involvement was central to Staff's investigation and the "last-minute change" in its recommendation for the Project. By restricting its ability to question all parties with knowledge of the reason for the extent of the local outreach, the Board allowed the Staff Report to enter the record without transparency as to the full nature of the Staff investigation, as required by R.C. 4906.07(C). Kingwood states that this was unlawful and unreasonable and that it should have been permitted to call Ms. White as a witness. (Kingwood App. for Rehearing 27-29.)

{¶ 59} Joint Intervenors reply to Kingwood's eight, ninth, and tenth grounds for rehearing collectively. With respect to this eighth ground for rehearing, Joint Intervenors state that the "Nature of Investigation" section of the Staff Report clearly meets the requirement of R.C. 4906.07(C) for Staff to set forth the nature of the investigation, as this section describes the type or main characteristic of the investigation. Joint Intervenors aver that nothing in R.C. 4906.07(C) requires a staff report to document every phone call and communication made by all Board Staff. They state that Juliana Graham-Price was the staffer who contacted the local officials and that she testified in the hearing about these conversations and that the purpose of the outreach is obvious—to obtain input from the public on the Project. Joint Intervenors point out that Ms. White did not make any of these contacts, so subpoenaing Ms. White to testify as to the substance of these conversations would add nothing to the discussion. At best, Joint Intervenors believe that any testimony from Ms. White concerning any other contacts would constitute the needless presentation of cumulative evidence, which a tribunal is free to exclude under Ohio R. Evidence 403(B) and the Board's general authority to manage and expedite the flow of a proceeding. Joint Intervenors contend that, despite Kingwood claiming otherwise, the record in these

proceedings does identify the purpose of Staff's outreach to local governments. Joint Intervenors submit that Kingwood has the burden of demonstrating that it "suffered prejudice" from the denial of its subpoena request; but no prejudice occurs if the complaining party can obtain the relevant information by other means. In this proceeding, Kingwood had the opportunity to question not only Ms. Graham-Price, but the local governments' witnesses as well. Because of these opportunities for Kingwood to elicit this information from multiple other sources, Joint Intervenors find Kingwood's procedural due process claims to be hollow. (Joint Intervenors Memo Contra at 27-28.)

{¶ 60} Greene County also collectively responds to Kingwood's eighth, ninth, and tenth grounds for rehearing dealing with the denied subpoena of Ms. White. Greene County finds it logical that Staff would have made "last-minute outreach" to local governments affected by the Project, considering the significant size and scope of the Project. Ms. Graham-Price, whose job title is Community Liaison, testified that she was reaching out to government officials simply to determine their positions on the proposal at the direction of Ms. White. Ms. White, however, never spoke to any local authorities. Greene County argues that no statute or regulation restricts the Board or Staff from considering the positions of local governments impacted by an application. In short, Ms. Graham-Price was simply doing her job and following the direction of her superior. Kingwood's contention that testimony from Ms. White is critical to determining the nature of Staff's investigation is, in Greene County's estimation, unconvincing, as Kingwood was permitted to subpoena and examine Ms. Graham-Price on this issue. Even more significant, Greene County submits that none of these discussions were dispositive to the Board's decision to reject the application as not in the public interest, convenience, and necessity. Greene County believes that Kingwood's argument on this issue inaccurately assumes that the Board blindly follows the recommendations. While the Board relies on the Staff Report to the extent it finds its recommendations persuasive, the Board does this regarding any evidence submitted to the Board. The Staff Report is only one piece of evidence in the overall process which the Board considers in reaching its independent determination to approve or deny an application.

Greene County concludes that a subpoena of Ms. White's testimony would be unreasonable because her testimony is irrelevant to the Board's ultimate decision. (Greene Memo Contra at 9-10.)

{¶ 61} The Board finds that Kingwood's eighth ground for rehearing is without merit. Kingwood is correct that R.C. 4906.07(C) requires Staff to set forth the nature of its investigation—which it did in the Staff Report, both in the section titled "Nature of Investigation," which outlined the procedures of Staff's investigation, but also in the ensuing 49 pages evaluating the application. As we stated in the Order, the collective testimony of Staff witnesses makes clear that the Staff Report was the collective work of Staff "as a whole" and there was no disagreement among Staff members as to its contents or conclusions (Order at ¶ 79). Further, as to the specific issues that Kingwood stresses it needed further investigation into, Kingwood was permitted to subpoena and cross-examine Ms. Graham-Price, the individual who contacted the local government entities. Kingwood fully questioned Ms. Graham-Price as to why she initiated such outreach and the substance of the conversations. The Board sees no new argument as to how the ALJ erred in making this ruling, nor how the Order was incorrect in denying Kingwood's interlocutory appeal. This eighth ground for rehearing is denied.

9. **NINTH GROUND FOR REHEARING: THE BOARD'S DECISION TO DENY KINGWOOD'S INTERLOCUTORY APPEAL OF THE ALJ'S DENIAL OF ITS SUBPOENA REQUESTS TO COMPEL THE TESTIMONY OF THE EXECUTIVE DIRECTOR OF THE OHIO POWER SITING BOARD, MS. THERESA WHITE, IS UNLAWFUL AND UNREASONABLE BECAUSE, ABSENT MS. WHITE'S TESTIMONY, THE BOARD DID NOT HAVE SUFFICIENT INFORMATION ON WHY THE BOARD STAFF WAS SOLICITING THE LOCAL GOVERNMENT AUTHORITIES' POSITIONS ON THE PROJECT ON THE EVE OF THE DATE THE STAFF'S REPORT AND RECOMMENDATION WAS DUE AND AFTER THE STAFF HAD ALREADY RECOMMENDED**

APPROVAL OF THE PROJECT IN THE CURRENT DRAFT OF THE STAFF REPORT AND RECOMMENDATION.

{¶ 62} Kingwood contends that the Staff Report is a "watershed moment" in a Board proceeding that can impact the entire trajectory of the proceeding, such that a recommendation to deny a certificate can embolden opponents and seriously restrict the ability of an applicant to effectively negotiate with other parties. Kingwood submits that was the case in this proceeding, as Staff's recommendation to deny the application severely limited Kingwood's ability to effectively negotiate with the intervenors. Kingwood states that it was able to establish that Ms. Graham-Price, at the explicit direction of Ms. White, reached out to local government officials the day before the Staff Report was issued in order to solicit their input. Kingwood avers that it established that an initial Staff recommendation to approve the Project was reversed only on October 29, the day the Staff Report was issued. Kingwood asserts that by denying its subpoena of Ms. White, it was denied the ability to question Ms. White as to the motivations or purposes of the outreach to local government officials. Kingwood avers that while the Board found that Staff did not act with impropriety in these communications, nowhere in the Order does the Board state that all relevant information was included in the record. Kingwood reiterates that the Board must hear testimony from Ms. White in order to evaluate the impetus of what Kingwood claims was "highly irregular" outreach to local government officials. Without testimony from Ms. White, Kingwood contends that the record is incomplete. (Kingwood App. for Rehearing at 30-32.)

{¶ 63} Joint Intervenors assert that Kingwood's claim that Staff's recommendation "emboldened" opponents of the Project and hindered settlement negotiations is both inaccurate and irrelevant. Joint Intervenors state that public opposition to the Project did not increase after the issuance of the Staff Report and the Order does not make such a finding. Joint Intervenors take issue with Kingwood seeming to imply that Staff should refrain from recommending denial of a project in order to facilitate settlement discussions

and also assert that it is irrelevant as to whether Ms. White should have been subpoenaed to testify. (Joint Intervenors Memo Contra at 29-31.)

{¶ 64} As noted above, Greene County responded globally to Kingwood's eighth, ninth, and tenth grounds for rehearing and did not delineate particular arguments to specific grounds for rehearing.

{¶ 65} The Board finds that Kingwood's ninth ground for rehearing is without merit. As already stressed above in our denial of the eighth ground for rehearing, the Board remains unpersuaded by Kingwood's repeated assertions that the Board lacked sufficient information surrounding Staff outreach to local government entities. Kingwood was permitted to subpoena and cross-examine Ms. Graham-Price about the calls themselves and inquire into why she initiated the outreach. As we recounted in the Order, Ms. Graham-Price, whose job title is the self-explanatory "Community Liaison," testified, among other things, that her primary job functions are interacting with local government officials regarding the Board's processes and pending projects. Further, Ms. Graham-Price stated that Ms. White instructed her to contact Greene County and the three intervening townships to determine the respective positions of these entities with respect to the Project. Ms. Graham-Price fully explained the substance of these conversations: (1) Greene County planned a resolution to oppose the Project; (2) Cedarville Township communicated that it and the other townships planned to oppose the Project; and (3) Xenia Township responded that it also planned to oppose the Project. As the ALJ ruled at hearing, and as we affirmed in the Order, Ms. Graham-Price provided these salient facts on the communications such that further testimony, whether from Ms. White or any other Staff witness, was unwarranted. (Order at ¶ 77; *see* Tr. VIII at 1928-1945.) Kingwood has raised no new arguments to change this position and the Board therefore denies this ninth ground for rehearing.

10. TENTH GROUND FOR REHEARING: THE BOARD'S DECISION TO DENY KINGWOOD'S APPEAL OF ITS SUBPOENA REQUESTS TO COMPEL THE TESTIMONY OF THE EXECUTIVE

DIRECTOR OF THE OHIO POWER SITING BOARD, MS. THERESA WHITE, IS UNLAWFUL AND UNREASONABLE BECAUSE THE DENIAL OF THE SUBPOENA REQUESTS CONSTITUTES A VIOLATION OF DUE PROCESS AS KINGWOOD WAS UNABLE TO PUT ON EVIDENCE THAT THE STAFF'S REPORT AND RECOMMENDATION, WHICH SET THE TONE FOR THE REMAINDER OF THE PROCEEDING, WAS OUTCOME DETERMINATIVE AND NOT BASED ON AN ANALYSIS OF KINGWOOD'S APPLICATION.

{¶ 66} Kingwood alleges that the Board's failure to allow the Applicant to call Ms. White to testify infringed on Kingwood's right to due process, as found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. Kingwood states that due process requires, at a minimum, notice and the opportunity to be heard, which entails an ability to present all arguments a party deems important to a case. According to Kingwood, only Ms. White was in a position to answer Applicant's inquiries into why a Staff subordinate reached out to intervening local government entities and whether the application review process was influenced by external factors. Kingwood argues that the ALJ denial of its subpoena of Ms. White as "unwarranted" is not a valid reason to deny or quash a subpoena. Because neither the ALJ nor the Board determined that the subpoena of Ms. White would be "unreasonable or oppressive," Kingwood asserts that the subpoena was not validly denied. Kingwood repeats that Ms. White's testimony was critical to allowing it to fully present arguments that it deemed important and necessary and the Board's refusal to allow Kingwood to question Ms. White constitutes a due process violation. As such, Kingwood avers that the Board's decision to deny its earlier appeal of the ALJ's denial of its subpoena of Ms. White is unlawful and unreasonable. (Kingwood App. for Rehearing at 32-33.)

{¶ 67} With respect to Kingwood's due process claim, Joint Intervenors state that the key in determining whether an administrative hearing satisfies procedural due process is whether a party had the opportunity to present the facts that demonstrated a party was entitled to the requested judgment. Joint Intervenors submit that a tribunal's denial of a subpoena does not violate due process if the requesting party can present facts via other

means, such as subpoenas to other witnesses. In this proceeding, Kingwood had ample opportunity to cross-examine multiple Staff witnesses, including Ms. Graham-Price. Further, Joint Intervenors argue that Ms. White's testimony, and the purposes for which Kingwood sought her testimony, was irrelevant. (Joint Intervenors Memo Contra at 29.)

{¶ 68} As noted above, Greene County responded globally to Kingwood's eighth, ninth, and tenth grounds for rehearing and did not delineate particular arguments to specific grounds for rehearing.

{¶ 69} The Board finds that Kingwood's tenth ground for rehearing is without merit. Similar to our reasoning in denying Kingwood's ninth ground for rehearing, the Board remains unreceptive to Kingwood's repeated claims that it was prohibited from delving into the contacts between Staff and intervening local government entities. We disagree with Kingwood's assertion that only Ms. White could answer its inquiries. As stated in the Order, and reiterated above, Kingwood was permitted to subpoena Ms. Graham-Price and cross-examine her on all relevant topics. Ms. Graham-Price explained her role as Community Liaison and fully recounted the substance of the pertinent conversations. (Order at ¶ 77) Further, Staff submitted testimony from 11 other witnesses, all of whom were offered up for cross-examination by Kingwood. Greene County and the intervening townships also offered witnesses which Kingwood was able to cross-examine. Applicant was afforded ample opportunities to investigate the contacts between Staff and local government entities, and no due process rights of Kingwood were violated in either the ALJ's rulings as to Ms. White or the Board's opinions in the Order. Accordingly, this tenth ground for rehearing is denied.

B. Joint Application for Rehearing

{¶ 70} In the Joint Application for Rehearing, Joint Intervenors profess their support of the overall decision of the Order to deny Kingwood's application for a certificate of environmental compatibility and public need but believe that the Order failed to

determine that there are grounds other than those enumerated in the Order for denying the certificate. As grounds for rehearing, Joint Intervenors submit that the Order is unlawful and unreasonable based upon 15 assignments of error outlined within the Joint Application for Rehearing. The 15 assignments of error are listed below but will be addressed collectively by the Board.

1. **ASSIGNMENT OF ERROR NO. 1: THE BOARD HAS ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE FACTS AND REASONING SUPPORTING MANY OF ITS CONCLUSIONS.**

2. **ASSIGNMENT OF ERROR NO. 2: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S INCOMPATIBILITY WITH THE OBJECTIVES OF LOCAL LAND USE PLANNING CODES AS ANOTHER REASON TO DENY THE CERTIFICATE PURSUANT TO R.C. 4906.10(A)(6).**

3. **ASSIGNMENT OF ERROR NO. 3: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S INCAPACITATION OF 1,025 ACRES OF GOOD FARMLAND FOR FOOD PRODUCTION FOR 35 YEARS AS ANOTHER REASON TO DENY THE CERTIFICATE PURSUANT TO R.C. 4906.10(A)(6).**

4. **ASSIGNMENT OF ERROR NO. 4: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO FIND THAT THE PROJECT'S PROVEN NEGATIVE ECONOMIC IMPACTS ARE AN ADDITIONAL REASON WHY THE PROJECT DOES NOT SERVE THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY UNDER R.C. 4906.10(A)(6), AND BY FAILING TO FIND THAT KINGWOOD'S FAILURE TO EVALUATE THE PROJECT'S OTHER POTENTIAL NEGATIVE ECONOMIC IMPACTS AS REQUIRED BY**

R.C. 4906-4-06(E)(4) AND R.C. 4906.10(A)(6) ARE ADDITIONAL REASONS FOR DENYING THE CERTIFICATE.

5. **ASSIGNMENT OF ERROR NO. 5: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO FIND THAT THE PROJECT DOES NOT MINIMIZE THE PROJECT'S ADVERSE ENVIRONMENTAL IMPACT UNDER R.C. 4906.10(A)(3) NOR SERVE THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY UNDER R.C. 4906.10(A)(6) DUE TO IT SHORT SETBACKS.**

6. **ASSIGNMENT OF ERROR NO. 6: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD PROVIDED THE INFORMATION REQUIRED BY R.C. 4906.10(A)(2) AND OHIO ADM.CODE 4906-4-08(D)(4)(e) & (f) TO DESCRIBE AND MITIGATE THE PROJECT'S ADVERSE VISUAL IMPACTS AND BY FINDING THAT THE PROJECT'S ADVERSE VISUAL IMPACTS DO NOT PRECLUDE THE ISSUANCE OF A CERTIFICATE UNDER R.C. 4906.10(A)(3) AND R.C. 4906.10(A)(6).**

    a. ***Kingwood did not accurately describe the Project's adverse visual impacts pursuant to R.C. 4906.10(A)(2) and Ohio Adm.Code 4906-4-08(D)(4)(e), but instead submitted non-representative simulations designed to conceal the Project's actual visibility from the board and the public.***

    b. ***The Board erred by finding that the Project's adverse visual impacts do not preclude the issuance of a certificate under R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).***

    c. ***Kingwood did not provide measures to minimize the Project's adverse visual impacts pursuant to Ohio Adm.Code 4906-4-08(D)(4)(e), R.C. 4906.10(A)(3), and R.C. 4906.10(A)(6).***

7. **ASSIGNMENT OF ERROR NO. 7: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD HAS PROVIDED THE INFORMATION**

ABOUT THE PROJECT'S POTENTIAL IMPACTS ON WILDLIFE AND PLANTS REQUIRED BY OHIO ADM.CODE 4906-4-08(B) AND R.C. 4906.10(A), (3), AND (6).

8. ASSIGNMENT OF ERROR NO. 8: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY ERRONEOUSLY FINDING THAT THE PROJECT PROVIDES FOR WATER CONSERVATION MEASURES AS REQUIRED BY OHIO ADM.CODE 4906-4-07(C)(3)(e) AND R.C. 4906.10(A)(2), (3), (6), AND (8).

9. ASSIGNMENT OF ERROR NO. 9: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S THREAT TO THE NEIGHBORS' PROPERTY VALUES AS ANOTHER REASON WHY THE PROJECT WOULD NOT SERVE THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY UNDER R.C. 4906.10(A)(6).

10. ASSIGNMENT OF ERROR NO. 10: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S THREAT TO THE NEIGHBORS' HISTORIC AND CULTURAL RESOURCES AS ANOTHER REASON WHY THE PROJECT DOES NOT COMPLY WITH R.C. 4906.10(A)(3) AND (6).

11. ASSIGNMENT OF ERROR NO 11: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE PROJECT'S RISK TO THE COMMUNITY DURING TORNADOES AS ANOTHER REASON WHY THE PROJECT DOES NOT COMPLY WITH R.C. 4906.10(A)(6).

12. ASSIGNMENT OF ERROR NO. 12: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT THE PROJECT'S NOISE IMPACTS DO NOT PRECLUDE THE ISSUANCE OF A CERTIFICATE UNDER R.C. 4906.10(A)(3) AND R.C. 4906.10(A)(6).

13. ASSIGNMENT OF ERROR NO. 13: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD PROVIDED THE INFORMATION REQUIRED BY OHIO ADM.CODE 4906-4-07(C) AND R.C. 49016.10(A)(2), (3), (5), AND

(6) ABOUT THE PROJECT'S DRAINAGE IMPACTS AND ASSOCIATED MITIGATION TO PREVENT FLOODING.

14. **ASSIGNMENT OF ERROR NO. 14: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FINDING THAT KINGWOOD PROVIDED THE INFORMATION REQUIRED BY OHIO ADM.CODE 4906-4-07(C) AND R.C. 4906.10(A)(2), (3), (5), AND (6) ABOUT THE PROJECT'S POLLUTION IMPACTS AND ASSOCIATED MITIGATION.**

15. **ASSIGNMENT OF ERROR NO. 15: THE BOARD ACTED UNLAWFULLY AND UNREASONABLY BY FAILING TO IDENTIFY THE APPLICANT'S INEXPERIENCE AS ANOTHER REASON WHY THE PROJECT DOES NOT COMPLY WITH R.C. 4906.10(A)(6).**

{¶ 71} In the responding Memorandum Contra, Kingwood responds generally that all of Joint Intervenors' assignments of error should be denied. Kingwood avers that the assignments of error dealing with administrative rule compliance are irrelevant as to whether Kingwood satisfied the R.C. 4906.10(A) criteria. Kingwood points out that much of the Joint Application for Rehearing are near identical recitations of Joint Intervenors' post-hearing briefs. Kingwood submits that there is ample evidence in the record to refute the assignments of error alleged by Joint Intervenors and each of them should, therefore, be denied.

{¶ 72} The Board finds that the assignments of error alleged by Joint Intervenors are without merit, as the arguments made in the Joint Application for Rehearing were all previously made in post-hearing briefs and evaluated by the Board in rendering the Order. While the nature of an application for rehearing inherently lends itself to some repeating of previous arguments, a thorough comparison of the Joint Application for Rehearing and the initial post-hearing brief of CGA demonstrates that the Joint Application for Rehearing is essentially a facsimile of the initial brief. While there are alterations in certain sections, with some additional information or sentences added in particular locations, the arguments

remain identical, with large swaths being word-for-word reproductions.[1] The Board addressed the topics raised by Joint Intervenors within the statutory analysis in the Order. Specifically, the Board addressed land use (¶ 103, 107, 108); loss of farmland (¶ 153-156); economic impacts (¶ 136, 142, 149); setbacks and environmental impact (¶ 108-112); visual impacts (¶ 110-112), information on the wildlife and plant impacts (¶ 108); and water conservation measures (¶ 108, 162). To the extent that an argument made by CGA or any of the Joint Intervenors was not explicitly referenced in the Order, it was nevertheless thoroughly and adequately considered by the Board in making its determinations. In issuing its June 15, 2021 correspondence, Staff determined that the application submitted by Kingwood complied with Ohio Adm.Code Chapters 4906-01, et seq., such that Staff found sufficient information to begin its review of the application. Despite CGA's arguments, the Board saw no reason to doubt this assessment and, having reviewed the same arguments for a second time in the Joint Application for Rehearing, sees no reason to question that determination now. With respect to rulings made in the Order, Joint Intervenors fail to present any new arguments regarding the statutory findings and we decline the invitation to reweigh the evidence, which is basically what is being asked of the Board in submitting a near-copy of the initial brief. Accordingly, all 15 assignments of error outlined in the Joint Application for Rehearing are denied.

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[1] *Compare* Joint App. for Rehearing at 14-15 *with* CGA Initial Br. at 8-9; *compare* Joint App. for Rehearing at 16-21 *with* CGA Initial Br. at 9-14; *compare* Joint App. for Rehearing at 21-28 *with* CGA Initial Br. at 15-21; *compare* Joint App. for Rehearing at 28-30 *with* CGA Initial Br. at 21-22; *compare* Joint App. for Rehearing at 30-50 *with* CGA Initial Br. at 22-38; *compare* Joint App. for Rehearing at 50-55 *with* CGA Initial Br. at 38-43; *compare* Joint App. for Rehearing at 55-57 *with* CGA Initial Br. at 43-44; *compare* Joint App. for Rehearing at 57-60 *with* CGA Initial Br. at 44-46; *compare* Joint App. for Rehearing at 60-67 *with* CGA Initial Br. at 46-55; *compare* Joint App. for Rehearing at 68-70 *with* CGA Initial Br. at 55-57; *compare* Joint App. for Rehearing at 70-74 *with* CGA Initial Br. at 57-60; *compare* Joint App. for Rehearing at 74-78 *with* CGA Initial Br. at 60-63; *Compare* Joint App. for Rehearing at 79-81 *with* CGA Initial Br. at 64-65; *compare* Joint App. for Rehearing at 81 *with* CGA Initial Br. at 65.

C. Greene County Application for Rehearing

{¶ 73} In the Greene Application for Rehearing, Greene County states that while it agrees with the Board's Order in rejecting the stipulation and denying the application, it believes that there are additional or alternative grounds for the denial that should be incorporated into the Order. Greene County submits three assignments of error, arguing that the Board acted unlawfully and unreasonably by: (1) not expressly citing conflicts between the Project and the county's Perspectives 2020 land use plan as reasons the Project did not satisfy R.C. 4906.10(A)(6); (2) failing to identify the Project's threat to the neighbors' property values as an additional reason why the Project would not satisfy R.C. 4906.10(A)(6); and (3) failing to find that the Project's negative economic impacts are an additional reason why the Project does satisfy R.C. 4906.10(A)(6) and by failing to find that Kingwood failed to evaluate the Project's economic impacts as required under statute and Commission regulations. Greene County states that its second and third assignments of error are identical to those Assignment of Error Nos. 4 and 9 in the Joint Application for Rehearing and Greene County incorporates by reference the arguments made by Joint Intervenors in those sections. In support of its first assignment of error, Greene County argues that the only potential "shortcoming" in the Order is that it could be read as relying only upon the Commissioners' opposition (and that of township trustees), rather than the underlying rationale of the opposition. Greene County requests that its application for rehearing be granted for the limited purpose of amending the Order to "unequivocally adopt" the contents of the Commissioners' Resolution No. 21-10-28-8 (Greene Co. Ex. 2) and Resolution 21-8-26-10 (Greene Co. Ex. 3) as additional grounds for denying Kingwood's application. (Greene App. for Rehearing at 1-5.)

{¶ 74} In its Memo Contra Greene County, Kingwood responds that the Board should deny all three assignments of error. With respect to the first assignment of error, Kingwood points out that the Board is not bound to adopt any local land use plan or resolution when either granting or denying a certificate under R.C. 4906.10(A). Kingwood

states that the Board referenced the County's resolutions as examples of local opposition but did not indicate a need to formally adopt the resolutions in their entirety. Further, Kingwood answers that the Board did make explicit findings in the Order on the issues raised in the County's resolution opposing the Project. (Memo Contra Greene County at 2-4.)

{¶ 75} The Board finds that Greene County's first assignment of error is without merit. In this assignment of error, Greene County essentially requests that the Board reassess evidence that it already considered in formulating the Order. Similar to our reasoning in denying Joint Intervenors' assignments of error, the Board declines the invitation to reweigh evidence that was already thoroughly considered in issuing the Order. The Board fully evaluated all record evidence and found that the Project is not in the public interest, convenience, and necessity for the reasonings explained in the Order (Order at ¶¶ 142-152). To the extent that a particular piece of evidence was not explicitly cited in support of this conclusion, the Board did not feel it appropriate to make such a statement. However, the Board stands behind the analysis and determinations previously made and are unpersuaded that any additional grounds for denying the application are necessary.

{¶ 76} Greene County's second and third assignments of error are identical to Joint Intervenors' Assignment of Error Nos. 4 and 9 and the sole support for these assignments are incorporating the arguments made by Joint Intervenors in their application for rehearing (Greene App. for Rehearing at 2). As the Board already denied all assignments of error in the Joint Application for Rehearing, we likewise deny both the second and third assignments of error in the Greene Application for Rehearing, for the same reasoning outlined above.

IV. ORDER

{¶ 77} It is, therefore,

{¶ 78} ORDERED, That the application for rehearing filed by Kingwood be denied. It is, further,

{¶ 79} ORDERED, That the application for rehearing filed by Joint Intervenors be denied. It is, further,

{¶ 80} ORDERED, That the application for rehearing filed by Greene County be denied. It is, further,

{¶ 81} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:
Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Jack Christopher, Designee for Lydia Mihalik, Director
Ohio Department of Development

Damian Sikora, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

Drew Bergman, Designee for Anne Vogel, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Brian Baldridge, Director
Ohio Department of Agriculture

DMH/dr

Summary: Opinion & Order on Rehearing denying: (1) the application for rehearing filed by Kingwood Solar I LLC; (2) the application for rehearing filed by Citizens for Greene Acres; and (3) the application for rehearing filed by Greene County Commissioners electronically filed by Debbie S. Ryan on behalf of Ohio Power Siting Board.

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.[1] 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,[2] 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.[3] 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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1 *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.

2 *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.

3 *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

This foregoing document was electronically filed with the Public Utilities

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4/14/2022 3:01:20 PM

in

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

OAC Ann. 4906-2-12

This document is current through updates effective November 6, 2023.

4906-2-12. Intervention.

(A) Persons who desire to intervene in a board proceeding shall comply with the following requirements:

(1) The chief executive officer of each municipal corporation and county and the head of each public agency charged with the duty of protecting the environment or of planning land use in the area in which any portion of such facility is to be located may intervene by preparing and filing with the board, within thirty days after the date he or she was served with a copy of the application under division (B) of section 4906.06 of the Revised Code, a notice of intervention containing the following information:

(a) A certification or affirmation as to the legal title and authority of such official.

(b) A statement demonstrating the fact that all or part of the proposed facility is to be located within the area under the jurisdiction of such official.

(c) A statement indicating that such official intends to intervene in the proceedings, together with the grounds for which intervention is sought.

(2) All other persons may petition for leave to intervene by:

(a) Preparing a petition for leave to intervene setting forth the grounds for the proposed intervention and the interest of the petitioner in the proceedings.

(b) Filing said petition within thirty days after the date of publication of the notice required in accordance with paragraph (A)(1) of rule 4906-3-09 of the Administrative Code or in accordance with division (B) of section 4906.08 of the Revised Code or as otherwise directed by the board or the administrative law judge.

(3) Copies of all notices of intervention and petitions for leave to intervene shall be sent to all parties by the prospective intervenor, and a certificate of service shall be filed with the board at the time of filing said notice or petition pursuant to rule 4906-2-05 of the Administrative Code.

(B) The board or the administrative law judge shall grant petitions for leave to intervene only upon a showing of good cause.

(1) In deciding whether to permit intervention under this paragraph, the board or the administrative law judge may consider:

(a) The nature and extent of the person’s interest.

(b) The extent to which the person’s interest is represented by existing parties.

(c) The person’s potential contribution to a just and expeditious resolution of the issues involved in the proceeding.

(d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

(C) The board or the administrative law judge may, in extraordinary circumstances and for good cause shown, grant a petition for leave to intervene in subsequent phases of the proceeding, filed by a person identified in paragraph (A)(1) or (A)(2) of this rule, who failed to file a timely notice of intervention or petition for leave to intervene. Any petition filed under this paragraph must contain, in addition to the information set forth in paragraph (A)(1) or (A)(2) of this rule, a statement of good cause for failing to timely file the notice or petition and shall be granted only upon a finding that:

(1) Extraordinary circumstances justify the granting of the petition.

(2) The intervenor agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding.

(D) Unless otherwise provided by law, the board or the administrative law judge may:

(1) Grant limited participation, which permits a person to participate with respect to one or more specific issues, if:

(a) The person has no real and substantial interest with respect to the remaining issues.

(b) The person's interest with respect to the remaining issues is adequately represented by existing parties.

(2) Require intervenors with substantially similar interests to consolidate their examination of witnesses or presentation of testimony.

Statutory Authority

Replaces:

4906-7-04.

Effective:

12/11/2015.

Five Year Review (FYR) Dates:

11/30/2020.

Promulgated Under:

111.15.

Statutory Authority:

4906.03.

Rule Amplifies:

4903.221, 4906.03, 4906.08, 4906.09, 4906.12

Prior Effective Dates:

12/27/76, 6/10/89, 8/28/98, 12/15/03, 1/25/09.

End of Document

OAC Ann. 4906-2-13

This document is current through updates effective November 6, 2023.

OH - Ohio Administrative Code > 4906 Ohio Power Siting Board > Chapter 4906-2 Procedural standards for cased before board

4906-2-13. Role of participants in public hearings.

At the public hearing, the board or the administrative law judge shall accept written or oral testimony from any person regardless of that person's status. However, the right to examine witnesses is reserved exclusively for parties and the staff.

Statutory Authority

Replaces:

4906-7-05.

Effective:

12/11/2015.

Five Year Review (FYR) Dates:

11/30/2020.

Promulgated Under:

111.15.

Statutory Authority:

4906.03.

Rule Amplifies:

4903.02, 4906.08, 4906.12, 4906.03

Prior Effective Dates:

12/27/76, 6/10/89, 8/28/98.

End of Document

OAC Ann. 4906-2-23

This document is current through updates effective November 6, 2023.

4906-2-23. Subpoenas.

(A) The board, any board member empowered to vote, or the administrative law judge assigned to a case may issue subpoenas, upon their own motion or upon motion of any party or the staff. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such a person to produce the books, papers, documents, or other tangible things described therein. A copy of the motion for a subpoena and the subpoena itself should be submitted in person to the board, any board member entitled to vote, or the administrative law judge assigned to the case for signature of the subpoena. After the subpoena is signed, a copy of the motion for a subpoena and a copy of the signed subpoena shall be docketed and served upon the parties of the case. The person seeking the subpoena shall file the original signed subpoena and make arrangements for its service.

(B) Arranging for service of a signed subpoena is the responsibility of the requesting person. A subpoena may be served by a sheriff, deputy sheriff, or any other person who is not a party and who is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering it to such person, reading it to him or her in person, leaving it at his or her place of residence, leaving it at his or her business address if the person is a party or employee of a party to the case, or mailing the subpoena via United States mail as certified or express mail, return receipt requested, with instructions to the delivering postal authority to show to whom delivered, date of delivery, and address where delivered. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division. When a subpoena is served by mail, the person filing the return shall include the signed receipt with the return.

(C) The board or the administrative law judge may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive, or condition the denial of such a motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein.

(D) A subpoena may require a person, other than a member of the board staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4906-2-14 of the Administrative Code. Such a subpoena is subject to the provisions of rule 4906-2-21 of the Administrative Code as well as paragraph (C) of this rule.

(E) Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the board no later than five days prior to the commencement of the hearing.

(F) Any persons subpoenaed to appear at a board hearing, other than a party or an officer, agent, or employee of a party, shall receive the same witness fees and mileage expenses provided in civil actions in courts of record. For purposes of this paragraph, the term “employee” includes consultants and other persons retained or specially employed by a party for purposes of the proceeding. If the witness is subpoenaed at the request of one or more parties, the witness fees and mileage expenses shall be paid by

such party or parties. If the witness is subpoenaed upon motion of the board, any board member entitled to vote, or the administrative law judge, the witness fees and mileage expenses shall be paid by the state, in accordance with section 4903.05 of the Revised Code. Unless otherwise ordered, an application for a subpoena requiring the attendance of a witness at a hearing shall be accompanied by a deposit sufficient to cover the required witness fees and mileage expenses for one day's attendance. The deposit shall be tendered to the fiscal officer of the board, who shall retain it until the hearing is completed, at which time the officer shall pay the witness the necessary fees and expenses, and shall either charge the party making the deposit for any deficiency or refund to such party any surplus remaining from the deposit.

(G) If any person fails to obey a subpoena issued by the board, any board member entitled to vote or an administrative law judge, the board may seek appropriate judicial relief against such person under section 4903.02 or 4903.04 of the Revised Code.

(H) A sample subpoena is provided in the appendix to this rule.

4906-2-23 Appendix A

Click here to view this image.

Statutory Authority

Replaces:

4906-7-08.

Effective:

12/11/2015.

Five Year Review (FYR) Dates:

11/30/2020.

Promulgated Under:

111.15.

Statutory Authority:

4906.03.

Rule Amplifies:

4903.04, 4903.05, 4903.06, 4906.03, 4906.08, 4906.12

Prior Effective Dates:

12/27/76, 6/10/89, 12/15/03.

End of Document

OAC Ann. 4906-2-30

This document is current through updates effective November 6, 2023.

OH - Ohio Administrative Code > 4906 Ohio Power Siting Board > Chapter 4906-2 Procedural standards for cased before board

4906-2-30. Decision by the board.

Within a reasonable time after the conclusion of the hearing, the board shall issue a final decision based only on the record, including such additional evidence as it shall order admitted. The board may determine that the location of all or part of the proposed facility should be modified. If it so finds, it may condition its certificate upon such modifications. Persons and municipal corporations shall be given reasonable notice thereof. The decision of the board shall be entered on the board journal and into the record of the hearing. Copies of the decision or order shall be served on all attorneys of record and all unrepresented parties in the proceedings by ordinary mail.

Statutory Authority

Replaces:

part of 4906-7-17.

Effective:

12/11/2015.

Five Year Review (FYR) Dates:

11/30/2020.

Promulgated Under:

111.15.

Statutory Authority:

4906.03.

Rule Amplifies:

4903.22, 4906.03, 4906.10, 4906.11, 4906.12, 4906.20

Prior Effective Dates:

12/27/76, 6/10/89, 8/28/98, 12/15/03, 1/25/09, 5/7/09.

End of Document

ORC Ann. 303.58

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 3: Counties (Chs. 301 — 355) > Chapter 303: County Rural Zoning; Renewal of Slums and Blighted Areas (§§ 303.01 — 303.99) > Renewal of Slum or Blighted Areas (§§ 303.26 — 303.99)

§ 303.58 County resolution may prohibit construction of wind farm or solar facility; restricted areas; maps and boundaries.

(A) The board of county commissioners may adopt a resolution designating all or part of the unincorporated area of a county as a restricted area, prohibiting the construction of any or all of the following:

(1) An economically significant wind farm;

(2) A large wind farm;

(3) A large solar facility.

(B) A resolution described in division (A) of this section may designate one or more restricted areas and shall fix restricted area boundaries within the unincorporated area of the county.

(C)

(1) The board may adopt a resolution designating a restricted area at a regular meeting of the board or at a special meeting called for the purpose of discussing such a resolution.

(2) At least thirty days prior to the meeting at which a resolution to designate a restricted area will be discussed, the board shall do all of the following:

(a) Provide public notice of the date and time of the meeting by one publication in a newspaper of general circulation within the county;

(b) Publicly post a map showing the boundaries of the proposed restricted area at all public libraries within the county;

(c) Provide written notice of the meeting, by first class mail, to all school districts, municipal corporations, and boards of township trustees located in whole, or in part, within the boundaries of the proposed restricted area.

(3) The board shall comply with the requirements of divisions (C)(1) and (2) of this section before the board modifies a resolution it previously adopted under this section.

(D) Any resolution designating a restricted area shall include a map of the restricted area, as well as texts sufficient to identify all boundaries of the restricted area. A copy of the resolution and any accompanying texts and maps shall be filed with the office of the county recorder of the county.

(E) A resolution adopted under this section shall not affect the construction of a utility facility that was presented to the board of county commissioners under section 303.61 of the Revised Code, and the board did not adopt a resolution prohibiting the facility within the time required under section 303.62 of the Revised Code.

History

2021 sb52, § 1, effective October 11, 2021.

End of Document

ORC Ann. 4906.02

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 49: Public Utilities (Chs. 4901 — 4999) > Chapter 4906: Power Siting (§§ 4906.01 — 4906.99)

§ 4906.02 Creation of power siting board; membership, organization, and duties of chairman.

(A)

(1) There is hereby created within the public utilities commission the power siting board, composed of the chairperson of the public utilities commission, the director of environmental protection, the director of health, the director of development, the director of natural resources, the director of agriculture, and a representative of the public who shall be an engineer and shall be appointed by the governor, from a list of three nominees submitted to the governor by the office of the consumers' counsel, with the advice and consent of the senate and shall serve for a term of four years. The chairperson of the public utilities commission shall be chairperson of the board and its chief executive officer. The chairperson shall designate one of the voting members of the board to act as vice-chairperson who shall possess during the absence or disability of the chairperson all of the powers of the chairperson. All hearings, studies, and consideration of applications for certificates shall be conducted by the board or representatives of its members.

In addition, the board shall include four legislative members who may participate fully in all the board's deliberations and activities except that they shall serve as nonvoting members. The speaker of the house of representatives shall appoint one legislative member, and the president of the senate and minority leader of each house shall each appoint one legislative member. Each such legislative leader shall designate an alternate to attend meetings of the board when the regular legislative member appointed by the legislative leader is unable to attend. Each legislative member and alternate shall serve for the duration of the elected term that the legislative member is serving at the time of appointment. A quorum of the board is a majority of its voting members.

The representative of the public and, notwithstanding section 101.26 of the Revised Code, legislative members of the board or their designated alternates, when engaged in their duties as members of the board, shall be paid at the per diem rate of step 1, pay range 32, under schedule B of section 124.15 of the Revised Code and shall be reimbursed for the actual and necessary expenses they incur in the discharge of their official duties.

(2) In all cases involving an application for a certificate or a material amendment to an existing certificate for a utility facility, as defined in section 303.57 of the Revised Code, the board shall include two voting ad hoc members, as described in section 4906.021 of the Revised Code.

(B) The chairperson shall keep a complete record of all proceedings of the board, issue all necessary process, writs, warrants, and notices, keep all books, maps, documents, and papers ordered filed by the board, conduct investigations pursuant to section 4906.07 of the Revised Code, and perform such other duties as the board may prescribe.

(C) The chairperson of the public utilities commission may assign or transfer duties among the commission's staff. However, the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.

(D) The chairperson may call to the chairperson's assistance, temporarily, any employee of the environmental protection agency, the department of natural resources, the department of agriculture, the department of health, or the department of development, for the purpose of making studies, conducting hearings, investigating applications, or preparing any report required or authorized under this chapter. Such employees shall not receive any additional compensation over that which they receive from the agency by which they are employed, but they shall be reimbursed for their actual and necessary expenses incurred while working under the direction of the chairperson. All contracts for special services are subject to the approval of the chairperson.

(E) The board's offices shall be located in those of the public utilities commission.

History

134 v S 397 (Eff 10-23-72); 137 v H 415 (Eff 12-14-77); 137 v S 437 (Eff 1-8-79); 138 v H 204 (Eff 7-30-79); 139 v H 694 (Eff 11-15-81); 139 v H 536 (Eff 8-12-82); 139 v S 378 (Eff 1-11-83); 140 v H 100 (Eff 2-24-83); 141 v H 381. Eff 10-17-85; 2021 hb110, § 101.01, effective September 30, 2021; 2021 sb52, § 1, effective October 11, 2021.

End of Document

ORC Ann. 4906.07

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 49: Public Utilities (Chs. 4901 — 4999) > Chapter 4906: Power Siting (§§ 4906.01 — 4906.99)

§ 4906.07 Scheduling of hearing on application; investigation and report.

(A) Upon the receipt of an application complying with section 4906.06 of the Revised Code, the power siting board shall promptly fix a date for a public hearing thereon, not less than sixty nor more than ninety days after such receipt, and shall conclude the proceeding as expeditiously as practicable.

(B) On an application for an amendment of a certificate, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

(C) The chairperson of the power siting board shall cause each application filed with the board to be investigated and shall, not less than fifteen days prior to the date any application is set for hearing submit a written report to the board and to the applicant. A copy of such report shall be made available to any person upon request. Such report shall set forth the nature of the investigation, and shall contain recommended findings with regard to division (A) of section 4906.10 of the Revised Code and shall become part of the record and served upon all parties to the proceeding.

History

134 v S 397 (Eff 10-23-72); 139 v H 694 (Eff 11-15-81); 141 v H 381. Eff 10-17-85; 2012 SB 315, § 101.01, eff. Sept. 10, 2012.

End of Document

ORC Ann. 4906.09

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 49: Public Utilities (Chs. 4901 — 4999) > Chapter 4906: Power Siting (§§ 4906.01 — 4906.99)

§ 4906.09 Record of proceedings; rules of evidence; consolidation.

A record shall be made of the hearing and of all testimony taken. Rules of evidence, as specified by the power siting board, shall apply to the proceeding. The board may provide for the consolidation of the representation of parties having similar interests.

History

134 v S 397 (Eff 10-23-72); 139 v H 694. Eff 11-15-81.

End of Document

ORC Ann. 4906.10

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 49: Public Utilities (Chs. 4901 — 4999) > Chapter 4906: Power Siting (§§ 4906.01 — 4906.99)

§ 4906.10 Guidelines for granting or denying certificate; facility must comply with air, water, and solid waste requirements; facility subject to enforcement and monitoring powers of director of environmental protection.

(A) The power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be subject to sections 4906.101, 4906.102, and 4906.103 of the Revised Code and conditioned upon the facility being in compliance with standards and rules adopted under section 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code. An applicant may withdraw an application if the board grants a certificate on terms, conditions, or modifications other than those proposed by the applicant in the application.

The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:

(1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline;

(2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under section 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or

production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

(B) If the board determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon that modification, provided that the municipal corporations and counties, and persons residing therein, affected by the modification shall have been given reasonable notice thereof.

(C) A copy of the decision and any opinion issued therewith shall be served upon each party.

History

134 v S 397 (Eff 10-23-72); 139 v H 694 (Eff 11-15-81); 139 v S 78 (Eff 6-29-82); 140 v S 225 (Eff 7-4-84); 142 v H 662 (Eff 6-29-88); 144 v H 15 (Eff 10-15-91); 146 v H 572 (Eff 9-17-96); 148 v H 163 (Eff 6-30-99); 148 v S 3. Eff 10-5-99; 150 v H 133, § 1, eff. 4-7-04; 2012 SB 315, § 101.01, eff. Sept. 10, 2012; 2017 hb49, § 101.01, effective September 29, 2017; 2019 hb166, § 101.01, effective October 17, 2019; 2021 sb52, § 1, effective October 11, 2021.

End of Document

ORC Ann. 4906.12

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 49: Public Utilities (Chs. 4901 — 4999) > Chapter 4906: Power Siting (§§ 4906.01 — 4906.99)

§ 4906.12 Power siting board to follow procedures of public utilities commission.

Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.

History

134 v S 397 (Eff 10-23-72); 139 v H 694. Eff 11-15-81.

End of Document

ORC Ann. 4906.13

Current through File 12 of the 135th General Assembly (2023-2024).

Page's Ohio Revised Code Annotated > Title 49: Public Utilities (Chs. 4901 — 4999) > Chapter 4906: Power Siting (§§ 4906.01 — 4906.99)

§ 4906.13 Exclusion of major utility facility or wind farm from state or local jurisdiction.

(A) As used in this section and sections 4906.20 and 4906.98 of the Revised Code, "economically significant wind farm" means wind turbines and associated facilities with a single interconnection to the electrical grid and designed for, or capable of, operation at an aggregate capacity of five or more megawatts but less than fifty megawatts. The term excludes any such wind farm in operation on June 24, 2008. The term also excludes one or more wind turbines and associated facilities that are primarily dedicated to providing electricity to a single customer at a single location and that are designed for, or capable of, operation at an aggregate capacity of less than twenty megawatts, as measured at the customer's point of interconnection to the electrical grid.

(B) No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906. of the Revised Code. Nothing herein shall prevent the application of state laws for the protection of employees engaged in the construction of such facility or wind farm nor of municipal regulations that do not pertain to the location or design of, or pollution control and abatement standards for, a major utility facility or economically significant wind farm for which a certificate has been granted under this chapter.

History

134 v S 397. Eff 10-23-72; 152 v H 562, § 101.01, eff. 6-24-08; 2017 hb49, § 101.01, effective September 29, 2017; 2019 hb6, § 1, effective October 22, 2019.

End of Document

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. 21-117-EL-BGN**

APPLICATION FOR REHEARING OF KINGWOOD SOLAR I LLC

Pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Rule 4906-2-32, Kingwood Solar I LLC ("Kingwood") respectfully submits this Application for Rehearing of the December 15, 2022 Opinion and Order ("Order") issued by the Ohio Power Siting Board ("Board") in this proceeding. Kingwood sets forth the following specific grounds for rehearing as to why the Order is unlawful and unreasonable:

1. The Board's consideration of the local governmental authorities' positions on the project to determine whether the project is in the public interest, convenience and necessity (R.C. 4906.10(A)(6)) exceeded the Board's statutory authority and therefore was unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

2. The Board's delegation of its decision-making authority to the local governing body of Greene County and the three intervening townships was impermissible, unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

3. The Board's change of its interpretation for what is required to meet the "public interest, convenience, and necessity" criterion of R.C. 4906.10(A)(6) to now allow unanimous opposition by local governmental authorities within the project area to control the Board's decision without a reasonable basis for doing so is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

4. The Board's reliance on public comments that are not a part of the record in these proceedings violates R.C. 4906.10(A), and is therefore unlawful and unreasonable. (*See* Order ¶ 151.)

5. Because the record, including hundreds of pages of exhibits and days of expert testimony, before the Board established that the proposed solar-powered electric generation facility meets all of the statutory criteria of 4906.10(A), including that the project will be in the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6), the Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

6. The Board's finding that the Joint Stipulation was not the product of serious bargaining among capable, knowledgeable parties is not supported by the record and therefore is unreasonable and unlawful. (*See* Order ¶¶ 163–70.)

7. The Board's finding that its determination as to the Project's non-compliance with R.C. 4906.10(A)(6) necessitates findings that (1) the Joint Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Joint Stipulation would violate an important regulatory principle or practice is not supported by the record or law, and therefore is unreasonable and unlawful. (*See* Order ¶ 169.)

8. The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have complete information on the nature of Staff's investigation in violation of R.C. 4906.07(C). (*See* Order ¶¶ 76–79.)

9. The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have sufficient information on why the OPSB Staff was soliciting the local governmental authorities positions on the project on the eve of the date the Staff's Report and Recommendation was due and after the Staff had already recommended approval of the project in the current draft of the Staff Report and Recommendation. (*See* Order ¶¶ 76–79.)

10. The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because the denial of the subpoena requests constitutes a violation of due process as Kingwood was unable to put on evidence that the Staff's Report and Recommendation, which set the tone for the remainder of the proceeding, was outcome determinative and not based on an analysis of Kingwood's application. (*See* Order ¶¶ 76–79.)

For these reasons, and as further explained in the Memorandum in Support attached hereto,

Kingwood respectfully requests that the Board grant its Application for Rehearing.

Respectfully submitted,

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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. 21-117-EL-BGN**

MEMORANDUM IN SUPPORT

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I. INTRODUCTION

The Board has the opportunity with this case to redirect its current position and come back into compliance with the statutory directives set forth by the General Assembly. Instead of giving undue weight to the unsubstantiated opinions of local governmental entities and a vocal "not in my backyard" minority, the Board should appropriately weigh and consider whether the Kingwood Solar Project (the "Project") is in the public interest, convenience and necessity pursuant to the plain language of the R.C. 4906.10(A)(6).

The Project meets all of the statutory requirements that have been approved for similar projects several times before. Indeed, the Board explicitly determined that the Project meets all technical requirements for approval. Despite this compliance, the Board denied Kingwood's application and rejected the Joint Stipulation on the sole ground that the Board perceived "unanimous" public opposition against the Project. In so doing, the Board relied on the vague opinions expressed in the intervening local governmental entities' resolutions and unsubstantiated comments from a very small fraction of the local population of Greene County, Ohio which totals nearly 170,000. Such a determination is unreasonable and unlawful and warrants rehearing and reversal.

Surely, this is not what the statute intended when it required the Board to ensure projects serve the "public interest, convenience, and necessity." Nowhere in the statute does it reference public opinion, political motivations, or local perception. The Board cannot look to the opinions of a few elected governmental officials, call those opinions the public welfare, and give it the majority weight over the many public interest benefits that the Board attributed to the Project. But unfortunately, the Board impermissibly delegated its decision-making authority to those local officials—a delegation which is explicitly prohibited by statute and which offends the General

Assembly's intention to place the approval and siting of major utility facilities in the hands of the Board and insulated from local politics. The Board must correct its unreasonable departure from the statute's plain meaning and from its prior precedent. Without correction, the Board walks the dangerous path of letting personal and political opinion govern development—which does not always benefit the public good.

Many of the problems in this case arose when, just a few days before the Staff Report and Recommendation was due to be filed, Staff solicited last minute input from the intervening county and three townships and changed its recommendation—the sole reason being "strong local government opposition." While Staff's solicitation was not included in its Staff Report, Kingwood doggedly pursued information about that solicitation, with each stone overturned leading to a new question and new person being involved. Yet, when the path led back to the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, Kingwood was blocked from questioning her on whether that solicitation was for reasons other than investigating the project, i.e., finding a reason to reverse the pending recommendation by Staff that the Board approve the Project.

As all will agree, an administrative agency must follow its guiding statutes and be open to transparency in its investigations, especially an agency like the Ohio Power Siting Board. The Board's Order, however, failed to follow the express language of R.C. 4906.10(A)(6) and also failed to provide full transparency as to what happened just before the Staff Report issued. Now is the time for the Board to right the course by reversing the Order, approving the Joint Stipulation and issuing a certificate of environmental compatibility and public need for the Project. Doing so will not require further testimony from Ms. White unless the Board wishes to have that testimony on the record to ensure complete transparency to the public.

II. ARGUMENT

Despite the determination that the Project was technically compliant, the Board denied Kingwood's application based on its finding that "the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (Order ¶ 152.) The Board based this determination on the sole fact that the elected officials from Greene County, and the three intervening townships—Miami, Cedarville, and Xenia Townships—as well as a very vocal minority, opposed certification by passing resolutions against the Project and submitting comments, many of which were not admitted as evidence in the record. (*Id.* at ¶¶ 146–51.) In doing so, the Board bypassed the significant evidence in the record that the Project will positively impact the local community, and the State of Ohio as a whole, by creating new jobs, increasing tax benefits, providing increased access to clean energy, reducing the dependency on fossil fuels, and preserving agricultural land.

Ultimately, the Board held that because the governing bodies of the localities adjacent to and within the Project area "unanimously" opposed Kingwood's application, the Project must fail. (*Id.* at ¶ 145.) By denying Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio, rejecting the Joint Stipulation, and denying Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. White, the Board acted unlawfully and unreasonably. For the following reasons—each of which warrants rehearing on its own—the Board should grant rehearing and reverse these decisions.

A. First Ground for Rehearing: The Board's consideration of the local governmental authorities' positions on the project to determine whether the project is in the public interest, convenience and necessity (R.C. 4906.10(A)(6)) exceeded the Board's statutory authority and therefore was unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

"[T]he [B]oard is a creature of statute, it can exercise only those powers the legislature confers on it." *In re Black Fork Wind Energy, LLC*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20. As such, "[t]he relevant requirements [to obtain a certificate of environmental compatibility and public need] are set by the General Assembly, not by the Board." *Accord TWISM*, 2022-Ohio-4677, at ¶ 50. The key question in these proceedings, then, is whether the General Assembly through its enactment of R.C. 4906.10(A)(6) allows the Board to consider the opinions of the local governmental authorities to determine whether the project is in the "public interest, convenience and necessity." Ultimately, as the Supreme Court of Ohio has recently clarified, the determination as to what statutory authority the Board has will be for the Court to determine without mandatory deference to the Board's own interpretation. *See TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 3 ("[T]he judicial branch is never required to defer to an agency's interpretation of the law.").

When interpreting a statute, the Board must begin with the plain text of the provision. *See Elliot v. Durrani*, 2022-Ohio-4190, ¶ 8. "If 'the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation,' because 'an unambiguous statute is to be applied, not interpreted.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8 (quoting *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus). Ambiguity exists only if the statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16. In interpreting the statutory text, words should

be given their customary meaning. *Weiss v. Pub. Util. Comm'n of Ohio*, 90 Ohio St.3d 15, 17, 2000-Ohio-5, 734 N.E.2d 775. The Board "may not add words to a statute to achieve a desired construction." *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 49. Indeed, where the statute is silent, the Board cannot add requirements for certification. *See TWISM*, 2022-Ohio-4677, at ¶ 19.

Here, the language of R.C. 4906.10(A)(6) is plain and unambiguous. R.C. 4906.10(A)(6) states, in relevant part, that the Board "shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines . . . [t]hat the facility will ***serve the public interest, convenience, and necessity***[.]" (emphasis added). The terms "public interest, convenience, and necessity" are not defined in the statute. However, dictionaries define "public interest" as "the general welfare and rights of the public that are to be recognized, protected, and advanced" and as "the welfare or well-being of the general public." *Public Interest*, Dictionary.com, https://www.dictionary.com /browse/public-interest (last visited Jan. 11, 2023); *Public interest*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/interest (last accessed Jan. 11, 2023). Similarly, Black's Law Dictionary defines the term as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question."

Courts have likewise defined "public interest" to mean for the benefit or protection of the public at large. When contrasting R.C. 4906.10(A)(3) with 4906.10(A)(6), the Supreme Court held that section 4906.10(A)(6) "require[s] the [Board] to answer . . . how much [a project] will ***benefit the public***." *Ohio Edison Co. v. Power Siting Com.*, 56 Ohio St.2d 212, 215, 383 N.E.2d

588 (1978) (emphasis added). Courts have similarly defined "public interest" as including the "protection" of the public, "support of the poor," "[r]elief of the unemployed," and levying of taxes "to provide funds for the maintenance" law enforcement and other welfare activities. *See State ex rel. Ross v. Guion*, 161 N.E.2d 800 (Ohio 8th Dist. 1959) (collecting cases).

Additionally, the fact that prior projects—that similarly faced "unanimous opposition" from affected local governmental entities—have been approved, issued a certificate of environmental compatibility and public need, and affirmed by the Supreme Court is further evidence that R.C. 4906.10(A)(6) does not contain any language that allows the Board to rely on such opposition to deny a project. *See, e.g., In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 5; *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 8. And it is probative that the General Assembly amended the Revised Code to expressly grant county board of commissioners the authority to prohibit the construction of large wind or solar facilities in certain areas of their counties. R.C. 303.58(A).[1] Had the Code, prior to amendment, already permitted local governments to have this say in where future solar facilities may be located, there would have been no reason for Senate Bill 52. *See State ex rel. Corrigan v. Barnes*, 3 Ohio App.3d 40, 49, 443 N.E.2d 1034 (8th Dist. 1982) (Markus, J. concurring) ("If the former law already so provided, there would have been no reason for that amendment.").

Finally, although the General Assembly did not provide a definition for "public interest," other states have done so, and those definitions uniformly align with the plain meaning outlined above. *See, e.g.*, D.C. Code 16-5501 (defining "[i]ssue of public interest" to mean "an issue related

[1] This Project is explicitly grandfathered under that legislation. *See* 2021 Sub. S.B. No 52, Section 4(A); Kingwood Ex. 1 at Appendix C (system impact study issued December 2018); *and see* Tr. Vol I at 142-144 (noting facility study payment made prior to SB 52 effective date).

to health or safety; environmental, economic, or community well-being . . ."); 70 Ill.Comp.Stat. 1863/2 ("'Public interest' means the protection, furtherance, and advancement of the general welfare and of public health and safety and public necessity and convenience."); Okla.Stat. tit. 59, 15.1A ("'Public interest' means the collective well-being of the community of people and institutions the profession serves[.]"). In sum, the plain and ordinary meaning of "public interest" means for the public good or for the public's benefit. This meaning does not include public opinion or perception.

Instead of looking at the "public interest, convenience, and necessity," the Board added the additional requirement that a project must be supported, or at a minimum not opposed, by the opinions of local governments where the project area is located. Indeed, the Board explicitly stated that it considered "the local *perception* of the Project." (Order ¶ 151 (emphasis added).) Yet, as the plain and unambiguous language of the statute provides, **there is no textual basis** in the statute for the Board to add in this requirement. There is no language in R.C. 4906.10(A)(6), or any other part of R.C. 4906.10, that authorizes the Board to take into account local governmental (and political) opinions. Indeed, the term "public interest" is not synonymous to "public opinion" or "local perception." As commonly defined, "public opinion" means "the collective opinion of many people on some issue, problem, etc., especially as a guide to action, decision, or the like." *Public Opinion*, Dictionary.com, https://www.dictionary.com/browse/public-opinion (last visited Jan. 11, 2023). An "opinion" is merely "a belief or judgment that rests on grounds insufficient to produce complete certainty" or "a personal view, attitude, or appraisal." *Opinion*, Dictionary.com, https://www.dictionary.com/browse/opinion (last visited Jan. 11, 2023). Likewise, "perception" means the "result of perceiving" or an "observation." *Perception*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/perception (last accessed Jan. 11, 2023).

By their plain meaning, "public opinion" or "perception" do not include what is "the welfare or well-being of the general public." Indeed, what benefits the "public interest" is often time not the popular view among a community. *See, e.g., Wildwest Inst. & Friends of v. Bull*, No. CV 06-66-M-DWM, 2006 U.S. Dist. LEXIS 111495, at *25 (D. Mont. June 30, 2006) (finding two problems with reliance on public comments to show "public interest": (1) "the concepts of public opinion and the public interest [] are not necessarily the same," and (2) ascertaining actual "public opinion" is extremely difficult).

Of significance, the Board took it a step further—it not only considered these unsubstantiated opinions, but it also determined that those opinions **alone** are enough to defeat an entirely compliant project. The Board "acknowledge[d]" that the Project offers many public benefits, including "(1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels, (4) protecting landowner rights, and (5) preserving long-term agricultural land use." (Order ¶ 149.) Despite these numerous benefits, the Board held that "the unanimous opposition of every local government entity that borders the Project ***is controlling*** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 145.) As such, the Board not only disregarded the significant benefits that the Project will bring to the public, it also impermissibly focused on singular local issues rather than the statewide implications of the Project. Even locally, however, there was not "unanimous opposition" as only three of the twelve townships of Greene County voiced opposition to the Project. The Board therefore also ignored the countywide implications of the Project in favor of a vocal local minority.

Interpreting R.C. 4906.10(A)(6) to include consideration of "local government opinion" and the broader "public opinion" is unlawful and unreasonable given the plain language of the statute. In other words, **relying upon unfounded opinions by local government officials and a vocal minority**, and allowing those opinions to outweigh the vast evidence of how the Project serves the actual public interest, convenience, and necessity falls far beyond the express statutory criterion. Accordingly, by including the additional requirement that the Project must be supported by some amount of the public, the Board exceeded its statutory grant of authority. Its denial of Kingwood's application for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio on the sole ground that the Project was opposed by some vocal minority and the local government entities is therefore unlawful and unreasonable.

B. Second Ground for Rehearing: The Board's delegation of its decision-making authority to the local governing body of Greene County and the three intervening townships was impermissible, unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

Expanding what may be considered as serving the public interest, convenience, and necessity to include public opinion and perception not only exceeds the Board's statutory authority, it also impermissibly delegates the Board's decision-making authority to local governing bodies or a vocal minority. The enabling statute is again clear that "the [B]oard's authority to grant certificates under section 4906.10 of the Revised Code ***shall not be exercised*** by any officer, employee, ***or body other than the board itself.***" R.C. 4906.02(C) (emphasis added); *see also In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010 Ohio 1841, 928 N.E.2d 427, ¶¶ 20–21; *In re Buckeye Wind*, 2012-Ohio-878, at ¶ 13. As such, the power to oversee the construction and operation of major utility facilities, including solar facilities, has been given to one entity alone—the Power Siting Board. Local government entities, including elected

representatives, zoning commissions, and county courts, have no say over whether, where, or how major utility projects may be built and run. *See* R.C. 4906.13(B).

In these proceedings, the Board went to great lengths to outline how Kingwood's Project met every technical criteria. (*See generally* Order ¶¶ 87–132, 153–62.) The Board further outlined the significant benefits that the Project would provide to the public good. (*See id.* at ¶ 149.) Despite this technical compliance and the Project's established benefits to the public interest, the Board denied Kingwood's application for the sole reason that the intervening local governmental entities passed "uniform" resolutions opposing the Project. (*Id.* at ¶¶ 150, 152.) In effect, the Board abdicated its exclusive decision-making authority to these local entities. Because the Board has the exclusive authority to grant certificates, its decision to defer to the opinions of local government entities in denying Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio is unlawful and unreasonable.

Of note, Kingwood is not suggesting that local governing bodies and members of the public cannot engage in the certification process. To the contrary, the Board has specific procedures that allow for an entity or individual to intervene in the proceedings and present evidence. *See* O.A.C. 4906-2-12. Admissible evidence presented by intervening parties may properly be considered by the Board. *See* O.A.C. 4906-2-13. However, unsubstantiated and inadmissible opinions from the public and the passage of resolutions by local governing bodies outlining vague opinions related to the Project or solar energy generally is not sufficient to establish whether the Project serves the public interest. To allow otherwise walks a dangerous path that leads to energy development in this State being determined not by Board—the body tasked by the General Assembly to do so—but rather by the whims of politics at the local governmental entity level.

The General Assembly expressly delegated the authority to grant certificates of environmental compatibility and public need to the Board, thereby allowing the Board's expertise to drive energy development in Ohio and insulating, in part, the decision-making process from outside political motivations. The Board's decision in these proceedings abdicated the certification process from the Board's expertise and placed it in the hands of politically-motivated local bodies. That is unlawful and unreasonable and requires rehearing and reversal.

C. Third Ground for Rehearing: The Board's change of its interpretation for what is required to meet the "public interest, convenience, and necessity" criterion of R.C. 4906.10(A)(6) to now allow unanimous opposition by local governmental authorities within the project area to control the Board's decision without a reasonable basis for doing so is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

Even assuming *arguendo* that the "public interest, necessity, and convenience" criterion of R.C. 4906.10(A)(6) included a requirement for local and public support of a project or even was ambiguous as to such a requirement, the Board's long-standing precedent establishes that no such requirement exists. The Supreme Court of Ohio has made clear that administrative agencies **must respect their prior precedent**. *Bernard v. Unemp. Comp. Rev. Comm.*, 136 Ohio St.3d 264, 2013-Ohio-3121, ¶ 12, 994 N.E.2d 437; *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16. Although the Board is allowed to change its prior interpretations, it may only do so with a reasonable basis. *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶¶ 16, 28.

For years, the Supreme Court of Ohio and the Board have evaluated R.C. 4906.10(A)(6) broadly by considering whether a proposed project benefits the general public—as the plain language of the statute directs. *In re Application of Duke Energy Ohio, Inc.*, 158 Ohio St. 3d 1501, 2020-Ohio-2803, 144 N.E.3d 438, at ¶ 30 (noting that division (A)(6) requires the Board to account for the "public"); *see also In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-

BTX, Entry on Rehearing (Feb. 20, 2022), at ¶ 35 ("[t]he interests of the general public are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6)"). In making this determination, the Board has considered various factors, including public interaction, economic benefits, public safety, energy generation, noise, electrical interference, aesthetic impacts, and local natural resources. *See, e.g., In re Big Plain Solar, LLC*, Case No. 19-1823-EL-BGN, Opinion, Order, and Certificate (Mar. 18, 2021), at ¶¶ 65–67 (noting applicant's interaction with public and analyzing public safety); *In re Aquila Fulton Cty. Power, LLC*, Case No. 01-1022-EL-BGN, Opinion, Order, and Certificate (May 20, 2002), at 12-13 (public need, economic impact, public safety, noise, aesthetic impact, electrical interference, and impact to natural resources); and *In re Duke Energy Madison, LLC*, Case No. 98-1603-EL-BGN, Opinion, Order, and Certificate (May 24, 1999), at 10-11 (public need, public safety, noise, and aesthetic impact).[2]

Indeed, the Board has made clear that local and/or political opposition, even strong "unanimous" opposition, is not sufficient to **outweigh the benefits a project will generate for the public interest**. *See e.g., In re Champaign Wind, LLC*, PUCO Case No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013) (issuing certificate even though the county and townships in the project area unanimously opposed the project); *In re Buckeye Wind, LLC*, PUCO Case No. No. 08-666-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010) (same); *see also*, *In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21,

[2] The Board also applied a similar analysis in these cases: *In re The Ohio State University*, Case No. 19-1641-EL-BGN, Opinion, Order, and Certificate (Sep. 17, 2020), at ¶¶ 90–93 (noting applicant's public interaction and analyzing economic impacts and safety); *In re Willowbrook Solar I, LLC*, Case No. 18-1024-EL-BGN, Opinion, Order, and Certificate (Apr. 4, 2019), at ¶¶ 51–53 (public interaction and public safety); *In re Guernsey Power Station, LLC*, Case No. 16-2443-EL-BGN, Opinion, Order, and Certificate (Oct. 5, 2017), at ¶¶ 43–45 (public interaction and public safety); and *In re Clean Energy Future-Lordstown, LLC*, Case No. 14-2322-EL-BGN, Opinion, Order, and Certificate (Sep. 17, 2015), at 21- 22 (public interaction, economic impact, and public safety).

2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area); *In re Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate (June 24, 2021), at ¶ 293 (holding that despite local citizens' testimony, the project would not create more opportunity for crime in the locality and the applicant had proposed adequate safety measures and setbacks, risk mitigation plans, and that the amended joint stipulation benefited the public);

Recently, however, the Board has shifted course to now allow local governmental entities the ability to effectively veto a project through their opposition to a project. Specifically, the Board **changed its interpretation of R.C. 4906.10(A)(6) to take into account local government opinion** when deciding whether the Project is in the public interest, convenience and necessity. *See In re Birch Solar I, LLC*, Case No. 20-1605-EL-BGN, Opinion and Order (Oct. 20, 2022) at ¶ 72 ("Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)."); *In re Republic Wind*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021), at ¶ 91 ("As part of the Board's responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, **we must balance projected benefits against the magnitude of potential negative impacts on the local community**."); *In re American Transmission Systems, Inc. (ATSI)*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022), at ¶ 81 **(expanding its interpretation of R.C. 4906.10(A)(6) to include local public opinion)**.

The Board has not provided any reasonable basis for this departure from its prior precedent—indeed, no reasonable basis exists. As outlined above, there is no statutory hook for

this new interpretation. And the enabling statute explicitly forbids the Board from delegating its decision-making authority to local governmental entities. The Board has no justification for why one renewable energy facility that faced uniform opposition from the local governments in the project area was approved and issued a certificate, *see In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN, while Kingwood's proposed facility that faced similar uniform opposition from the intervening county and townships was denied. **Strong local opposition alone against a proposed project cannot outweigh the benefits it will generate for the general public or overshadow a fully compliant project.** Indeed, public opinion is often just that—opinion, not probative or admissible evidence. Because the Board unreasonably departed from precedent and its prior interpretation of R.C. 4906.10(A)(6), the Board should grant rehearing, approve the Joint Stipulation and issue a certificate to Kingwood Solar for the Project pursuant to the Board's prior long-standing precedent.

D. Fourth Ground for Rehearing: The Board's reliance on public comments that are not a part of the record in these proceedings violates R.C. 4906.10(A), and is therefore unlawful and unreasonable. (*See* Order ¶ 151.)

Even if the Board could consider public opinion and comments, it may only do so if those opinions and comments are in the record. In its Order, the Board gave substantial weight to "the overwhelming number of public comments filed in the case, which largely disfavor the Project." (Order ¶ 151.) Despite acknowledging that these comments "fall short of being admitted evidence in the case," the Board "affirm[ed] that they add value to the Board's consideration of the local perception of the Project." (*Id.*) Based on this supposed opposition and the opposition from the local government entities, the Board determined that the Project "fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 152.)

By its own admission, the public comments relied on by the Board are not in the evidentiary record of these proceedings. (*Id.* at ¶ 151.) R.C. 4906.09 states that "[a] record shall be made of the hearing and of all testimony taken[.]" R.C. 4906.10(A) provides that the Board "shall render a decision ***upon the record*** either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate." (emphasis added). The rules governing the Board procedures further clarifies that "[w]ithin a reasonable time after the conclusion of the hearing, the board shall issue a final decision ***based only on the record***[.]" O.A.C. 4906-2-30 (emphasis added); *see also In re Champaign Wind*, 2016-Ohio-1513, at ¶ 24 ("The board must base its decisions in each case on the factual record before it."). Yet, the Board reviewed the public comments received, counted the comments, and relied on the comments in making its decision. (Order ¶¶ 38–43, 148, 150, 151.)

Because the Board relied on public comments that are outside of the record in these proceedings, it violated R.C. 4906.10(A) and O.A.C. 4906-2-30. Accordingly, its decision that the Project fails to serve the public interest based on these public comments is unlawful and unreasonable.

E. Fifth Ground for Rehearing: Because the record, including hundreds of pages of exhibits and days of expert testimony, before the Board established that the proposed solar-powered electric generation facility meets all of the statutory criteria of 4906.10(A), including that the project will be in the "public interest, convenience, and necessity" under R.C. 4906.10(A)(6), the Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio is unlawful and unreasonable. (*See* Order ¶¶ 133–52.)

The Board's decision to reject the Joint Stipulation and to deny Kingwood a certificate of environmental compatibility and public need was manifestly against the weight of the evidence and is unsupported by the record. As such, the Board's decision is unlawful and unreasonable.

1. The record contains overwhelming evidence that the Project is compliant with all statutory requirements and serves the public interest, convenience, and necessity.

The Board determined that the Project complied with all but one of the statutory requirements. Pursuant to the evidence submitted on the record, the Board found that the Project met and complied with each of the technical requirements outlined in R.C. 4906.10(A):

- The Project's "probable environmental impacts were properly evaluated and determined," and the Project, "subject to the conditions described in the Joint Stipulation, represents the minimum adverse environmental impact" in compliance with R.C. 4906.10(A)(2) and (3) (Order ¶ 106);

- "[T]he Project will serve the interest of electric system economy and reliability and is consistent with regional plans for expansion of the electric power grid of the electric systems serving the state of Ohio and interconnected utility systems" in compliance with R.C. 4906.10(A)(4) (*id.* at ¶ 118);

- The Project "will comply with the air emission regulations in R.C. Chapter 3704, and the rules and laws adopted thereunder," "will comply with Ohio law regarding water pollution control," "will comply with R.C. Chapter 3734 and all rules and standards adopted thereunder," and "will not unreasonably impair aviation" in compliance with R.C. 4906.10(A)(5) (*id.* at ¶¶ 122, 125, 128, 131, 132);

- The Project's impact on agricultural viability of any land in an existing agricultural district within the project area was properly evaluated and determined in compliance with R.C. 4906.10(A)(7) (*id.* at ¶ 156); and

- The Project "incorporates the maximum feasible water conservation practices, and, therefore, satisfies the requirements of R.C. 4906.10(A)(8)" (*id.* at ¶ 162).

As to R.C. 4906.10(A)(6), Kingwood presented significant evidence, including **12 expert witnesses**, showing that the Project will "serve the public interest, convenience, and necessity". The following is a summary of the record evidence that shows the Project serves the public interest, convenience, and necessity based on the plain meaning of that term:

- Creation of construction jobs and economic activity: The Project will create 180 full-time construction jobs, 152 indirect jobs, and 112 induced jobs, for a total of 444 Ohio jobs during the 16-month construction period that are projected to generate $33.01 million of labor income and would sustain an estimated 299 Ohio households. (Kingwood Ex. 107, Ex. A at 2.) During this construction time period, approximately $58.90 million is expected to be spent on Ohio-sourced goods and services, and construction activity will directly and indirectly support $112.93 million of economic activity in Ohio. (*Id.*)

- Creation of permanent jobs and economic activity: Ultimately, the Project will create 15 permanent jobs and approximately $6.75 million in new economic output annually in Ohio, most of which will be generated in Greene County, including $2 million in state and local annual taxes and approximately $1.5 million of annual PILOT payments. (*Id.*, Ex. A at 3.)

- Increased tax revenue: The Project is estimated to create between $55 million to $61 million over the course of the Project's 35-year operating life in new tax revenue for Greene County and local taxing jurisdictions. (Kingwood Ex. 108 at 3, Kingwood Ex. 108, Ex. A at 3.) Specifically, local school districts alone are anticipated to gain between $28 million to $40 million in new tax revenues over the Project's 35-year operating life. (Kingwood Ex. 108, Ex. A at 3.)

- No decrease in property values: As Kingwood's expert appraiser testified, the Project will not negatively impact adjacent property values. (Kingwood Ex. 9 at 1, 8; Kingwood Ex. 1, Appx. F; Kingwood Ex. 9; Kingwood Ex. 105; Tr. Vol. II at 366–67.)

- Creation of new income streams: Kingwood will pay approximately $1,100,000 in annual land lease to local landowners, escalating each year of operation. (Kingwood Ex. 107 at 10.)

- Other monetary benefits: The Project garnered community donations totaling $100,000 to local organizations and good neighbor agreements totaling $757,000 were offered to 65 non-participating property owners, (Tr. Vol. IX at 2130; Tr. Vol.

IX at 2152; Kingwood Ex. 7 at 8, Kingwood Ex. 107, Ex. A at 1; Tr. Vol. IX at 2153; Kingwood Ex. 6 at 8.)

- Attractive to businesses looking to invest in Ohio: As the Ohio Chamber of Commerce recognized, "[i]nvesting in clean energy in Ohio is also critical to attracting new businesses as many Ohio businesses, across a number of industry sectors, have chosen to implement entirely voluntary renewable energy procurement goals." (Kingwood Ex. 6, Attach. B.)

- Reduce dependency on fossil fuels: The Project will directly assist in replacing fossil-fuel power generation facilities in Ohio that have recently or are planned to retire, contributing to cleaner air and water for the southwest Ohio region. (Kingwood Ex. 107 at 8.)

- Preservation of farmlands: Unlike residential or commercial development, the Project will preserve approximately 1,500 acres for the life of the Project. (Kingwood Ex. 107 at 11.)

- Timely addressment of complaints: will ensure that any complaints from the public are addressed expeditiously. (Kingwood Ex. 1 at 32.)

- Commitment to the community: The Project will maintain communication with the community. (Jt. Ex. 1 at 8–9.)

- Assurance of safety: The Project includes emergency response plans that are coordinated with local emergency services, health and safety trainings for construction contractors and employees, and compliance with all safety and equipment standards. (Jt. Ex. 1 at 8–11; Kingwood Ex. 1 at 50–51.)

The Board does not refute these significant benefits that the Project will provide to the public welfare. (*See* Order ¶¶ 142, 149.) In fact, the Board specifically acknowledged the public benefits of the Project, "which include (1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT, (3) air quality and climate impact improvements from transitioning toward renewable energy and away from fossil fuels, (4) protecting landowner rights, and (5) preserving long-term agricultural land use." (*Id.* at ¶ 149.)

However, despite these acknowledged public benefits of the Project and the mountain of evidence as to the compliance of the Project, the Board held that "the unanimous opposition of

every local government entity that borders the Project ***is controlling*** as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)." (*Id.* at ¶ 145.) Not only is this determination impermissible under the enabling statute as outlined above, it also overstates these localities opposition and ignores the majority support that the Project received. The Board allowed the unsubstantiated and vague statements of officials from four local governmental entities and comments from a vocal minority to outweigh the substantial evidence that the Project meets all of the R.C. 4906.10(A) requirements, including "public interest, convenience, and necessity". This was unlawful and unreasonable.

2. The vague opinions and unfounded statements of Greene County and the three townships cannot outweigh this significant evidence in the record.

The resolutions and statements made by the intervening local entities that the Board impermissibly focuses on are merely vague and unsubstantiated opinions and therefore cannot provide a basis to outweigh the actual evidence of significant public benefit. The resolutions passed by the Greene County Board of Commissioners and the three townships outline alleged **issues which are already adequately addressed in Kingwood's Application and further through the Joint Stipulation conditions, and represent nothing more than politically motivated opposition**. For example, the Greene County Resolution (filed October 29, 2021) declares the Project as "incompatible with the general health, safety, and welfare of the residents of Greene County" and "incompatible with the adopted policies for development of renewable energy and farmland preservation." (Kingwood Ex. 20 at 2.) However, the original land use plan adopted by Greene County, "Perspectives 2020: A Future Land Use Plan for Greene County," does not address renewable energy installations in the County. (Tr. Vol. VII at 1705.) While an amendment to this plan was passed on August 26, 2021, it was filed **well after** the Application

was filed on April 16, 2021 and after the Application was deemed complete by the Board. (*Id.* at 1704.)

The resolutions from the three townships are likewise vague and irrelevant to the Board's inquiry. When they initially intervened, the Boards of Township Trustees of Miami and Cedarville Townships were supported by resolutions that indicated **no opposition** to the Project. And the intervention notice for Xenia Township also notes no opposition and merely the desire for the township trustees to intervene in this proceeding. (Kingwood Ex. 95 at 1.) Although all three townships later passed resolutions in opposition to the Project, these resolutions are **vague and rely on generic statements** stating the Project is "incompatible with the general health, safety, and welfare" of township residents or allude to issues that have been adequately addressed by the Applicant. (Kingwood Ex. 68 at 4; Kingwood Ex. 65 at 3; Xenia Township Ex. 1 at Ex. A.)

The townships presentations at the hearing provided no clarity nor concrete evidence. For example, Jeff Ewry, the chair of the Board of Trustees of Cedarville Township, testified that the township trustees **have not had a discussion on how the Project is incompatible** with the general health of Cedarville Township residents, **but stated the Project has caused "angst" and "high tensions" in the township**. (Tr. Vol. VI at 1530–31.) Allegations of tensions in the community, **without any evidence of actual harm to the community**, should not be a reason for the Board to determine that the Project does not satisfy R.C. 4906.10(A). *See, e.g.*, *In re Ross County Solar, LLC*, Opinion, Order, and Certificate (Oct. 21, 2021), at ¶¶ 129, 135–36 (finding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values in the project area). Mr. Ewry further stated that the Project was incompatible with the safety and welfare of township residents because of **traffic and potential contamination of water wells**. (*Id.* at 1532.) Both of these issues were adequately addressed by

Kingwood in the Application and the expert testimony of Kingwood's witnesses, including Dr. Brent Finley who testified on the lack of toxicity from panel use. Indeed, the Board itself found that these alleged concerns are not founded when it determined that the Project met each of the other statutory requirements, including that the Project represents the minimum adverse environmental impact, minimal ecological impacts, minimal traffic impacts, and minimal drainage and runoff impacts.

Don Hollister, Trustee for Miami Township, testified that Miami Township is opposed to the Project because it violates the local zoning code, **even though such codes are not applicable** to the Project pursuant to R.C. 4906.13. (Tr. Vol. VI at 1467–69.) Although he also expressed concern about setbacks, fencing, noise, road damage, drainage, erosion, and environmental consequences, Mr. Hollister also **admitted the township conducted no studies to support these alleged impacts** nor even mentioned these concerns in their resolution opposing the Project. (*Id.* at 1457–59, 1461.) And again, the Board determined that the Project's technical specifications were adequate to address these alleged concerns. Of note, Mr. Hollister made clear his bias against the Project, **admitting that he is personally opposed to the Project** and has even followed and commented on the Citizens for Green Acres opposition Facebook group since 2018. (*Id.* at 1463–66.)

Stephen Combs, Trustee for Xenia Township, expressed that the township is concerned about the long-term effects of the Project, and **identified a laundry list of issues** the Board should address including decommissioning, health effects, pollution, runoff, dust, wildlife, traffic, emergency response services, property values, and tourism. (Tr. Vol. VI at 1310-19.) Again, the Board determined that **each of these alleged issues have been adequately addressed by the application when it determined that the Project is compliant as to each of the other statutory**

requirements. As with the other two townships and the county, Xenia Township **did not conduct any independent studies or** demonstrate any actual impacts to the township. (Tr. Vol. VI. 1305–08, 1315–16.) Notably, Xenia Township has not expressed any opposition to a 30 MW solar project being developed by another company in the township. (Tr. Vol. VI at 1300–01.)

As the Board's determinations as to the other statutory criteria establish, none of the unsubstantiated concerns of the local governing bodies for Greene County or the three townships have any foundation in the record. That includes the County and townships' concerns related to visibility, tourism, traffic, noise, and other ecological impacts. And the vague and conclusory statements within the resolutions—that the Project is incompatible with the general health, safety, and welfare of the local communities—without actual evidence should not carry any weight—let along *controlling* weight—in the Board's decision. Accordingly, the Board's decision to deny the application and reject the Joint Stipulation contrary to the evidentiary record is unreasonable and unlawful.

F. Sixth Ground for Rehearing: The Board's finding that the Joint Stipulation was not the product of serious bargaining among capable, knowledgeable parties is not supported by the record and therefore is unreasonable and unlawful. (*See* Order ¶¶ 163–70.)

Kingwood and the Ohio Farm Bureau Federation ("OFBF") agreed to and proposed a Joint Stipulation to the Board that subjects the Project to 39 conditions that resulted from recommendations in the Staff Report and discussion with the intervening parties and the general public. (Jt. Ex. 1.) The Board rejected the Joint Stipulation, in part, because it found that the Joint Stipulation is not the "product" of serious bargaining. (Order ¶ 168.) Although the Board acknowledged that Kingwood made efforts to include all parties in settlement dialog and revised the conditions within the Joint Stipulation in accordance with feedback from all parties, the Board found that "the Stipulation fails to describe agreement of any of the parties as to the core issue in

this case—whether the Board should issue a certificate for the Project." (*Id.* at ¶ 168.) The Board then concluded that the Joint Stipulation cannot be a "'product' of serious bargaining." (*Id.*)

As an initial matter, the Board's finding that the Joint Stipulation "does not describe agreement of *any* parties as to the core issue in the case" is factually inaccurate. Both Kingwood and the OFBF are parties to these proceedings. *See* R.C. 4906.08; O.A.C. 4906-2-11. Additionally, the Board's determination that a stipulation must be as to the core issue of whether an application is to be approved is contrary to the Board's governing rules and regulations. Pursuant to O.A.C. 4906-2-24(A), "[a]ny two or more parties may enter into a written or oral stipulation concerning issues of fact or the authenticity of documents, or the proposed resolution of ***some or all of the issues in a proceeding***." (emphasis added). Nothing in the enabling statutes and regulations mandates that a stipulation may only be accepted if it addresses the "core issue" in a proceeding. Indeed, O.A.C. 4906-2-24(A) states the opposite.

Moreover, the Board's suggestion that all parties must join a stipulation in order to be considered the product of serious bargaining is misplaced. As outlined above, O.A.C. 4906-2-24(A) provides that "***[a]ny two or more parties*** may enter into a written or oral stipulation[.]" (emphasis added). O.A.C. 4906-2-24(D) goes on to explicitly delineate what may occur if not all parties join a stipulation—"[p]arties that do not join the stipulation may offer evidence and/or argument in opposition." To be sure, the Board regularly approves, and the Supreme Court consistently affirms, stipulations that are only agreed to and signed by some of the parties involved in the proceedings. *See, e.g.*, *In re Icebreaker Windpower, Inc.*, 2022-Ohio-2742, ¶ 6; *In re in re Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, ¶ 7. This is true even in cases where the non-signatory parties continue to oppose the application after the stipulation is submitted to the Board. Instead, the relevant inquiry is whether all parties were

invited to the settlement table, whether the parties were capable and knowledgeable of the issues, and whether the applicant was open and operated with integrity during the negotiations. *See In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 45; *In re E. Ohio Gas Co.*, 144 Ohio St.3d 265, 2015-Ohio-3627, 42 N.E.3d 707, ¶ 32; *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 85.

In this case, Kingwood engaged in significant settlement discussions with not only the other signatory party to the Joint Stipulation—the OFBF—but also each of the intervening parties. (Kingwood Ex. 7 at 2.) No party was excluded from the table. (*Id.* at 22.) And all parties were represented by competent counsel. (*Id.*) Although the intervenors did not ultimately sign onto the Joint Stipulation and it is now apparent they never would, Kingwood seriously considered and made adjustments to the Project in response to feedback and concerns expressed by all parties. (*Id.* at 2.) Kingwood made every effort, expending significant time and resources, to bargain with all parties to come to a solution. (*Id.*) For example, Kingwood revised the Project layout, increasing the setbacks and enhancing screening, to directly address concerns raised by the intervenors. (*Id.*) Kingwood made these changes for the sole reason of trying to obtain agreement among all parties as to the appropriateness of certification of the Project—the "core issue in the case."

Just because no agreement was ultimately reached by *all* parties does not mean that serious bargaining did not occur. Indeed, the very fact that Kingwood revised and amended the Project to provide additional safeguards is indicative of the serious bargaining that occurred. In the spirit of cooperation, Kingwood has maintained those extra conditions even though the parties who voiced the concerns that led to those changes declined to sign the Joint Stipulation. Accordingly, the Board erred in determining that the Joint Stipulation was not the product of serious bargaining.

G. Seventh Ground for Rehearing: The Board's finding that its determination as to the Project's non-compliance with R.C. 4906.10(A)(6) necessitates findings that (1) the Joint Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Joint Stipulation would violate an important regulatory principle or practice is not supported by the record or law, and therefore is unreasonable and unlawful. (*See* Order ¶ 169.)

The Board further held that its R.C. 4906.10(A)(6) determination "necessitates findings that (1) the Stipulation, as a package, is not beneficial to the public interest, and (2) adoption of the Stipulation would violate an important regulatory principle or practice." (Order ¶ 169.) As outlined in Section II(A) *supra*, the Board's determination under R.C. 4906.10(A)(6) that the Project fails to serve the public interest, convenience, and necessity is unlawful and unreasonable. For the reasons outline above, the record evidence establishes that the Project will serve the public interest, convenience, and necessity. As such, the Board's rejection of the Joint Stipulation based on that false determination is likewise unlawful and unreasonable.

Furthermore, the conditions in the Joint Stipulation represent additional aspects of the Project that serve the public interest and conform to important regulatory principles and practices. The Stipulation includes documenting commitments that Kingwood has made to **coordinate with the local government** on safety issues, such as the coordination regarding the traffic management and the emergency response training with the local communities. (Jt. Ex. 1 at 7-8, Condition 24.) It includes **further protections for local wildlife and ecology** through restrictions on work in perennial streams and the inclusion of wildlife-friendly fencing. (*Id.* at 5-7, Conditions 15, 20, 21, and 23.) It includes substantial concessions by the Applicant to reduce the Project footprint by **increasing the setbacks**, with significant setbacks in the areas identified by local stakeholders as being particularly important. (*Id.* at 3–4, Condition 4.) It includes **substantial commitments to prevent drainage issues** that would impact adjacent homeowners or farmers such as allowing access for Greene Soil & Water Conservation District inspectors to be present during certain

construction activities. (Jt. Ex. 1 at 9-10, Conditions 32, 33, and 34). And it includes **increased landscape screening** to further minimize visual impacts than originally proposed in the Application. (*Id.* at 5–6, Condition 16.)

Additional conditions in the Joint Stipulation also **require Kingwood to directly engage with local decision makers**, including the Greene County Board of County Commissioners, the Cedarville Township Board of Trustees, the Xenia Township Board of Trustees, the Miami Township Board of Trustees, the Greene County Engineer, In Progress, LLC and the Greene Soil & Water Conservation District. (Jt. Ex. 1 at 3, 6, 7, 10, and 11.) Local governmental officials can **choose to attend preconstruction conferences**. (*Id.* at 3.) Kingwood will make pre- and post-construction stormwater calculations and will submit the calculation, along with a copy of any stormwater submittals made to the Ohio EPA, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.* at 6.) If post-construction storm water best management practices are required, Kingwood **will submit construction drawings, detailing any stormwater control measures**, to the Greene County Department of Building Regulation and the Greene County Soil & Water Conservation District. (*Id.*)

Additionally, prior to commencement of construction, Kingwood will consult with the Greene Soil & Water Conservation District regarding seed mixes for the Project and shall provide the tags on such seed mixes to the agency. (Jt. Ex. 1 at 7.) Kingwood **will also coordinate with public officials such as the Greene County Engineer and local law enforcement** for temporary road closures, road use agreements, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed Project. (*Id.*) **Kingwood will also consult with the Greene Soil & Water Conservation District and the Greene County**

Engineer to determine the location of any tile located in a county maintenance ditch to ensure that parcels adjacent to the Project area are protected from unwanted drainage problems due to construction and operation of the Project. (*Id.* at 10.)

The Board ignored all of these conditions and safeguards for the public, declining to address them at all in its Order. Instead, faced with pressure from local government entities, the Board allowed the fact that the intervening county and townships opposed the Project to dictate its action altogether. (Order ¶ 168.) This was unlawful and unreasonable. To be sure, the Board consistently approves similar stipulations that include similar, or even less restrictive, conditions—including where not all parties to the proceedings join the stipulation. *See, e.g. In re Union Ridge Solar, LLC*, Case No. 20-1757-EL-BGN, Opinion, Order, and Certificate (Jan. 20, 2022); *In re Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021).

H. Eighth Ground for Rehearing: The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have complete information on the nature of Staff's investigation in violation of R.C. 4906.07(C). (*See* Order ¶¶ 76–79.)

In denying Kingwood's interlocutory appeal and affirming the ALJ's refusal to issue a subpoena for the Board's Executive Director to testify, the Board failed to rectify the failure of the Staff's Report and Recommendation to comply with R.C. 4906.07(C). That statute requires the chairperson of the Board to investigate the application and prepare a written report to the Board and the applicant with recommended findings on the statutory criteria and importantly, that report becomes part of the record. R.C. 4906.07(C). Among other specific requirements, the statute explicitly states that the "report **shall** set forth the nature of the investigation." *Id.* (emphasis added).

There is no dispute that the Staff Report and Recommendation, as submitted on October 29, 2021, **does not** set forth the nature of the investigation. *Id.* The record of the hearing clearly shows that Staff reached out to each of the local governments the day prior to the issuance of the report. (Tr. Vol. VIII at 1942.)[3] That late outreach and the reason for that late outreach is not, however, included anywhere in the Staff Report. It should be undisputed that the Staff Report failed to comply with the statute because it did not detail the full nature of the investigation. (*See* Staff Ex. 1.) The ALJs and then the Board refused to allow Kingwood to present evidence on why Staff conducted that outreach and the extent of that outreach, evidence that would have been elicited through the testimony of the Board's Executive Director, Theresa White. (Tr. Vol. VIII at 1962-1963; Order at ¶79.) That refusal was unlawful and unreasonable.

Ms. White's testimony was very important to Kingwood's presentation to challenge the basis for and validity of Staff's recommendation that the Project did not satisfy the public interest, convenience and necessity criteria of R.C. 4906.10(A). A day before the Staff Report was due to be issued, the Executive Director directed at least one subordinate, Ms. Juliana Graham-Price, to solicit various intervening local public entities on their position on the project. (Tr. Vol. VIII at 1942: 10-16.) After those solicitations, the Greene County Board of Commissioners issued a resolution against the project and then filed it with the Board on the same day that Staff reversed its recommended approval to a recommended denial. (Tr. Vol. VII at 1785:5-12; 1842:21-25; 1843:1-6.) And while the County passed a resolution against the Project, as of that date none of the three townships had issued a resolution opposing the Project.

[3] Note, the Order states that Ms. Graham-Price reached out to the local governments on both October 21 and October 28. See Order at ¶ 77. While Ms. Graham-Price testified that she was directed to reach out (and did reach out) on October 28, the Order does not include a reference to the October 21 outreach.

As established from other testimony in the proceedings, particularly from Ms. Juliana Graham-Price, **Ms. White's involvement was central to Staff's investigation and last-minute change in recommendation**. Indeed, Ms. White is the *only* person who knew why the Staff made last-minute outreach to the local entities. Yet, Kingwood was precluded on multiple occasions from being able to call Ms. White to testify in these proceedings.

In its Order, as justification for denying Kingwood's request to compel Ms. White's testimony, the Board explained that "the record is clear as to Staff's investigation of the positions of local government entities." (Order ¶ 79.) However, nothing in the record indicates 1) that Ms. Graham-Price was the only staff member or staff representative to reach out to the local government entities; 2) if Ms. White directed any other staff member or representative (including counsel) to reach out to the local government entities or their representatives (including counsel); or 3) what prompted Ms. White to initiate the outreach at the very last minute and after the Staff Report had been drafted to recommend approval of the project. By restricting Kingwood's ability to question all parties with knowledge of the reason for and the full extent of local outreach, the Board allowed the Staff Report to be presented to the Board and included in this record as evidence without transparency on the full nature of the Staff investigation (*see* R.C. 4906.07(C) mandating the Report automatically becomes part of the record). That was unlawful and unreasonable, and Kingwood should have been allowed to call Ms. White to the stand.

I. **Ninth Ground for Rehearing: The Board's decision to deny Kingwood's interlocutory appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because, absent Ms. White's testimony, the Board did not have sufficient information on why the OPSB Staff was soliciting the local governmental authorities positions on the project on the eve of the date the Staff's Report and Recommendation was due and after the Staff had already recommended approval of the project in the current draft of the Staff Report and Recommendation (*See* Order ¶¶ 76–79.)**

In a Board proceeding, the Staff report is a watershed moment. As Staff witness Grant Zeto agreed, a Staff recommendation to approve or deny an application can impact the entire trajectory of the proceeding. (Tr. Vol. VII at 1903: 5-15.) A recommendation to approve a project may cause project opponents to consider reasonable compromises to improve the project in a way that addresses specific impacts. On the other hand, a recommendation to deny an application can embolden project opponents and severely curtail the ability of a project to effectively address those opponents' reasonable concerns. Such was the case in this proceeding. Staff's recommendation in the Report to deny the application severely limited any opportunity for Kingwood to effectively negotiate with various Project opponents.[4]

In this case, Kingwood worked diligently to develop a complete record of Staff's investigation and the irregularities that surfaced with each question. Kingwood, during pre-hearing discovery, identified that at least one Greene County staff member had spoken with Board Staff. (*See, e.g.*, Kingwood Exhibit 24; *see also* Tr. Vol. V at 1086-1094.) By following the thread, which included subsequent subpoenas, Kingwood was able to establish that Ms. Graham-

[4] In the Order, the Board clearly identifies that opposition to the Project picked up and coalesced *after* the Staff Report was issued:

> **Following the issuance of the Staff report,** additional local government opposition included (1) the adoption of Project opposition resolutions by all three affected townships, (2) active participation in opposition to the Project by all four government entities in the evidentiary hearing.

(Order at ¶ 139 (emphasis added).)

Price, at the explicit direction of Ms. White, had reached out to the local governments the day before the Staff Report was issued to solicit their input. (Tr. Vol. VIII at 1942:10-16.) Kingwood further established that the initial recommendation to approve the Project was reversed on October 29, the day the Staff Report was issued. (Tr. Vol. VII at 1785:5-12; 1842:21-25; 1843:1-2.) However, because Kingwood was prevented from subpoenaing Ms. White, her explanation about why the outreach was initiated and whether that outreach was for a reason other than investigating Kingwood's application are not included in the record.

Instead of directly addressing the lack of information about this process in the Order, the Board relied on the "collective testimony" of Staff and summarily concluded that Staff did not act with impropriety. (*See* Order ¶ 79 ("Further we find no impropriety as to the nature and timing of Staff's communications. . ." and ". . .we find no impropriety as to similar communications. . .").) But nowhere in the Order does the Board conclude that all relevant information was included in the record. Because Kingwood was unable to question Ms. White, it was unable to ask what prompted such outreach—outreach which was highly irregular. It is imperative for the Board to hear Ms. White's testimony to actually evaluate the true impetus for the outreach at the eleventh hour, and then evaluate the irregularity of Staff's solicitation based on that information to determine whether Staff's recommendation was improperly influenced.

Only Ms. White can testify about why she directed at least one subordinate to solicit local officials the day prior to when the Staff Report issued. Likewise, only Ms. White can testify on whether other representatives of the Commission or the Board communicated with the local governmental officials or their counsel. Again, Kingwood discovered new information with every overturned stone as it pursued this issue at the hearing. Kingwood was then blocked from overturning another stone – which would have been Ms. White's testimony. Without her

testimony, the record is incomplete. As a result, the Board's decision to affirm the ALJs' refusal to issue a subpoena for Ms. White to testify is unlawful and unreasonable.

J. Tenth Ground for Rehearing: The Board's decision to deny Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony of the Executive Director of the Ohio Power Siting Board, Ms. Theresa White, is unlawful and unreasonable because the denial of the subpoena requests constitutes a violation of due process as Kingwood was unable to put on evidence that the Staff's Report and Recommendation, which set the tone for the remainder of the proceeding, was outcome determinative and not based on an analysis of Kingwood's application. (*See* Order ¶¶ 76–79.)

Staff and the Board's failure to allow Kingwood to call on the Executive Director to testify infringed on Kingwood's right to due process. The right to due process is found in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *Youngstown v. Traylor*, 123 Ohio St.3d 132, 2009 Ohio 4184, ¶ 8, 914 N.E.2d 1026. "Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution require that administrative proceedings comport with due process." *Richmond v. Ohio Bd. of Nursing*, 10th Dist. No. 12AP-328, 2013-Ohio-110, ¶ 10 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 554 N.E.2d 97 (1990)).

At a minimum, due process requires notice and the opportunity to be heard. *Krusling v. Ohio Bd. of Pharmacy*, 12th Dist. No. CA2012-03-023, 2012 Ohio 5356, ¶ 13, 981 N.E.2d 320 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L. Ed. 865 (1950)). Such an opportunity to be heard requires the "full opportunity to present all evidence and arguments which the party deems important[.]" *Reed v. Morgan*, 12th Dist. No. CA2011-03-065, 2012 Ohio 2022, ¶ 11.

In this case, Kingwood sought to elicit additional evidence to fully understand why the Board's Executive Director ordered a subordinate to solicit the positions of the intervening local

governmental entities on the eve of the issuance of a Staff Report that as then drafted, recommended approval of the Project. Kingwood also sought to elicit evidence on whether the process to finalize the Staff report was improperly influenced and whether the recommendation was influenced by interests outside Board Staff. Only Ms. White could explain the actual reason for the highly irregular, eleventh-hour outreach to the local governmental entities. Kingwood's requests for Ms. White's testimony to complete the record, however, were consistently denied. (Tr. Vol. VII at 1912: 11-15.; Tr. Vol. VIII at 1962: 25; 1963: 1-11.)

There is no dispute that the Board has the authority to grant Kingwood's subpoena. *See, e.g., In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 48, 2013-Ohio-5478, 3 N.E.3d 173. And there is no dispute that Kingwood availed itself of this authority by requesting the subpoena. *(See, e.g.,* Tr. Vol. VIII at 1962-1963; and Order at ¶79.) Yet, the ALJs and the Board denied the request by explaining that Ms. White testimony is "unwarranted." (Tr. Vol. VIII at 1962-193; Order ¶ 79.) This is not a valid reason to deny or quash a subpoena. The ALJ and Board may only do so if the subpoena "is unreasonable or oppressive." O.A.C. 4906-2-23(C). Neither the ALJ nor the Board made any such determination and her testimony was relevant because if the Staff's investigation was shown to be outcome determinative, then that fact would have been of consequence to the Board's consideration of Kingwood's application and its consideration of the Staff's recommendation and testimony.

The Executive Director's testimony was critical to allow Kingwood to fully present the arguments it deemed important and necessary. The Board's refusal to allow Kingwood to call the Executive Director constitutes a due process violation. Accordingly, the Board's decision to deny Kingwood's appeal of the ALJ's denial of its subpoena requests to compel the testimony Ms. White is unlawful and unreasonable.

III. CONCLUSION

Kingwood presents these ten grounds for rehearing to the Board for its consideration. For the foregoing reasons, rehearing should be granted, and the Board should approve the Joint Stipulation and issue Kingwood a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility in Greene County, Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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