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	:	Case No. 2023-1286
	:	On Appeal from the Ohio Power Siting Board
	:	Case No. 21-117-EL-BGN

BRIEF OF AMICI CURIAE CURRENT MEMBERS OF THE OHIO SENATE DEMOCRATIC CAUCUS IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Ohio Statutes

Legislative Acts

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

The proposed amici, the Ohio Senate Democratic Caucus, including Senate Minority Leader Nickie J. Antonio, Assistant Minority Leader Hearcel F. Craig, Minority Whip Kent Smith, Assistant Minority Whip Catherine D. Ingram, Senator William P. DeMora, Senator Paula Hicks-Hudson (Counsel of Record for amici), and Senator Vernon Sykes respectfully request leave to file the accompanying brief as amici curiae in opposition to the arguments of the Ohio Power Siting Board ("OPSB") as accepted by the Court through appellee OPSB's brief, any intervening appellee's brief, or any amicus brief.

Amici are the elected Senators representing seven of Ohio's thirty-three Senate districts, who have an interest in ensuring that the OPSB correctly performs its statutory duty as set by the Ohio General Assembly. In a time of public-utility related scandal and corruption, amici have a heightened interest in protecting their constituents from the consequences of decisions made contrary to law.[1] Further, amici themselves and their constituents are residents and taxpayers of Ohio and therefore have a substantial interest in the proper oversight of public utilities in this state, ensuring the reliability of the electrical grid upon which the state depends, and facilitating efforts to reduce the impact of climate change on Ohioans.

Amici agreed to file this brief to present a contrasting view after the appellee briefs and the amicus curiae briefs, and in particular, the amicus brief from the Ohio Senate Republican Caucus purporting to represent the entire Ohio Senate, whose members include amici, the Ohio Senate Democratic Caucus.

[1] *See* Press Release, Ohio Attorney General, Former PUCO Chairman, Former FirstEnergy Executives Indicted on Public Corruption Charges (Feb. 12, 2024), https://www.ohioattorneygeneral.gov/Media/News-Releases/February-2024/Former-PUCO-Chairman-Former-FirstEnergy-Executives; *see also* Press Release, U.S. Dept. of Justice, Former Ohio House Speaker sentenced to 20 years in prison for leading racketeering conspiracy involving $60 million in bribes (June 29, 2023), https://www.justice.gov/usao-sdoh/pr/former-ohio-house-speaker-sentenced-20-years-prison-leading-racketeering-conspiracy.

Amici, through this brief, distinguish themselves by arguing that the Ohio Revised Code and recent legislative history support Kingwood Solar LLC's ("Kingwood") position that the Ohio Power Siting Board erred in their denial of the solar project in Greene County, Ohio based solely on local elected officials' objections.

ARGUMENT

PROPOSITION OF LAW: The Ohio Revised Code sets out in plain statutory language eight criteria for certifying a major utility facility and does not invoke or elevate the opinion of local governments to be determinative regardless of other considerations. Far from adding weight to an argument to the contrary, Senate Bill 52 of the 134th General Assembly and its legislative history only reinforce the position that local opposition is not controlling as to the element of "public interest."

I. R.C. 4906.10(A)(6) requires that a major utility facility "serve the public interest, convenience, and necessity," but does not prioritize or even reference local government opinion in making that determination.

The Ohio Power Siting Board was established through legislative enactment in the 1970s (Senate Bill 397, 109th General Assembly) and empowered by the Ohio General Assembly to issue certificates for the construction of power generation facilities. R.C. 4906.03. The OPSB is charged with managing major utility facilities and plays a vital role in the viability and stability of Ohio's energy production portfolio. The OPSB is thus comprised of several public officials with oversight of energy production, land use, economic development, and public health. R.C. 4906.02(A)(1). A member of the public, appointed by the Governor on recommendation by the Ohio Consumers' Counsel, serves on the Board as well. *Id*. Members of the legislature serve on the Board, but without voting power. *Id.*

The OPSB, as a legislative creation, is governed by the plain language of the Ohio Revised Code. This Court has routinely upheld the proposition that the words on the page must be given their plain meaning. *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Co.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8, 9 (1969). Additionally, "if the meaning of the statute is

unambiguous, [the Court] must apply it as written." *Simpkins v. Grace Brethren Church of Del.*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 53.

The fact of the matter is that Ohio Revised Code Section 4906.10 says nothing about the relative weight that the OPSB shall grant to local elected officials' objections. The language is silent as to their importance. The Revised Code unambiguously states: "The board shall not grant a certificate for the construction, operation, and maintenance of a major facility [defined as over 50 megawatts] * * * unless it finds and determines" eight criteria. R.C. 4906.10(A).

This Court has long followed the maxim that reviewing a statute requires looking to "the four corners of the enactment." *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347, 1350 (1997). Among the eight listed criteria provided in R.C. 4906.10(A) to guide the OPSB's decision to certify an energy project, none of them clearly and unambiguously reference the opinion of local government bodies. The closest R.C. 4906.10 as a whole comes to specifically referencing local involvement is to require that persons in areas affected by a project continue to be provided notice when the OPSB requires a modification of the facility as a condition of granting the certificate. R.C. 4906.10(B).

The plain statutory language of R.C. 4906.10(A)(6), the central language at issue in this case, requires the OPSB, before approving a major utility facility, to determine that the facility serves the "public interest, convenience, and necessity." R.C. 4906.10(A)(6). While there is no definition in statute for public interest, the plain meaning is readily obtainable via dictionary. The Black's Law Dictionary definition for public interest states that it refers to the "general welfare of the public" and "something in which the public as a whole has a stake." Black's Law Dictionary, 9th Ed. 2009, Bryan A. Garner EIC, p. 1350. The definition of public interest, especially when used in conjunction with "convenience" and "necessity," very plainly and

unambiguously shows that the OPSB must consider the broader ramifications of the major utility facility and not *solely* the hyper-local views of the nearest elected officials. There is no requirement anywhere in R.C. 4906.10 or even Chapter 4906 to give local officials' views more or less credence than either the views of any other person speaking or the factors weighing in the name of the public interest.

Indeed, a reading of all forty-four of the OPSB's publicly-accessible decisions on solar facilities' applications for certificates (i.e., cases designated as ##-####-EL-BGN) reveals that the OPSB regularly weighed all factors relevant to its decision regarding R.C. 4906.10(A)(6). It has never—until recently—evaluated public opinion as "controlling." (Opinion and Order, ¶ 145). An oft-quoted passage sums up the balancing approach:

> "Public interest, convenience, and necessity should be examined through a broad lens. For example, this factor should consider the public's interest in energy generation that ensures continued utility services and the prosperity of the State of Ohio . . . 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." *Republic Wind*, 17-2295-EL-BGN, Opinion and Order, ¶ 91.

The OPSB used this same language in two solar cases decided the same day on June 24, 2021: *Alamo I* (18-1578-EL-BGN, Opinion and Order, ¶ 291) and *Angelina I* (18-1579-EL-BGN, Opinion and Order, ¶ 288). It would then go on to repeat that language in 12 of its next 17 decisions from July 15, 2021 to September 15, 2022, regularly balancing local concerns with the examined benefits of the project.[2] At this point, no solar case had been denied.

[2] *Republic Wind* language **used**, in order of decision: *Fox Squirrel* (20-0931-EL-BGN, Opinion and Order, ¶ 69); *Mark Center* (20-1612-EL-BGN, Opinion and Order, ¶ 65); *Wheatsborough* (20-1529-EL-BGN, Opinion and Order, ¶ 71); *Hardin III* (20-1678-EL-BGN, Opinion and Order, ¶ 73); *Clearview I* (20-1362-EL-BGN, Opinion and Order, ¶ 86); *Ross County* (20-1380-EL-BGN, Opinion and Order, ¶ 135); *Juliet* (20-1760-EL-BGN, Opinion and Order, ¶ 66); *Marion County* (21-0036-EL-BGN, Opinion and Order, ¶ 83); *Sycamore Creek* (20-1762-EL-BGN, Opinion and Order, ¶ 82); *AEUG Union* (20-1405-EL-BGN, Opinion and Order, ¶ 79); *Wild Grains* (21-0823-EL-BGN, Opinion and Order, ¶ 60); and *Dodson Creek I* (20-1814-EL-BGN, Opinion and Order, ¶ 96).

Republic Wind language **not used**: *Powell Creek* (20-1757-EL-BGN); *Cadence* (21-0004-EL-BGN); *Union Ridge* (21-0270-EL-BGN); *Tymotchee Creek* (20-1804-EL-BGN); and *Nottingham* (20-1677-EL-BGN).

In October 2022, the OPSB began directly quoting and citing *Republic Wind* instead of simply repeating the above quoted language unattributed. Over the next twelve decisions, seven of them included the "broad lens" language, sometimes without using the "balancing" language. In five of those seven times, the OPSB directly cited *Republic Wind*, and remarkably, it was more likely than not to have issued a denial when it did—including for Kingwood in this case.[3]

The apparent shift demonstrated by the OPSB's denial in this case, in announcing that public opinion is "controlling" on the question of R.C. 4906.10(A)(6), is inconsistent with its past history and the letter of the law.[4] The public interest, by definition, requires a broader concern for the general welfare of the public as a whole and cannot be compartmentalized to mean granting local officials a de facto veto over projects beneficial to all of Ohio. Indeed, far from rendering 4906.10(A)(6) superfluous, granting the OPSB the authority to consider the public interest (encompassing more than just local governments' opposition) retains the plain language and unambiguous nature of the statutory language.

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[3] *Republic Wind* **cited**, in order of decision: *Birch I* (denied) (20-1605-EL-BGN, Opinion and Order, ¶¶ 68, 70, 107); *Harvey I* (21-0164-EL-BGN, Opinion and Order, ¶ 295); *Kingwood I* (denied) (21-0117-EL-BGN, Opinion and Order, ¶¶ 142, 144, 183); *Yellow Wood* (20-1680-EL-BGN, Opinion and Order, ¶¶ 74, 227); and *Cepheus* (denied) (21-0293-EL-BGN, Opinion and Order, ¶¶ 3, 107, 121, 123, 178).

Republic Wind language **used**: *Springwater* (22-0094-EL-BGN, Opinion and Order, ¶ 99) and *Palomino* (21-0041-EL-BGN, Opinion and Order, ¶ 78).

Republic Wind language **not used**: *Pleasant Prairie* (20-1679-EL-BGN); *Border Basin I* (21-0277-EL-BGN); *South Branch* (21-0669-EL-BGN); *Blossom* (22-0151-EL-BGN); and *Dixon Run* (21-0768-EL-BGN).

[4] Further to the point regarding past history, amici find persuasive the OPSB's language in *Yellow Wood*: "While we note that Residents and Clinton County are not Signatory Parties, a stipulation in which some but not all parties agree to its terms, may still be considered by the Board. In fact, for some cases in which stipulations have been agreed to by some but not all parties to the proceeding, the Board has noted that adoption of such agreements would aid in ensuring that projects would represent the minimal adverse environmental impact and would serve the public interest, convenience, and necessity. See *In re Harvey Solar I, LLC*, Case No. 21-164-EL-BGN, Opinion, Order, and Certificate (Oct. 20, 2022); *In re Angelina Solar I, LLC*, Case No. 18-1579-EL-BGN, Opinion, Order, and Certificate (June 24, 2021)." The only difference in the composition stipulating parties in *Kingwood* as opposed to *Yellow Wood* is that OPSB Staff sided with local opposition against Kingwood, despite finding that all other criteria were satisfactorily met in its Staff Recommendation. *Yellow Wood* (20-1680-EL-BGN, Opinion and Order, ¶ 241).

II. Nothing in Senate Bill 52 of the 134th General Assembly changes the statutory language or meaning of R.C. 4906.10(A)(6) to render a de facto veto for local officials over renewable energy projects.

The change in the OPSB's decisions in directly citing *Republic Wind* and giving even more deference to local governments' opinions could be attributed to something that happened earlier in October 2022: Senate Bill 52 of the 134th General Assembly ("S.B. 52") went into effect. S.B. 52 gave county commissioners, for the first time, the power to definitively prohibit solar and wind energy facilities by adopting a resolution designating "all or part of the unincorporated area of a county as a restricted area." R.C. 303.58. Counties could also unilaterally prohibit facilities from being built by adopting a resolution during the initial public notice process, an additional power that they did not have before. R.C. 303.62. Senate Bill 52 also gave local officials a place on the Ohio Power Siting Board ("OPSB") with the power to vote on whether to grant or deny a utility facility's application. R.C. 4906.021.

These powers could be exercised proactively via a resolution subject to referendum, or at the end of the application process when it is time for OPSB members to vote. However, S.B. 52 bestowed no other new power for local governments to prohibit projects, such as simply mounting local opposition. While Kingwood is correct in asserting that their application was grandfathered in and that S.B. 52's provisions do not apply, amici are concerned that some OPSB decisions were unduly influenced by its passage. (Kingwood Brief, p. 26). Amici assert that it would not be proper for the OPSB to unexpectedly deviate from precedent in *Birch* and *Kingwood* due to political signals arising from legislation that could not govern those cases. That is because S.B. 52 *did not* change OPSB's criteria for evaluating a major utility facility, and thus it did not change the way the OPSB should read the plain text of "public interest." Interestingly, though, S.B. 52 almost did.

A. The relevant legislative history provides further context to how S.B. 52 did not modify R.C. 4906.10(A)(6), illustrating the General Assembly's intent.

Senate Bill 52's legislative history reveals that the Ohio Senate considered rewriting R.C. 4906.10(A)(6) to specifically give local input greater weight in evaluating "public interest." However, those efforts were ultimately rejected, suggesting a legislative intent to preserve the existing OPSB evaluation process. To be clear, S.B. 52 did not amend the "public interest" criterion and should not be misconstrued to do so. It is precisely because S.B. 52 did not grant local governments absolute power to prohibit solar and wind projects through R.C. 4906.10(A)(6), its plain language stands, despite broader policy signals from the General Assembly.

Senate Bill 52, as introduced on February 9, 2021, included provisions that permitted townships to invalidate a certificate granted by OPSB by referendum. (S.B. 52 as introduced, at R.C. 519.217). It also enabled the residents of a township, if their township board of trustees failed to adopt a resolution, to initiate a referendum on the OPSB's decision to issue a certificate to a solar or wind project. (*Id*.) This process was contemplated as a remedy for local governments only *after* the OPSB granted a certificate of environmental compatibility and public need. S.B. 52 as introduced did not modify OPSB's eight required prongs to grant such a certificate. (*Id*. at R.C. 4906.10).

Three and a half months later, on May 25, 2021, the Senate Energy and Public Utilities Committee adopted a substitute bill that took aim at R.C. 4906.10(A)(6). (Meeting Minutes, on file with the Senate Clerk's Office). A substitute bill is a legislative document that, once adopted by a committee or the whole chamber, *substitutes* the current working document. The May 25 substitute bill retained the continuing law requirement for the public interest, convenience, and

necessity, but added that townships or county commissioners could "adopt a resolution opposing [the certificate] on the basis that [the project] would not serve the public interest, convenience or necessity." (Sub. S.B. 52, reference number L_134_1533-1, 4906(A)(6)(b)).

The substitute bill continues "[t]he receipt of a resolution described in division (A)(6)(b) of this section shall *create a rebuttable presumption* that the utility facility is not in the public interest, convenience, and necessity . . ." (*Id*. at 4906(A)(6)(c), emphasis added). Upon receipt, the OPSB was to hold an adjudicatory hearing to hear arguments that rebutted or supported the presumption and then decide, after considering the evidence, whether the project was in the public interest. (*Id*.)

All of the above language as found in the May 25 substitute bill was stricken from the next substitute bill adopted by the Senate Energy and Public Utilities Committee on June 2, 2021. (Sub. S.B. 52, reference number L_1523-3; Meeting Minutes, on file with the Senate Clerk's Office). No subsequent substitute bill contained any substantive changes to R.C. 4906.10(A)(6). (Sub. S.B. 52, reference numbers L_134_1618-4, -5, -6). It is one thing to propose an amendment that changes the language of a bill, and it is another thing to adopt new language in place of an existing bill. The Ohio Senate, for a time, seriously considered whether to more clearly define "public interest, convenience, and necessity" by creating a presumption, but chose not to establish a new definition.

Two things are learned from this legislative history. First, if the May 25 substitute bill's language had survived, it *still* would not have given local governments a controlling opinion that was dispositive of the public interest prong, instead merely creating a presumption that could be rebutted. In other words, S.B. 52 would never have given the OPSB the ability to declare local opinion as "controlling," and the General Assembly never intended to do so. Second, because

S.B. 52 did not modify "public interest," the General Assembly did not intend for the OPSB to change how it evaluates that criterion, either before its effective date or afterward, regardless of the broader policy signals contained elsewhere within the legislation.

Thus, it is perplexing that the OPSB determined public opposition as controlling on the question of whether the project was in the public interest, particularly when considering that it has never done so before *Birch* and *Kingwood*. The General Assembly did not bestow that power through S.B. 52. Even when it considered changing how the OPSB evaluated public interest, it was interested in creating a rebuttable presumption, *not* a "controlling" opinion that is dispositive of the criteria. This legislative history is consistent with Kingwood's insight that S.B. 52 provided local governments with a way to block utility projects, and that it did so without changing the eight criteria in R.C. 4906.10(A)—especially with respect to how the OPSB should have read the plain text of "public interest."

CONCLUSION

This case will influence the direction of Ohio's energy future. The OPSB's decision here to prohibit a solar project solely based on local opinion will have negative public policy consequences. It suggests that much of Ohio is not open for business for solar and wind energy projects, which will have an impact on the state's energy independence and security.

A clear reading of the applicable law demands that the OPSB give full and fair consideration to all relevant points when determining "public interest," and not give conclusive weight to any one factor. However, the shift represented by S.B. 52 seems to appear in the OPSB's recent decisions, culminating in the improper application of the law in *Birch* and *Kingwood*. As the legislative history of S.B. 52 revealed, this is not an outcome the General Assembly intended. As members of the General Assembly, amici curiae respectfully ask this court to reverse the OPSB's Order and remand for further proceedings.

Respectfully submitted,

/s Paula Hicks-Hudson

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