IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Kingwood I, LLC, for a Certificate of Environmental Compatibility and Public Need	:	Supreme Court Case No. 2023-1286
	:	Ohio Power Siting Board
	:	Case No. 21-117-EL-BGN

BRIEF AMICUS CURIAE OF THE OHIO SENATE IN SUPPORT OF APPELLEE

ON APPEAL FROM THE OHIO POWER SITING BOARD

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Power Siting Board is a creature of statute whose power comes from—and is limited by—the General Assembly. The Senate is keenly interested in ensuring that the Board remains within those limits, and that the Court properly construes Chapter 4906.

The Senate is particularly interested in the interpretation of Senate Bill 52 from the 134th General Assembly. Twenty of the twenty-one Senators who voted in favor of SB 52 are still in the Senate today. And one of the primary sponsors of SB 52, Senator Reineke, also currently serves on the Power Siting Board. This Senate is therefore uniquely well-positioned to shed light on the plain language it used in drafting and enacting SB 52.[1]

LAW AND ARGUMENT

The Ohio Power Siting Board ("the Board") is a creature of statute housed within the Public Utilities Commission. R.C. 4906.02. No one can construct a major utility facility without first obtaining a certificate from the Board. R.C. 4906.04. And the General Assembly stated in no uncertain terms that the Board "shall not grant a certificate for the construction, operation, and maintenance of a major utility facility . . . unless it finds and determines *all* of the following: . . . (6) That the facility will serve the public interest, convenience, and necessity." R.C. 4906.10(A)(6).

[1] The Senate's arguments here apply with equal force to *In re Birch Solar*, No. 2023-1011, currently before the Court.

The Senate appeared as *amicus curiae* to make two brief but important points. First, the language of R.C. 4609.10(A)(6) is meant to ensure that the public—particularly local governments and local citizens closest to proposed projects—can speak to whether a particular project will *in fact* serve the public interest, convenience, and necessity. Second, Senate Bill 52 of the 134th General Assembly does not undercut the importance of local communities' views when reviewing a project under R.C. 4906.10(A)(6). Kingwood's view of SB 52 is not consistent with plain language of that enactment.

I. R.C. 4906.10(A)(6) is designed to protect community input and interests in Power Siting Board decisions.

Section (A)(6) was plainly written to give local citizens and local governments a voice in the certification process, and to ensure that the Board takes local objections (or support, as the case may be) seriously in its decision-making. The very point of a local government is to represent the interests of a particular community; it thus should not be casually ignored.

A. Kingwood's interpretation of R.C. 4906.10(A)(6) would wrongly cut local citizens and elected officials out of the Board's decision-making.

If the Power Siting Board can ignore "voluminous" opposition by local elected officials and still find that a project satisfies (A)(6), then it renders the voice of those

local officials "useless" and "powerless."[2] Indeed, as Senator Rob McColley observed during the confirmation of current PUCO Chairwoman Jenifer French in May 2021:

> If unanimous opposition from the people who would typically have authority over the land use, that being the board of township trustees or, in some cases, the county commissioners, is not an indicator that it's [a proposed project] against the public interest, convenience, and necessity, then what would be an indication that it's against the public interest, convenience, and necessity?[3]

The Board was therefore right to give great weight to the opinions of local citizens and local elected officials who would be most closely impacted by Kingwood's proposed facility.

B. Kingwood's interpretation of R.C. 4906.10(A)(6) renders the provision superfluous.

Kingwood's approach renders R.C. 4906.10(A)(6) superfluous because no "renewable energy" project would ever fail the criteria. Kingwood asserts that R.C. 4906.10(A)(6) is more centered around job creation, increased energy production, "clean" energy, eliminating fossil fuels, and similar concerns. Appellant's Br. at 9-10, 13-14. But that interpretation would neuter R.C. 4906.10(A)(6). The construction of *any*

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[2] Question of Sen. Rob McColley, The Ohio Channel, *Ohio Senate Energy and Public Utilities Committee Hearing – 5-12-2021*, at 13:57-14:38, https://ohiochannel.org/video/ohio-senate-energy-and-public-utilities-committee-5-12-2021.

[3] The Ohio Channel, *Ohio Senate Energy and Public Utilities Committee Hearing – 5-12-2021*, at 16:30-16:50, https://ohiochannel.org/video/ohio-senate-energy-and-public-utilities-committee-5-12-2021.

facility will create construction jobs (and thus should generate tax revenue). *See* Appellant's Br. at 13. And to the extent that Kingwood believes promoting "clean" energy and eliminating fossil fuels are coextensive with "the public interest," every "green" project will meet the (A)(6) criteria. Virtually every facility would then be able to pull together an application that satisfies (A)(6), no matter what the local community says.[4] Suffice it to say, that is not what the General Assembly enacted.

Kingwood's approach also makes R.C. 4906.10(A)(6) superfluous because (A)(6) adds nothing to the other criteria in subsection (A). Kingwood asserts that "public interest" amounts to little more than environmental or economic concerns. Appellant's Br. at 12-15, 20-22, 26. But those concerns are addressed in subsections (2), (3), (7), and (8). Indeed, Kingwood argues that its proposed project is in the public interest precisely *because* it meets the criteria in subsections (2), (3), (7), and (8). Appellant's Br. at 12, 15, 18 ("Indeed, the Board itself found that these alleged concerns are unfounded when it determined that the Project met each of the other statutory requirements.")

"No part [of a statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision

[4] Kingwood advances the curious and concerning argument that essentially the people of a community do not know what is good for them, so the Power Siting Board need not (indeed, *ought not*) take the views of the public or local officials into consideration when determining the "public interest, convenience, and necessity." Appellant's Br. at 27-29, 35. The implication is that the power company knows best what is in the public interest. The Court should reject that condescending approach.

meaningless or inoperative." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21. Kingwood's argument effectively reads (A)(6) out of the statute, and thus must be rejected.

II. Senate Bill 52 from the 134th General Assembly did not change R.C. 4906.10(A)(6).

Kingwood suggests that Senate Bill 52 from the 134th General Assembly impacts the meaning of R.C. 4906.10(A)(6). According to Kingwood,

> 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.

Appellant's Br. at 25-26. Kingwood is half right. Senate Bill 52 did expressly grant county boards of commissioners the authority to prohibit wind and solar construction in areas of their counties.

But SB 52 did not change any of the requirements or language of R.C. 4906.10(A)(6)—it did not touch division (A)(6) *at all*. And as such, SB 52 did not undermine, change, or augment the way (A)(6) should be read and applied. Division (A)(6) has always required the Board to determine whether a proposed project serves the public interest, convenience, and necessity—and that inquiry has always required

considering the views of locally elected governments and officials who, by their very nature, represent the public at large.

CONCLUSION

Kingwood believes it understands the public interest better than locally elected governments could, and that it understands SB 52 better than the Senators who drafted and passed it. The Court should reject both assertions and instead affirm the opinion of the Power Siting Board.

Respectfully submitted,

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