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 INTERVENING APPELLEES BOARD OF TRUSTEES OF MIAMI TOWNSHIP, BOARD OF TRUSTEES OF CEDARVILLE TOWNSHIP, BOARD OF TRUSTEES OF XENIA TOWNSHIP, CITIZENS FOR GREENE ACRES, INC., JENIFER ADAMS, P. CHANCE BALDWIN, JACOB CHURCH, VERITY DIGEL, JED HANNA, KRAJICEK FAMILY TRUST, JAMES JOSEPH KRAJICEK, KAREN LANDON, NICOLE MARVIN, CHAD MOSSING, KAREN MOSSING, NICHOLAS PITSTICK, KYLE SHELTON, MARLIN VANGSNESS, JEAN WEYANDT, AND JERALD WEYANDT

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Intervening Appellees ("Intervenors") Boards of Trustees of Cedarville, Miami, and Xenia Townships ("Townships"), Citizens for Greene Acres, Inc. ("CGA"), and the CGA members named in this brief's title (collectively with CGA, the "Citizens") hereby submit their Merit Brief.[1]

STATEMENT OF FACTS[2]

The Kingwood Solar Project ("Project") is a clinic on the worst ways to site and design an industrial solar facility. This is the natural product of the inexperience of Kingwood Solar I LLC ("Kingwood") and its parent company, Vesper Energy, in constructing and operating solar facilities. Kingwood is a brand new company formed for the purpose of filing this Application. Vesper has never operated a solar facility. (Stickney, Tr. I 44:1-20, Tr. I 47:22-25) To the knowledge of Kingwood's project manager, Dylan Stickley, Vesper has never finished the construction of a solar facility. (Stickney, Tr. I 44:21 to 45:10) This inexperience is manifested in a Project location and design that will inflict the maximum damage on the community.

I. The Project Would Ruin The Scenic Views From Nearby Residential, Historic, Recreational, And Tourist Areas.

The Project has a poorly planned layout with an irregular and irrational shape. Rather than being organized in a logical square or rectangular shape, the land to be used in the Project ("Project

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[1] This brief uses the following abbreviations: (1) "Application" or "Applic." refers to the application narrative submitted by Kingwood on April 16, 2021 (ICN 5); (2) "Applic. Exh." refers to the exhibits attached to the application narrative; (3) "Kingwood Exh." refers Kingwood's exhibits introduced at the hearing; (4) "Tr." refers to the transcript of the hearing, which is preceded by the name of the witness and followed by the transcript's volume, page numbers, and line numbers (e.g., "Stickney, Tr. I 75:20" refers to Dylan Stickney's testimony at line 20 on page 75 of transcript volume I; (5) the written direct testimony of a witness is cited as "Direct Testimony" preceded by the witness' last name and followed by the page and line numbers of the written testimony; (6) the "Opinion, Order, and Certificate" under appeal herein is referred to as the "Opinion"; (7) "OPSB Supp." refers to the supplement to the Merit Brief of the Ohio Power Siting Board ("OPSB"); (8) "Int. Supp." refers to Intervenors' Supplement; and (9) pages of Kingwood's Appendix are cited as "Appx." followed by the page number.

[2] Intervenors concur with OPSB's Statement of Facts. Intervenors also note that they have chosen not to pursue the assignments of error in their notice of cross-appeal.

Area") sprawls for miles with irregular boundaries. The boundaries go "in and out." (English, Tr. III 655:13-16) The Project Area's peculiar shape is displayed in the Staff Report. (Staff Exh. 1, Staff Report, p. 9 (OPSB Supp. 325)) These irregular boundaries increase the footage of the Project boundaries coming into contact with adjacent properties owned by residents who are not leasing land for the Project (known as "nonparticipating properties"). (English, Tr. III 653:17 to 654:8) In fact, Kingwood has identified about 47,000 linear feet (8.9 miles) of boundaries that are in direct public view. (English, Tr. III 674:11 to 676:7)

By curling the Project boundaries around neighboring residences, Kingwood sited its solar equipment immediately next to the Citizens' yards and houses on two, three, or four sides in an abject exercise of irresponsible utility siting. For example, see Citizens Exh. 10, Mossing Direct Testimony, p. 2, lines 10-17 (OPSB Supp. 455) (bordered on four sides); Citizens Exh. 4, Digel Direct Testimony, p. 2, lines 9-11 (OPSB Supp. 447) (three sides); Citizens Exh. 6, Hanna Direct Testimony, p. 2, lines 7-16 (OPSB Supp. 472) (two sides); Citizens Exh. 9, Landon Direct Testimony, p. 2, lines 18-24 (OPSB Supp. 440) (two sides); Citizens Exh. 11, Pitstick Direct Testimony, p. 2, lines 7-11 (OPSB Supp. 458) (two sides). The Project's design would inflict the maximum aesthetic damage on the maximum number of people.

The Project Area is located within 1,500 feet of 159 residences, including 53 within 250 feet. (Applic., pp. 98-99, (OPSB Supp. 310-311). The Application admits that the solar equipment would be highly visible to people within a half mile, i.e. within 2,640 feet. (ICN 29, Applic. Exh. Q, p. 4 (Int.Supp. 134)) CGA has 48 members who own and/or live on properties adjacent to the Project Area. (Citizens Exh. 1, Adams Direct Testimony, Exh. C (OPSB Supp. 434))

Photographic simulations prepared by Citizens' expert witness and CGA member Dr. George Landon, a professor of computer science at Cedarville University, graphically illustrate

the solar facilities' obtrusive, imposing, and disturbing appearance from nearby residences. (Citizens Exh. 9, Landon Direct Testimony, p. 2, lines 8-9 (OPSB Supp. 440); p. 4, line 10 to p. 6, line 17 (OPSB Supp. 442-443); & Exhibits D, E, G, H, J, K, M, and N (Int.Supp. 2-17)) The simulations portray the Project's fences and solar panels at the Project's setback distances of 25 feet and 250 feet between the fence and his yard and house, respectively, with a distance of another 20 feet between the fences and the panels. (Id., p. 4, lines 15-22; p. 5, lines 6-13, 20-23; p. 6, lines 1-4, 10-17 (OPSB Supp. 442-444); Stickney, Tr. I 75:20 to 76:14) The simulations depict the solar facilities' appearance from both ground level (Landon Exhibits D, E, J, K (Int.Supp. 2-5, 10-13)) and second-floor windows of the Landon home (Landon Exhibits G, H, M, N (Int.Supp. 69, 14-17)). (Id., p. 4, line 11 to p. 6, line 17 OPSB Supp. 442-444)) Exhibits J and K vividly depict the imposing presence of the 14-foot solar panels by adding them to a photograph of Dr. Landon's sons flying a kite. (Int.Supp. 10-13) Landon Exhibits H and K (Int.Supp. 8-9, 12-13) illustrate the neighbors' views in locations where the solar fence and solar panels are 250 feet and 270 feet, respectively, from their houses.[3] (Id., p. 5, lines 10-13; p. 6, lines 1-4 (OPSB Supp. 443-444)) Landon Exhibits J and M (Int.Supp. 10-11, 14-15) simulate the appearance at ground level of the solar facility at 25 feet from the property line. (Id., p. 5, lines 14-23 (OPSB Supp. 443)) The neighbors would be forced to endure these awful views for virtually every day during the life of the Project – the next 35 years. It is no wonder that OPSB's Opinion finds that the Project will "impact the viewsheds of nonparticipating residents." (Opinion, p. 51, ¶ 110 (Appx. 51))

[3] Kingwood has argued that its drawing of solar panel locations showed them to be located farther away from the Landon residence than provided by the 250-foot setback. Actually, the drawing provides an approximate distance of 200 feet to the north of the Landon house, which the required Project setback would enlarge to 250 feet. (Landon, Tr. IV 741:1-19, 749:15 to 750:7) More importantly, Dr. Landon's simulations are designed not just to display the views from the Landons' home, but also illustrate the views of other neighbors whose yards and houses would be 25 feet and 250 feet, respectively, from the facility.

OPSB's Opinion stated that the Project is not expected to visually impact local recreational areas, but erroneously based this impression on the testimony of two witnesses who have no expertise in visual impact analysis. (Id.) One of these witnesses was Susan Jennings, who the Opinion mistakenly identified as "CGA's visual impact witness." (Id.) Actually, Ms. Jennings is an expert on farmland preservation for food production, a completely different field. (Citizens Exh. 7, Jennings Direct Testimony, p. 1, line 26 to p. 2, line 16 (Int.Supp. 48-49)) She did not think the Project would be visible from recreational areas at Glen Helen, John Bryan State Park, or Clifton Gorge, but she cautioned that she lacks expertise in visual impact analysis. (Jennings, Tr. VI 1373:12-15, 1379:19-21) OPSB also cited the testimony of Kingwood architectural witness Amy Kramb, but she expressed no opinions about the visibility of these recreational areas, as the purpose of her visit to the Project Area was only to look at Project views from some of the area's historic sites. (Kingwood Exh. 109, Kramb Rebuttal Testimony) Kingwood's visual impact expert Lynn Gresock, and Kingwood's Application admitted that the Project may be visible from five public natural areas at Clifton Gorge, John Bryan State Park, Little Miami Jacoby Road state route access, Upper Great Scott Trail, and Glen Helen, as well as other areas. (Gresock, Tr. II 315:23 to 316:23; ICN 29, Applic. Exh. Q, pp. 6-8, Table 1 (Int.Supp. 135-137))

The solar equipment would be highly visible to motorists. Since Kingwood seeks to site its solar facilities within a mere 50 feet of the public roads with limited exceptions of 200-300 feet (Jt. Exh. 1, Stipulation, p. 11, ¶ 37), the community will be exposed constantly to close-up claustrophobic views of solar arrays whenever they venture from their homes. For example, the property of CGA member Terry Fife is not adjacent to the Project Area, but she would not be able to leave or return to her house without seeing the solar facility. (Fife, Tr. VI 1224:8-15)

In another display of poor design, Kingwood's selection of land with variations in elevation heightens the Project's visibility. Kingwood's topography survey shows the Project Area has "gently rolling topography with elevations ranging between 920 and 1,080 feet above sea level." (Stickney, Tr. I 50:14 to 51:3) The Project Area has a rolling topography with small pockets of higher hilly land. (Citizens Exh. 1, Adams Direct Testimony, p. 7, lines 4-10 (OPSB Supp. 426); Kingwood Exh. 8, Krajicek Direct Testimony, p. 9, lines 16-18 (OPSB Supp. 469)) Many homes in and next to the Project Area are built on elevated land overlooking the surrounding crop fields in the Project Area. (Id., lines 18-19) In fact, houses were built on higher terrain to provide better views of the surrounding territory. (Id., lines 19-23) Ten CGA members own houses on higher elevations overlooking the Project Area. (Citizens Exh. 1, Adams Direct Testimony, p. 7, lines 4-5, 8-10 (OPSB Supp. 426)) For example, CGA members Jenifer and Steven Adams would have unobstructed views of solar equipment to the north on land right next to their yard and continuing for another mile from 15 windows in their house, which is 36 feet higher at its base than the lowest elevation in the Project Area. (Citizens Exh. 1, Adams Direct Testimony, p. 5, line 7 to p. 6, line 2 (OPSB Supp. 424-425) & Exhs. H & I)

Although Kingwood promises to plant some trees along some of the Project's edges, these trees even at mature height would not screen the views from neighboring houses and yards on higher elevations. In fact, the trees will not even obstruct the views from nearby houses on flat terrain, because the second story windows would be higher than the trees. For example, Dr. Landon's views of the Project Area through his second story windows were at elevations of 17 feet above ground level. (Citizens Exh. 9, Landon Direct Testimony, p. 5, lines 1-5 & p. 6, lines 5-9 (OPSB Supp. 443-444)) Since the trees will grow only one to two feet per year (English, Tr. III 649:13-14), the trees would take a considerable number of years to reach 17 feet in height.

As further evidence of irresponsible design, Kingwood plans to plant tall trees in its "tall screening" module only on the Project's north side, because tall trees would shade some solar panels on other sides. (English, Tr. III 663:17-22) For example, no tall trees will be in the vegetative screening along the solar arrays to the north of the Landons' house. Instead, "light" screening is provided for the solar field north of the Landons' home, which consists of "lower growing evergreen species." (Landon, Tr. IV 768:8-12) Obviously, squeezing every dollar from electricity production is more important to Kingwood than saving the neighbors' quality of life.

II. The Project Would Incapacitate 1,025 Acres Of Good Farmland From Food Production For 35 Years.

The farm fields in the Project Area are currently growing grain crops. (Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 2-3 (OPSB Supp. 469)) The solar project will remove 1,025 acres of agricultural land from food production for 35 years or longer. (Applic., pp. 99-100, table 08-7 (OPSB Supp. 311-312); Applic., pp. 120-121; Stickney, Tr. I 147:4-7) [4]

The testimony of CGA member J. Joseph Krajicek is informative about the good quality of the farmland in the Project Area. Mr. Krajicek has farmed for 40 years. (Citizens Exh. 8, Krajicek Direct Testimony, p. 2, lines 1-4 (OPSB Supp. 462)) Mr. Krajicek testified that most acreage in the Project Area's crop fields is of average or above average quality for growing crops. (Id., p. 10, lines 10-14 (OPSB Supp. 470)) According to the U.S. Department of Agriculture ("USDA"), Greene County had the sixth highest average corn yield per acre among Ohio's counties in 2020. (Id., lines 14-16)

Susan Jennings, the Executive Director of Agraria Center for Regenerative Practice in Yellow Springs, testified about the importance of farming in the Project Area. She has extensive

[4] The Opinion (at p. 65, ¶ 154 (Appx. 65)) has a typographical error where it states that the Project will displace 205 agricultural acres.

occupational experience in land conservation for food production. (Citizens Exh. 7, Jennings Direct Testimony, p. 1, line 26 to p. 2, line 16 (Int.Supp. 48-49)) Ms. Jennings testified that about 98% of the Project Area has prime or locally important soils. (Id., p. 5, lines 1-7 (Int.Supp. 52))

This information was confirmed by Michele Burns of the Tecumseh Land Preservation Association. (Tecumseh Land Exh. 1, Burns Direct Testimony, p. 2, lines 37-38 (Int.Supp. 57)) USDA defines prime farmland as land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops. (Id., lines 30-32) Ms. Burns calculated that the Project Area produces $1,0000,000 annually in agricultural commodities, a figure that Ms. Jennings independently calculated and verified using agricultural statistics for Greene County. (Id., p. 3, lines 55-58 (Int.Supp. 58); Citizens Exh. 7, Jennings Direct Testimony, p. 5, line 22 to p. 6, line 1 (Int.Supp. 52-53); Jennings, Tr. VI 1345:18 to 1346:14, 1387:1-10)

Ms. Jennings and Ms. Burns both testified about the need to keep farming the agricultural land in the Project Area rather than taking it out of production for 35 years. Prime farmland is hugely important to global food production. (Tecumseh Land Exh. 1, Burns Direct Testimony, p. 2, lines 29-30 (Int.Supp. 57)) Only about 3% of the earth's surface, all of which is located in Ukraine, China, Brazil/Argentina, and the United States Corn Belt, contains prime farmland such as that found in the Project Area. (Id., lines 32-38) According to a United Nations report, the earth will need to grow 70% more food by 2050 to feed the population demand. (Id., lines 40-41) Ohio is blessed with some of the best farmland in the country, as well as abundant water to grow the crops. (Citizens Exh. 7, Jennings Direct Testimony, p. 3, lines 16-17 (Int.Supp.)50) These resources have led to agriculture and related industries being Ohio's number one economic driver with one in seven of its jobs related to agriculture. (Id., lines 17-18)

At the same time, farmland is under threat nationally and internationally from a variety of sources including development, desertification and drought, and conflict. (Id., lines 8-9) Two recent examples are the Ukraine conflict which had an immediate impact on commodity availability internationally, and the drought in California, which is driving up food prices. (Id., lines 9-11) Other recent price and supply challenges include a steep rise in the price of fertilizer and other inputs, and transportation and processing problems. (Id., lines 11-13) The empty store shelves that began in the recent shutdowns alerted everyone of the need to protect farmland in their communities in order to grow food closer to home. (Id., lines 13-15)

Ms. Jennings, based on her experience with soil health, expressed doubts about whether the soils in a solar field can be restored to their pre-project vitality for growing crops. (Id., p. 6, lines 6-12 (Int.Supp. 53)) These concerns were echoed by the Townships' expert witness Eric Sauer, a registered landscape architect and planner. (Tr. VI, pp. 1389-1445; Miami Twp. Exh. 1, Sauer Direct Testimony, p. 1, lines 2-8 (Int.Supp. 60)) Mr. Sauer testified that the Project's construction and maintenance activities can compact the soils, especially if conducted on wet ground. (Id., p. 5, lines 9-10 & p. 6, lines 9-13 (Int.Supp. 64-65)) Kingwood's plan to strip and stockpile topsoil could destroy the soil by damaging the existing soil structure and the millions of living organisms needed to maintain its health. (Id., p. 5, line 16 to p. 6, line 8 (Int.Supp. 64-65))

Kingwood has contended that the Project will remove only 1% of Greene County's total farmland from farming. But that statistic is misleading. Every solar project removes just a small percentage of the total acreage from farming, but the cumulative effect of a multitude of projects is substantial, whether those projects are inside or outside of Greene County. (Jennings, Tr. VI 1369:10-21; Tecumseh Land Exh. 1, Burns Direct Testimony, p. 2, lines 41-47 (Int.Supp. 57)) The cumulative effects of solar project development, combined with other types of developments,

are having a devastating effect on farmland. (Id., lines 43-44) Kingwood does not seek to protect farmland; it is just joining the stampede of developments looking to exploit agricultural land.

Losses of prime farmland in Ohio are especially detrimental, since this land is an integral part of the 3% of prime soil existing worldwide. (Id., lines 41-43) Ohio has lost over seven million acres, or one third, of its farmland since 1950. (Citizens Exh. 7, Jennings Direct Testimony, p. 3, lines 19-20 (Int.Supp. 50))

Kingwood tries to soften the impression of its intent to damage food production by arguing, unconvincingly, that removing good farmland from food production for 35 years is actually good for agriculture. Kingwood reasons that tying the land up in solar arrays will prevent its development for non-agricultural uses in the meantime. (Applic., p. 121) However, Kingwood presented no evidence that anyone, other than Kingwood, plans to convert this farmland to other uses. In fact, even without a solar facility there, the agricultural classification of the Project Area in local zoning would prohibit this land from being used for a housing development or other non-agriculture developments. (Fife, Tr. VI 1244:12-25) There are many reasons to disapprove this Project, and the preservation of this rich farmland is an important one.

III. <u>The Project Is Incompatible With The Objectives Of Local Land Use Planning Codes Established For The Well-Being Of County Residents</u>.

Smothering the Project Area with industrial solar equipment is contrary to the land use objectives of Greene County and the three townships in which the Project area is situated. The Project Area is zoned in an agricultural district, not an industrial district. (Miami Exh. 1, Sauer Direct Testimony, p. 16, lines 16-18 (Int.Supp. 75)) Residents who purchased farms or rural homes expect to live in a rural or agricultural setting. (Id., p. 17, lines 4-5 (Int.Supp. 76)) An industrial use such as a utility-scale solar facility is not compatible with local land use plans. (Id., lines 3-9)

On August 26, 2021, the Greene County Commissioners passed a resolution declaring the county's intent to balance development and farmland preservation and approving an amendment to the county's comprehensive land use plan. (Greene County Exh. 1, Huddleson Direct Testimony, p. 4, lines 68-83 (OPSB Supp. 399)) This plan guides decisions of regional, county, and township officials on applications for new developments or land uses. (Id., lines 71-75) Two important goals of Perspectives 2020 are the protection of agriculture and recreational resources. (Id., p. 4, lines 76-83 & p. 5, lines 87-98 (OPSB Supp. 399-400)) Kingwood's Project conflicts with those goals. This Project also is incompatible with Greene County's Farmland Preservation Plan, which is designed to protect existing farmland from encroachment by other uses. (Miami Township Exh. 1, Sauer Direct Testimony, p. 14, lines 4-20)

In addition, Section 400.1 of the Xenia Township Zoning Resolution explains that township areas zoned as Agricultural District are intended to maintain and protect areas with an existing agricultural character and prime agricultural soils, which provide a substantial economic base for the township. (Citizens Exh. 12, Rand Direct Testimony, Exh. D, p. 36 (Int.Supp.100-104)) It further advises that "[u]nnecessary encroachment by nonagricultural land uses which limits agricultural effectiveness either through encroachment of land resources or through incompatibility of land uses will be discouraged." (Id.) The Project is contrary to these objectives. (Xenia Twp. Exh. 1, Combs Direct Testimony, p. 2, lines 19-23 (OPSB Supp. 416))

The Project also conflicts with Miami Township's zoning and land use plans, which are designed to protect open areas, recreational treasures, and agricultural land. (Miami Twp. Exh. 3, Hollister Direct Testimony, p. 4, line 20 to p. 6, line 3 (OPSB Supp. 412-414))

The Project is also inconsistent with Cedarville Township's zoning and land use regulations. (Cedarville Twp. Exh. 1, Ewry Direct Testimony, p. 2, lines 19-36 (OPSB Supp. 402)) The Project's industrial use is contrary to the township's objective to preserve farmland. (Id.)

Although local land use regulations are not legally binding on OPSB, a project's incompatibility with local land use plans is an important consideration in determining whether the project serves the public interest, convenience, and necessity under R.C. 4906.10(A)(6). After all, the local land use plans are designed to serve the public interest, so these plans mirror what the local community considers to be in the public interest.

IV. The Project Will Cost Jobs And Income.

While Kingwood attempts to focus the court's attention solely on what it regards as the Project's positive economic impacts, these benefits do not warrant the widespread damage that the Project will cause to the community's economic and non-economic interests. In fact, the Project will cause a net loss of "direct" jobs.

The solar project will remove 1,025 acres of agricultural land from food production. (Applic., pp. 99-100, table 08-7 (OPSB Supp. 311-312)) This land includes a 106-acre field that CGA member P. Chance Baldwin has rented from a participating landowner for nine years. (Citizens Exh. 2, Baldwin Direct Testimony, p. 2, line 15 to p. 3, line 10 (OPSB Supp. 450-451)) Based on crop yields, this field is the best farmland that Mr. Baldwin farms. (Id., p. 3, lines 18-19 (OPSB Supp. 451)) Mr. Baldwin's situation illustrates the dilemma posed by the Project for the area's farmers who rent and farm crop land in the Project Area. Without this 106-acre field, Mr. Baldwin's remaining farm may no longer be large enough to be viable and he may be forced to downsize his farming equipment and hire other farmers to care for his crops. (Id., lines 4-8) Finding replacement land to farm in this area is difficult. (Id., lines 8-10)

Replacing productive farm ground with the Project will also hurt other area farmers. Citizen James Joseph Krajicek knows other farmers who rent crop land in the Project Area. (Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 8-11 (OPSB Supp. 469)) Mr. Stickney knew about four or five participating landowners who rent their crop land to farmers. (Stickney, Tr. I 118:2-15) At a loss of $1,0000,000 annually in agricultural commodities, the Project would be costly for area's farmers.

Removing the Project Area's prime farmland from crop production at this time would be particularly ill-timed. Agricultural production needs to increase to avoid world starvation, not decrease. Moreover, tenant farmers are already facing historically high rents, and as land is taken out of production, fewer are able to find the acres they need to be profitable. (Citizens Exh. 7, Jennings Direct Testimony, p. 5, lines 21-22 (Int.Supp. 52)) Removing land from farm production also creates stresses on all the support industries that rely on agriculture, including equipment dealers, processors, transport firms, and the food industry. (Id., p. 6, lines 1-5 (Int.Supp. 53))

Replacing crops with solar panels decreases sales of grain seed and reduces grain sales to businesses that rely on the grain as ingredients for their own products. (Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 3-5 (OPSB Supp. 469)) Mr. Krajicek knows custom farmers who farm the Project Area and vendors who apply fertilizers and herbicides on the crops there, who will lose that business if solar panels replace the crops. (Id., lines 5-8, 11-13)

The Project will offer only four full-time equivalent jobs for operating the facility. (Stickney, Tr. I 99:16-20; ICN 15, Applic. Exh. D, p. 4) The Project also would offer construction jobs, but the economic benefits from construction are just a "one-time economic activity during the 16-month construction period." (ICN 15, Applic. Exh. D, p. 2) In contrast, agriculture's economic losses will persist for at least 35 years.

Kingwood's economic impact report represents that Project operation will offer four direct jobs, 13 indirect jobs, and six induced jobs, including four direct jobs, nine indirect jobs, and two induced jobs performed in Greene County. (ICN 15, Applic. Exh. D, pp. 7, 9) None of the jobs will produce enough income to support a household, as shown by permanent operating impact detail tables on Pages 7 and 9 of the economic report. (Id.) These figures are underwhelming.

During Kingwood's rebuttal testimony, these figures were discovered to be even more unimpressive. During that testimony, Mr. Stickney sponsored an updated economic analysis with an updated table for "State of Ohio Updated Permanent Operating Impact Detail" revealing that the Project will cause a net loss of two direct jobs in Ohio during operation, including one in Greene County. (Kingwood Exh. 107, Stickney Rebuttal Testimony, Exh. A, pp. 3, 5 (Int.Supp. 139-140)) This indicates that six people in Ohio, including five people in Greene County, will lose their agriculture-related jobs. (Id.; Stickney, Tr. IX 2160:8 to 2162:5)

Although Kingwood has attempted to paint a rosy economic picture for the Project, the Project actually will cause a net loss of direct jobs, not increase direct jobs. Kingwood contends that the Project will provide a small increase in indirect and induced jobs, but Kingwood does not explain how that could happen if the Project is killing the direct jobs. That scenario seems improbable, and Kingwood has failed to explain how that could occur.

Nor does the updated economic report provide the necessary information necessary to determine the Project's economic damage to recreational businesses and other non-agricultural interests. Mr. Stickney admitted that Kingwood has not looked for negative economic impacts from the Project on local businesses, stating that he just assumes there will not be many. (Stickney, Tr. I 124:19 to 126:1) Thus, the full extent of the Project's adverse economic impacts are unknown, because Kingwood concealed them by choosing not to identify and study them.

V. The Project Will Reduce Surrounding Property Values.

One hardly needs an appraisal expert to know that the construction of an industrial complex that damages a neighborhood's aesthetic setting will reduce property values. A person need not be a property expert to realize that a residence next to a visible industrial solar facility is worth less than a residence with a pleasant view. People enjoy living in a scenic environment, but not surrounded by a sea of industrial metal and glass. Placing an unsightly facility within 250 feet of a neighbor's house or within 25 feet of a neighbor's yard will damage the pleasantness of the neighbor's surroundings and the value of the neighbor's residence.

Nevertheless, since Kingwood hired a property valuation contractor, CohnReznick, to opine about property values around solar facilities, the Citizens retained their own expert, Mary McClinton Clay, to expose the inaccuracy of CohnReznick's opinion that solar facilities do not impair property values. Ms. Clay's expert testimony about a solar facility's damaging impact on property values just confirms what everyone already knows: the presence of an industrial solar plant adjacent to a neighbor's residential property will reduce the value of that property.

Because solar companies are well-financed, it is not surprising that they are able to pay contractors to conduct studies concluding, contrary to everyone's common sense, that solar projects do not damage property values. CohnReznick's report in Kingwood's Application is a typical product of this solar company strategy. Ms. Clay found the study to be biased, flawed, and skewed in order to produce the erroneous conclusion CohnReznick was paid to render. (Citizens Exh. 3, Clay Direct Testimony, p. 5, line 7 to p. 23, line 17) This conclusion was not surprising, since its expert witness had substantial financial incentive to testify that solar facilities do not damage adjoining property values, having been paid previously by solar companies to render that opinion more than 100 times. (Lines, Tr. II 366:22 to 367:14)

In contrast to Mr. Lines' biased opinion, Ms. Clay found two soundly conducted case studies concluding that two solar facilities dropped neighboring property values by a range of 6.3% to 28% in one study and by 15.7% to 16.9% in the other study. (Citizens Exh. 3, Clay Direct Testimony, p. 23, line 21 to p. 24, line 6) She found two more case studies on solar projects that reduced the values of nearby vacant properties by 15.5% in one case and by 30% in another case. (Id., p. 24, lines 7-17) Consistent with these case studies, Ms. Clay found that the Project's close proximity likely will negatively affect neighboring property values. (Id., p. 5, lines 13-16 & p. 24, lines 18-21) That conclusion should not surprise anyone.

Of particular relevance to this case is Ms. Clay's finding that solar facilities damage the value of nearby properties even if separated by a vegetative buffer. (Id., Exh. I) She cited case studies finding that single family lots and improved residential properties located within about 500 feet of a solar farm, and with dense mature woodland between them, still lose 15% of their value. (Id., Exh. I, pp. 6-7) Other case studies have found that single family lots and agricultural tracts with a clear view of a solar facility within 450 feet, or with minimal natural vegetation between them, lose 30% of their value. (Id.) These case studies have ominous ramifications for the 50 households located within 250 feet of the Kingwood Project Area.

VI. The Project Will Harm Wildlife And Natural Resources.

Township expert witness Eric Sauer testified that the Project will harm the area's natural resources. Kingwood plans to remove approximately 25.5 acres of wood lots and vegetated fence rows and to rapidly alter the existing agricultural landscape to prairie with potentially devastating effects. (Miami Twp. Exh. 1, Sauer Direct Testimony, p. 7, line 9 to p. 8, line 14 (Int.Supp. 66-67)) Wood lots provide stormwater control, critical habitat for a wide variety of beneficial animals and insects, and a visual break in the landscape. (Id.) Kingwood plans to remove vegetated fence

rows that provide wind breaks, block overland water flows to prevent erosion, provide habitat to diversify wildlife species, and offer wildlife movement corridors. (Id., p. 8, lines 7-14 (Int.Supp. 67)) The Project likely will damage drainage tiles and increase floodwater runoff. (Id., p. 10, line 14 to p. 13, line 2 (Int.Supp. 69-73))

VII. The Project Will Impair The Public's Enjoyment Of The Community's Historic And Cultural Resources.

Kingwood's architectural history expert Amy Kramb identified 685 architectural sites of 50 years of age or older in the Ohio Historic Inventory database within five miles of the Project Area, 258 of which were within two miles. (Kingwood Exh. 109, Kramb Rebuttal Testimony, Exh. A, p. 6; Kramb, Tr. IX 2196:16 to 2197:10) Five sites within two miles are registered on the National Register of Historic Places, along with an historic district with nine sites. (Kramb, Tr. IX 2200:21 to 2201:5) Ms. Kramb's visit to the area identified another 16 sites and two additional districts that may qualify for the Register. (Id., 2201:7-19, 2202:4-12)

Although Ms. Kramb testified about potential views of the Project from vantage points at historic sites, she did not obtain the physical access necessary to support her opinions. All 258 of the historic sites within two miles are on private property, which she did not access. (Kramb, Tr. IX 2198:7-13) She stated that her opinions about the Project's visibility from each historic property were based on what she could see "from standing at that property at the edge of the public right-of-way." (Kramb, Tr. IX 2197:20-22) Sometimes she did not even get out of her vehicle to look at the views from those properties. (Kramb, Tr. IX 2198:14-18) She could not even get a glimpse at 14 architectural sites from which views of the Project Area are likely or possible. (Kingwood Exh. 109, Kramb Rebuttal Testimony, Exh. A, p. ii)

Despite Ms. Kramb's incomplete survey, she found that eight historic sites potentially eligible for the National Register of Historic Places may have views of the Project Area. (Id., Exh.

A, p. ii) She also identified an additional seven architectural sites that she could not physically see during her visit to the study area as likely to have views of the Project Area, and another seven from which views are possible. (Id.)

Citizen expert witness and CGA member Terry Fife also testified about the extensive historic and cultural treasures of this area. She is a historian who has been actively engaged in the field of applied public history for 40 years, starting as a researcher and curator at the Chicago Historical Society, which is now known as the Chicago History Museum. (Citizens Exh. 5, Fife Direct Testimony, p. 2, lines 1-6 (Int.Supp. 19)) In 1988, she founded a historical research firm called History Works, which is now recognized as the oldest public history consulting firm in the Midwest and whose clients include museums, scholars, not-for-profits, corporations, and some of the nation's largest law firms. (Id., p. 2, line 22 to p. 3, line 4 (Int.Supp. 19-20)) For 20 years, she also taught at Loyola University of Chicago in courses for graduate students on oral history, public history media, and historical museums. (Id., p. 3, lines 14-23 (Int.Supp. 20))

Ms. Fife testified about the area's rich cultural and historic history. Ancient civilizations built mounds in the county, and a surviving Adena mound is located in a county park a short distance from the Project Area that attracts visitors from all over the state. (Id., p. 7, line 22 to p. 8, line 3 (Int.Supp. 24-25)) Native Americans including Miami, Wyandots, Delawares, and Shawnees (e.g., Tecumseh) also lived in the area. (Id., p. 8, lines 4-13 (Int.Supp. 25)) Ohio's newest state park commemorating Tecumseh and other Native Americans will be sited about two miles from the Project Area. (Id., p. 8, line 14 to p. 9, line 3 (Int.Supp. 25-26)) This park will shed more light on the currently misunderstood and underappreciated role of the Shawnees in the history and culture of this area and the state. (Id.)

Settlors of European descent began to arrive soon after the Revolutionary War. (Id., p. 7, lines 18-19 & p. 9, line 4 to p. 10, line 16 (Int.Supp. 24, 26-27)) The theological beliefs of many of them, including Presbyterians and Quakers, led them to fiercely oppose slavery. (Id., p. 9, line 15 to p. 10, line 16 (Int.Supp. 26-27)) The area's anti-slavery philosophy and sparsely populated countryside attracted free people of color from eastern cities and elsewhere. (Id., p. 10, lines 17-22 (Int.Supp. 26)) Few other rural counties in the Midwest can claim the presence of an established African American community in the years before 1865. (Id., lines 20-21) The majority of the county's citizens of color lived in the three Intervenor Townships. (Id., lines 21-22)

The architectural contributions of the European and African American settlors are pervasive and noticeable in historic dwellings and other structures throughout and immediately around the Project Area. (Id., p. 11, lines 3-8 (Int.Supp. 27)) At least twenty 19th century structures still stand in the village of Clifton and many more are located just outside the village. (Id., lines 17-18) The historic Clifton Mill and the Grinnell Mill have been preserved as emblems of the area's early industrial heritage. (Id., p. 11, line 22 to p. 12, line 1 (Int.Supp. 27-28))

Each of the three townships operates cemeteries close to the Project Area that further document the area's historic heritage. (Id., p. 14, lines 5-6 (Int.Supp. 31)) Established in the early 1800s, these racially integrated cemeteries hold graves of early settlors including Revolutionary War veterans and a number of notable African Americans. (Id., lines 5-21)

This area played an important role in the Underground Railroad, and it has the architectural sites to prove it. (Id., p. 15, line 1 to p. 16, line 14 (Int.Supp. 32-33)) About half of the 50 members of the Greene County Anti-Slavery Society lived within five miles of the Project Area with some of them residing in the Project Area. (Id., p. 15, lines 6-15 & p. 16, lines 1-6 (Int.Supp. 32-33))

About half of the county's 16 probable Underground Railroad sites are within five miles. (Id., p. 15, lines 16-23 (Int.Supp.)32)

The early presence of free African Americans led to the establishment of the community of Wilberforce, located only a couple of miles from the Project Area. (Id., p. 16, lines 17-18 (Int.Supp. 33)) Wilberforce University was founded there in 1856 and is America's oldest private African American institution of higher education. (Id., lines 20-21) Wilberforce is also the home of Payne Theological Seminary, the first such institution established by the African American Episcopal Church in the 1840s, and Central State University, which is one of only 19 "1890 Morrill Land Grant Universities" in the nation, established to ensure that students of color could access public institutions of higher education. (Id., p. 17, lines 6-19 (Int.Supp. 34))

Although the Project would impair individual historic sites throughout the area, the Project's impact on the historic value of this community is not limited to the repulsive views of solar arrays from historic sites. An industrial utility of 1,025 acres is completely out of character with, and would destroy the aesthetics of, the entire historical community. (Id., p. 29, line 13 to p. 30, line 6 (Int.Supp. 46-47)) The entire area is full of historic architectural structures that add to the quality of life. Massive arrays of solar panels would destroy the aesthetic character of this area, as residents, recreationists, and visitors attracted to the area's historic setting would be forced to drive or bike through and look at miles of solar panels as they move from one site to another.

VIII. The Project Will Be A Noise Nuisance.

The Project Area and environs are in a quiet rural farming area. (Citizens Exh. 12, Rand Direct Testimony, p. 20, line 9 (Int.Supp. 88)) The Project would end the area's tranquility. Citizens' expert Robert Rand, an acoustics expert with 40 years of experience, testified that the Project's predicted noise levels appear to be excessive for the quiet rural area and are likely to

provoke widespread complaints. (Id., p. 1, lines 29-33; p. 24, lines 1-4 (Int.Supp. 78, 92))

Mr. Rand's conclusion was informed by his visit to the Hardin Solar I project approved by OPSB, where he found a line of solar inverters producing continuous tonal noise which dominated the environment and sounded like "swarms of bees." (Id., p. 15, lines 5-6 (Int.Supp. 81)) At 790 feet away, the inverters' humming was measured at levels of 42 to 45 A-weighted decibels ("dBA"). (Id., p. 14, lines 17-19; p. 15, lines 6-19; p.18, lines 1-5 (Int.Supp. 82, 83, 86)) Mr. Rand found that, "[w]ithout question, inverter noise with that sound character intruding onto adjacent residential property would be objectionable for neighbors who do not want such a facility installed." (Id., p. 18, lines 1-3 (Int.Supp. 86))

Mr. Rand noted that the inverter noise at Kingwood is expected to occur at the same level based on the inverter units that may be selected. (Id., lines 5-9) The loudness of the inverter noise from 790 feet away at Hardin Solar I proves that Kingwood's proposed 500-foot setback between inverters and residences will not prevent noise nuisances at neighboring homes. (Id., p. 11, lines 12-13 (Int.Supp. 80A)) Kingwood's inverters would need to be 1,800 feet away before their noise receded to reasonable levels. (Id., lines 21-22) The Project's noise is another way that the Project would destroy the quality of life in the surrounding community.

IX. The Threatened Damage From The Project Has Resulted In Overwhelming Public Opposition To The Project.

Kingwood's brief betrays its realization that the public overwhelmingly hates its Project. Kingwood repeatedly belittles the opponents of this ill-sited and poorly designed Project as a "vocal minority," as if repeating this term over and over will fool anyone into believing it. To the contrary, the opposition to Kingwood's Project has been especially prominent and one-sided. The local governments all oppose this Project for being contrary to their citizens' best interests. As described in OPSB's brief, the speakers at OPSB's local public hearing overwhelmingly opposed

the Project. OPSB also provided forms to be signed by attendees of the hearing who did not want to speak, on which opponents outnumbered supporters by 97 to five. See the two OPSB docket entries on March 3, 2022 labeled "Public Comment Regarding the Project." (Int.Supp. 102-110)

Public opposition started early in the Project's history. CGA President Jenifer Adams testified that she attended a Town Hall hosted by the county commissioners at the Greene County Fairgrounds on April 6, 2021. (Citizens Exh. 1, Adams Direct Testimony, p. 8, lines 18-19 (OPSB Supp. 427)) The Town Hall's purpose was for the commissioners to hear the concerns and input from Greene County's residents regarding the Project. (Id., lines 19-21) Based on Ms. Adams' observations, the majority of the 150 people in attendance opposed the Project. (Id., p. 8, line 21 to p. 9, line 1 (OPSB Supp. 427-428)) This was an early indication of the public's opposition.

Ms. Adams further observed that opposition to the Project has been extensive, long-standing, and continues to grow. (Id., p. 9, line 5 (OPSB Supp. 428)) Opposition to the Project far outweighs support for the Project. (Id., lines 5-6) She has observed this in communications from CGA's membership, attendance at CGA meetings, attendance at local government meetings, attendance at Kingwood's meetings, attendance at the OPSB public hearing for the Project, public comments submitted to OPSB, and general feedback from members of the community. (Id., lines 6-11) The county and township officials, who as local leaders are attuned to their constituents' views, took notice of this opposition and the reasons for it. Kingwood implicitly acknowledges the overwhelming volume of local opposition by arguing that it is politically motivated.

Alarmed by this opposition, Kingwood tried to entice the community into dropping its opposition by offering money. Kingwood sent good neighbor agreements to 65 landowners adjacent to the Project Area offering to pay each of them $1,000 upon signing the agreement and to pay another $7,500 to $25,000 once Project construction started. (Kingwood Exh. 6, Stickney

Direct Testimony, p. 8, lines 3-7) Kingwood started offering good neighbor agreements in August 2021. (Stickney, Tr. I 61:9-12) As of the time of hearing on March 7, 2022, only six landowners had taken the bait. (Stickney, Tr. I 182:18 to 183:1) Few people wanted the money badly enough to accede to such a bad project. Rational people normally act rationally. The rejection from 59 of the 65 landowners sent a clear message that the damage to their properties and/or the community at large was not compensable. These offers did not have their intended effect as evidenced by their failure to suppress the public outpour of opposition on display at the local public hearing on November 15, 2021. A wealthy developer's inability to buy meaningful citizen support for its Project is a telltale sign that the Project is widely recognized as contrary to the public's interest.

Kingwood also offered to create a "community benefit fund" that would be replenished with $225,000 per year to be divided among whichever townships withdrew their opposition to the Project. (Kingwood Exh. 6, Stickney Direct Testimony, p. 8, lines 10-20; Stickney, Tr. I 219:14-19) The townships declined this offer. (Stickney, Tr. I 190:1-3) Even big money from a wealthy developer cannot drum up any significant local enthusiasm for this Project.

Kingwood was so concerned about the overwhelming public opposition that it decided to commission and conduct an opinion poll in a desperate attempt to portray the opponents as a "minority." By the time Kingwood conducted its opinion poll on March 2-3, 2022 (Citizens Exh. 16, p. 2 (Int.Supp. 113)), OPSB's local public hearing had already displayed the public's opposition to the Project on November 15, 2021. As shown by its polling questions, Kingwood knew that it could make its Project appear popular only by concentrating primarily on respondents who knew nothing of the Project's harms and by skewing the questions so badly as to guarantee the answers it wanted. Kingwood's pollster primarily polled citizens living outside of the three affected townships, thus guaranteeing that most respondents would know little to nothing about

the Project's threats to the community. (Hobart, Tr. VIII 2040:11 to 2048:24) Kingwood established that the percentage of respondents who had seen, heard, or read "nothing at all" about the Project was 60%, with another 13% aware of "not very much." (Citizens Exh. 16, p. 6) The respondents were then asked:

> As you may know, Kingwood Solar has proposed a solar project that consists of 1,200 acres of private, leased land in Xenia, Cedarville, and Miami townships. It is projected to provide $1.5 million annually to the local communities in Greene County with the largest beneficiary being the schools. Do you support or oppose this proposed Kingwood Solar Farm?

(Id., p. 9 (Int.Supp. 117)) Not surprisingly, 63% of the respondents answered this question by saying they favored the Project, which was equivalent to the 60% who had heard nothing about the Project. The poll then asked additional skewed questions with introductions praising the Project to produce an ultimate favorability number of 68%, which was less than the 73% who knew nothing or not very much about the Project. (Id, pp. 15-18 (Int.Supp. 126-129))

If Kingwood actually believed the public favored its Project, it would have employed an honest opinion poll to measure that opinion instead of a deceptive one. OPSB justifiably rejected the poll's methodology and results. (Opinion, pp. 63-64, ¶ 148 (Appx. 63-64)) Yet this poll is the basis of Kingwood's claim that the public favors its Project.

Importantly, the county and townships intervened into this proceeding and passed resolutions opposing the Project. In another desperate argument, Kingwood states that the Project's opponents are in the minority, because only three of Greene County's 12 townships voiced opposition to the Project. However, the other nine townships had no reason to get involved in the case, because the Project does not threaten their communities. Notably, these nine townships also did not express any support for the Project. The non-involvement of these townships does not support Kingwood's view that the Project's opponents are in the minority. The county and

townships have opposed this Project, because they recognized the immense damage that the Project would impose on their community.

ARGUMENT

I. Intervenors' Response To Kingwood's First Proposition Of Law:

In Determining That The Project Does Not Serve The Public Interest, Need, And Convenience Under R.C. 4906.10(A)(6), The Board Struck A Reasonable Balance Between The Project's Perceived Benefits And Its Substantial Detriments.

A. The Project Must Comply With All Criteria In R.C. 4906.10(A).

R.C. 4906.10(A) provides that "[t]he 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." (Emphasis added.) The Project must comply with all eight criteria in this statute. OPSB justifiably found that the Project cannot be approved because it does not comply with R.C. 4906.10(A)(6).

B. The Court Has Consistently Ruled That It Will Not Reweigh Or Second Guess Factual Determinations Of The Public Interest By Regulatory Agencies That Are Best Suited To Implement State Policy.

OPSB determined that the Project does not serve the public interest after carefully weighing the Project's overall perceived benefits and weighing them against the adverse impacts on the local community to determine that the balance favored denial of the certificate. (Opinion, pp. 61-62, 64, ¶¶ 144, 149 (Appx. 61-62, 64); Order on Rehearing, p. 17, ¶ 47 (Appx. 90)) The Opinion expressly states that the Board "must balance projected benefits against the magnitude of potential negative impacts on the local community," who are "most directly affected by the Project." (Opinion, p. 61, ¶ 144; Order on Rehearing, p. 17, ¶ 47 (Appx. 90)) OPSB specifically considered Kingwood's claims that the Project would provide energy, employ workers, pay taxes, improve air quality, protect the rights of landowners leasing their land to Kingwood, and preserve long-

term agricultural use after Project's expiration. (Opinion, p. 64, ¶ 149 (Appx. 64)) The Board examined Kingwood's assertions of benefits in depth. (Id., p. 58, ¶¶ 135-137 (Appx. 58)) At the same time, OPSB noted the Project detriments described by local governments and citizens, including its proximity to relatively dense and growing populated areas, its proximity to and views from a large number of unique recreational, parks, and wildlife areas, its impacts on unique historic and cultural resources, its adverse impacts on wildlife, its inconsistency with local land use planning, its impairment of agriculture, its devaluation of nearby properties, and its threat to the all-important tourism of the area. (Id., pp. 60, 62-63, ¶ 140, 146-147 (OPSB Supp. 60, 62-63)) As Intervenors explain below, this conclusion is amply supported by the record. Accordingly, OPSB considered and balanced both the Project's benefits and detriments, determined that the detriments outweighed the benefits, and concluded that the Project would not serve the public interest.

The court has ruled that the determinations of the "public interest" under other public utility regulatory statutes by the Public Utilities Commission of Ohio ("PUCO") are factual determinations for which the court will not reweigh the evidence, second guess, or substitute its judgment for the judgment of the administrative agency. *In re Application to Modify the Exemption Granted to E. Ohio Gas Co.*, 144 Ohio St.3d 265, 2015-Ohio-3627, 42 N.E.3d 707, ¶¶ 28-29; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 301, 2008-Ohio-861, 883 N.E.2d 1035, ¶¶ 46-51; *Hazelton v. Pub. Utilities Comm'n of Ohio*, 145 Ohio St. 34, 39–40, 60 N.E.2d 673 (1945). This principle is consistent with the court's announcements of the standard of review in appeals of OPSB cases stating that the court will not reweigh or second-guess OPSB on questions of fact. *In re Application of Alamo Solar I, L.L.C.*, Slip Opinion No. 2023-Ohio-3778, ¶ 17; *In re Application of Firelands Wind, L.L.C.*, Slip Opinion No. 2023-Ohio-2555, ¶ 17. This standard of review presents a heavy burden for the party challenging an order, because the court

consistently defers to the agency's judgment in matters that require the agency to apply its special expertise and discretion to make factual determinations. *Ohio Consumers' Counsel* at ¶ 13.

In *E. Ohio Gas*, the court affirmed PUCO's determination that granting an exemption from commodity sales service regulations to a natural gas company complied with the mandate in R.C. 4929.08(A) that the exemption be "in the public interest." *E. Ohio Gas* at ¶¶ 27-29. PUCO weighed the competing interests and decided that the exemption would serve the state's energy policy. Id. at ¶¶ 27-28. The court noted that the party objecting to the exemption was "requesting that we reweigh the evidence regarding whether modification was in the public interest, which is outside the scope of our function on appeal." Id. at ¶ 27. The court observed that "[w]hether the commission's findings will ultimately be correct is an open question, but '[t]his court has consistently refused to substitute its judgment for that of the commission on evidentiary matters.'" Id. at ¶ 28, quoting from *Monongahela Power Co. v. PUCO,* 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. Thus, the court advised that "this is a case in which we should defer to the commission's findings," since these are "issues best suited for the regulatory agency assigned to implement state policy." *E. Ohio Gas* at ¶ 29.

In *Hazelton*, PUCO balanced competing interests in determining that its denial of a certificate was in the public interest. 145 Ohio St. at 39–40, 60 N.E.2d 673. The court noted that "[f]rom all the evidence, conflicting inferences arose as to whether the public interest required that the application be granted." Id. at 40. Despite the conflicting evidence, the court ruled that "[t]he commission exercised its discretion and this court cannot say that the order denying the application was unreasonable." Id.

In *Ohio Consumers' Counsel*, the court affirmed a PUCO decision that an exemption from a regulatory requirement to a telecommunications company was "in the public interest" under the

language of R.C. 4927.03 as worded at that time. 117 Ohio St.3d 301, 2008-Ohio-861, 883 N.E.2d 1035, at ¶¶ 46-51. The court announced that it would "not second-guess" PUCO's weighing of the competing interests of regulations and free-market competition to determine whether the exemption was in the public interest. Id. at ¶ 48. The court observed that "the public-benefit finding is a factual determination made by the commission" and that PUCO's decision on the "showing of public interest will not be disturbed by this court absent a demonstration that it is clearly unsupported by the record." Id. at ¶ 50.

Thus, the court has consistently ruled that it will not reweigh, second-guess, or substitute its judgment for an administrative agency's balancing of competing interests in determining whether the agency's action serves the public interest. In the case at bar, the court should refrain from reweighing the competing statewide and local public interests considered by OPSB in deciding that a certificate for Kingwood would not serve the public interest under R.C. 4906.10(A)(6). The court should decline Kingwood's invitation to wade into its own weighing of the evidence in this complex fact-intensive decision.

C. The Local Governments' Opposition To The Project Is Based Not Only On Their Own Hearing Testimony, But Also On Evidence Presented By Other Parties At The Evidentiary Hearing.

Kingwood argues that the points made in the county and township resolutions opposing the Project and the contents of their witnesses' testimony do not justify OPSB's finding that the Project does not serve the public interest. Kingwood also opines that OPSB's Opinion rejected the local governments' arguments about the Project's harms. Kingwood's arguments merely invite the court to impermissibly reweigh the evidence to second-guess the Board's findings.

The local governments' opposition was not based solely on the evidence that their witnesses presented at the hearing. They filed their own post-hearing briefs, and the Townships

then joined the Citizens in filing a joint response to Kingwood's application for rehearing, relying on considerable hearing evidence of the Project's harms presented by both the local governments and other parties, including the Citizens and Kingwood itself. OPSB's decision necessarily needed to consider all evidence in support of the local governments' positions.

For the same reason, the court should dismiss Kingwood's arguments that the local governments did not conduct their own expert studies or hire their own expert witnesses to provide additional testimony at the hearing. The Townships provided extensive expert testimony on technical issues from Eric Sauer -- a registered landscape architect and planner -- as well as testimony from township trustees Jeff Ewry, Don Hollister, and Stephen Combs whose insights were based on their extensive collective experience in governing and protecting the townships' citizens.[5] In addition, the local governments were entitled to, and did, rely on the contents of Kingwood's Application, the cross-examination of Kingwood's expert witnesses, and the testimony of six Citizen experts, which proved the Project's detriments.

Kingwood asserts that the local governments' resolutions and testimony are vague and unfounded, and therefore should not have been considered by OPSB. The opposite is true. The resolutions in opposition to the Project adopted by the county and townships oppose the Project as incompatible with the general health, safety, and welfare of their respective residents, and these findings are explicitly stated in their resolutions opposing the Project. Those determinations were

[5] A Kingwood cheap shot accuses Mr. Hollister of bias, stating that he followed and commented on CGA's Facebook page and was personally opposed to the Project. But he can hardly be faulted for educating himself by reading the Facebook page or communicating with other citizens on Facebook, no more than the Staff can be criticized for monitoring public comments on the docket. That is good, responsive government. And he testified that he was personally opposed to the Project because it violates the township zoning requirements designed to protect the public that otherwise would apply absent preemption of local zoning authority. (Hollister, Tr. VI 1466:13 to 1467:24) Wanting to protect his constituents from harm is hardly bias.

made based on a number of reasonable concerns that had been expressed by citizens to their elected officials and on the officials' own experience as government officials. The townships backed up their resolutions with 18 pages of technical expert testimony of written direct testimony from Eric Sauer specifically describing the Project's technical deficiencies, some of which is summarized in the Statement of Facts above. (Miami Twp. Exh. 1, Sauer Direct Testimony (Int.Supp. 60-77)) Tellingly, Kingwood does not mention Mr. Sauer's extensive testimony in its argument that the townships did not submit technical evidence to support their position.

Cedarville Township trustee Jeff Ewry testified about the following additional points in support of Cedarville Township's continuing opposition to the Project based on his experience as a township trustee: i) its close proximity to several unique, scenic and historic areas that are tourist attractions; ii) its industrial purpose is out of character for the agricultural community; iii) the housing density near the Project area is three times the average density near other Ohio solar projects located in southwest Ohio; iv) the potential impacts on adjacent property owners from damaged field tiles is significant without an adequate process for identifying and repairing the field tiles damaged during construction and operation of the Project; v) the proposed 250-foot setback from the facilities to non-participating properties contained in the Stipulation is still less than the 300 feet setback recommended by the recently amended Greene County Land Use Plan; vi) Kingwood's estimate of temporary and permanent job creation appears to be overstated; and vii) the risk of a violent weather event damaging the Project and nearby properties has still not been adequately considered. (Cedarville Exh. 1, Ewry Direct Testimony, lines 19-36, 102-134, 147-162 (OPSB Supp. 402, 405, 407)) These are all topics that a local official in a rural area is expected to know.

The local governments rely not only on their own testimony, but also on evidence from other parties at the evidentiary hearing. The Statement of Facts above describes some of the voluminous evidence on Project impacts presented by the local governments, the Citizens, and Kingwood, including evidence that the Project would ruin the scenic views from nearby residential, historic, recreational, and tourist areas, remove 1,025 acres of good farmland from food production for 35 years, destroy the benefits of local land use planning codes, produce harmful noise levels, extinguish existing jobs and income, reduce property values, harm wildlife and other natural resources, and impair the public's enjoyment of historic and cultural resources. OPSB cites the local governments' concerns about most of these issues as bases for its determination that the Project does not serve the public interest. (Opinion, pp. 62-63, ¶¶ 146, 147 (Appx. 62-63)) **Importantly, OPSB specifically rejected Kingwood's argument that the Board found the Intervenors' positions to be vague and unfounded**. (Order on Rehearing, p. 17, ¶ 47 (Appx. 90))

Finally, the court should not be persuaded by Kingwood's assertion that satisfaction of the "technical requirements" of the other criteria in R.C. 4906.10(A) should also satisfy R.C. 4906.10(A)(6). To follow Kingwood's rationale would reduce to meaningless the balance the Board must strike under R.C. 4906.10(A)(6) between the projected benefits and harms of a project.

The Ohio General Assembly has declared it to be a public policy and public purpose of the state to require the fiscal integrity of municipal corporations, counties, and townships so that they may "provide for the health, safety, and welfare of their citizens." R.C. 118.02. Local governmental officials are uniquely qualified to make that determination because they normally live, work, worship and recreate in the community with their constituents. Local government officials are far more qualified to determine what is in the local "public interest" than employees and experts paid by a non-Ohio energy company whose purpose and goal is to generate profits by

constructing and operating an energy facility on land to which it has no historical or personal connection. OPSB was well within its authority to ascribe importance to these informed views.

D. Stipulations That Settle Nothing Are Not Entitled To Deference.

Kingwood makes a big deal out of a Joint Stipulation and Recommendation filed by Kingwood and the Ohio Farm Bureau Federation ("OFBF"), stating that its terms should be afforded substantial weight. (Jt. Exh. 1) However, the fact that only two parties agreed to the stipulation means that eight parties (counting the Citizens as one party) did not agree to it. And even OFBF did not ask the Board to approve the Project. In fact, the stipulation's introduction states only that Kingwood and OFBF recommended the stipulation's conditions "in the event the Ohio Power Siting Board (the 'Board') issues a Certificate in this proceeding." (Id., p. 1) In short, Kingwood did not settle with any party. This stipulation is entitled to no weight.

While Kingwood correctly represents that any two or more parties can enter into a stipulation, that does not mean that the stipulation is automatically entitled to any weight or deference. Otherwise, any two allies could enter into a sweetheart deal and impose that deal on everyone else. Surely, Kingwood would not agree that a stipulation between only the Citizens and the townships would be entitled to deference. In this case, the conditions listed in the stipulation come nowhere close to curing the Project's ailments. In short, the stipulation does nothing to promote the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

E. The Project's Supposed Benefits For Energy Production And Air Quality Do Not Justify Destroying The Environment.

Kingwood represents that the Project will reduce dependency on fossil fuels and attract new businesses to Ohio, but OPSB is rapidly approving other solar projects and has a multitude of additional solar projects in the pipeline to meet those objectives. Approving a flawed Project that

will severely damage a community is not the right way to promote green energy when a better designed project can be planned and constructed in a more appropriate location.

The Ohio General Assembly has delegated to OPSB the responsibility to use its expertise to set the state's energy policy. Kingwood and its amici demand that the court set the state's policy instead, substituting its judgment for OPSB's in determining what advances the public interest under the state's energy policy.

The court's declination to reweigh the evidence underpinning OPSB's fact-intensive decisions about a project's public interest will not jeopardize or even slow the state's rush to build renewable energy facilities. OPSB is inundated with applications for these facilities. Recently it was reported that the electric grid operator for the region in which Ohio is located, PJM Interconnection, "is so clogged with requests from energy developers seeking connections to its regional transmission network in the eastern United States that it is proposing a two-year pause on reviewing more than 1,200 energy projects, most of them solar power." (Pittsburgh Post-Gazette, https://www.post-gazette.com/business/powersource/2022/02/02/pjm-interconnection-queue-energy-projects-electricity-grid-operator-backlog-approval-process/stories/202202020087). OPSB website boasts that it has already approved 41 enormous new solar projects on 73,922 acres of land, with another 13 applications pending. See https://opsb.ohio.gov/about-us/resources/solar-farm-map-and-statistics and then select "download" to read the Board's statistics on solar projects.

OPSB has made the judgment that the state's energy policy will not be impaired by disapproving a relatively few projects that are overwhelmingly opposed due to their anticipated devastating effects on local communities. The court should not substitute its judgment for OPSB's expertise by immersing itself in the fact-intensive balancing of the benefits and detriments for these projects. Nor should the court reduce OPSB's role to a *pro forma* approval for every project

as demanded by amici for the sake of "predictability" in licensing. OPSB is responsible for setting energy policy, not the court or amici.

In summary, the Project's detriments are severe. Its benefits are doubtful and negligible. And even if Kingwood's claims of Project benefits are accepted at face value, OPSB correctly determined that the balance between the Project's perceived benefits and its serious downsides to the local community weighs in favor of denying the certificate.

II. Intervenors' Response to Kingwood's Second Proposition of Law:

OPSB Lawfully And Reasonably Considered The Interests Of The Entire Public Rather Than Excluding Local Public Interests From Its Consideration Of The Public Interest Under R.C. 4906.10(A)(6).

A. The Ohio Power Siting Board Has The Discretion To Consider The Local Public Interest As A Factor In Determining Whether An Energy Project Serves The Public Interest Under R.C. 4906.10(A)(6).

Intervenors have no quarrel with Kingwood's premise that the public interest includes the interests of the entire public community. Indeed, OPSB's Opinion acknowledges that point by stating that the public interest "should be examined broadly." (Opinion, p. 61, ¶ 144 (Appx. 61)) However, looking at public interest broadly necessarily requires OPSB to consider the interest of the entire public, both local and statewide. Certainly, R.C. 4906.10(A)(6) does not allow OPSB to ignore the interests of the segment of the public most impacted by a project.

By analogy, the balancing of statewide and local public interests under R.C. 4906.10(A)(6) is consistent with the federal courts' interpretation of the "public interest" in the "public interest, convenience, and necessity" as used in the federal Communications Act. This act requires the Federal Communications Commission (FCC) to approve or disapprove licenses for communication companies in a manner that achieves this standard. *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 225, 63 S. Ct. 997, 87 L. Ed. 1344 (1943). This is an "expansive" standard,

providing the FCC with broad discretion to consider any factor relevant to attaining the goals and objectives of the act. Id., 319 U.S. at 219.

The FCC has interpreted public interest, convenience, and necessity in a manner that prohibits the licensing of stations that fail to protect local community interests, and the U.S. Supreme Court has upheld these requirements. Id. at 203 (requiring stations to broadcast local news, local events, local advertisements, and other programs of local consumer and social interest). Consistent with this principle, the FCC with the federal courts' approval has carefully balanced local public interests against broader national and regional interests to achieve the public interest, convenience, and necessity. For example, see *Simmons v. F.C.C.,* 169 F.2d 670, 672 (D.C. Cir. 1948) (finding that the public interest, convenience, and necessity would be served by FCC's order denying application to increase power and change frequency of radio station that would have enabled the station to plug into a network line and act as a mere relay of program material piped in from outside the community without regard for local community needs or desires for local news broadcasts and other programs of local interest); *Courier Post Pub. Co. v. F.C.C.*, 104 F.2d 213, 218 (D.C. Cir. 1939) (requiring the FCC to issue a permit for a local radio station to serve the local interests (e.g., local news) of a community that was being served only by regional stations, because the public interest component of public interest, convenience, and necessity required service of local interests, not just regional interests); *CBS Television Network Affiliates Ass'n v. F.C.C.,* 555 F.2d 985, 989–990 (D.C. Cir. 1977) (finding that the public interest component of "public interest, convenience, and necessity" could be implemented by prohibiting cable television companies with stronger signals from sending their signals into areas occupied by local cable television stations serving local interests whose economic viability would be threatened by the competition).

Similarly, the same standard in R.C. 4906.10(A)(6) also should be interpreted to protect local public interests even if they conflict with broader geographical interests.

While Kingwood urges OPSB to concentrate solely on the Project's supposed benefits to the public outside of the local community, the Board cannot fully evaluate the public interest without considering a project's effects on the local public. OPSB's Opinion appropriately recognizes that R.C. 4906.10(A)(6) does not allow OPSB to ignore a project's impact "on individuals who are most directly affected by the Project, primarily those who live near it." (Opinion, p. 64, ¶ 149 (Appx. 64)) OPSB's Opinion recognizes that local governments and citizens are the most knowledgeable about whether a project will harm their community, and OPSB was justified in considering their views. In considering the "public interest, convenience and necessity" under R.C. 4906.10(A)(6), the Board should, and did, ascribe the greatest weight to the views of the members of the public who are most impacted by a project.

B. The Passage Of Senate Bill 52 Does Not Indicate That OPSB Should Exclude Local Interests From Its Protection Of The Public Interest Under R.C. 4906.10(A)(6).

Kingwood asserts that the Ohio 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 legislature believed R.C. 4906.10(A)(6) already provided local governments with veto authority. A more plausible explanation for the General Assembly's action is that it wished to correct OPSB's previous misinterpretation of R.C. 4906.10(A)(6) that inappropriately diminished the voices of local governments and their citizens in certification decisions. Moreover, while Senate Bill 52 provides counties with outright authority to veto solar projects, OPSB does not implement R.C. 4906.10(A)(6) to make disapproval automatic if local government opposes a project. Instead, OPSB considers local support or opposition as a factor in OPSB's balancing test under R.C.

4906.10(A)(6). In fact, OPSB approved another solar project opposed by local officials after conducting the same balancing test. *In re Ross County Solar LLC,* Case No. 20-1380-EL-BGN, 2021 WL 4974122, at *23, ¶¶ 135-136 (Oct. 21, 2021). Notably, SB 52 did not amend or repeal the application of R.C. 4906.10(A)(6) to grandfathered facilities, and OPSB has a continued obligation to implement that criterion.

Amicus curiae Ohio Chamber of Commerce ("OCC") cites comment letters from two state representatives filed in the docket of a different OSPB case as evidence that the Ohio General Assembly did not intend R.C. 4906.10(A)(6) to give local governments the right to veto projects, unlike Senate Bill 52. According to OCC, Representative Bill Seitz's letter opines that "localized opposition to a grandfathered project may be of some relevance" under R.C. 4906.10(A)(6), but is not "determinative" as it would be if Senate Bill 52 applied. (Emphasis added.) Similarly, Representative Hoops' letter states that, "while reasonable local input into a project is important and warranted, it is by no means determinative." (Emphasis added.) That is, these letters opine that SB 52 does not authorize local governments to veto a grandfathered project, but they advise that local input is germane to OPSB's decision under R.C. 4906.10(A)(6). This view is consistent with OPSB's action herein. OPSB does not let local governments veto projects. It just weighs their views against the projects' benefits. This balancing process in no way abdicates OPSB's decisions to local officials or the public.

C. OPSB Weighed Local Public Interests Against Statewide Interests Rather Than Deferring To Public Opinion.

Kingwood argues that the term "public interest" as used in R.C. 4906.10(A)(6) is not the same as "public opinion," and that OPSB's denial of the Certificate is impermissibly based solely on public opinion. Kingwood claims that dictionaries and court decisions do not define "public

interest" to include "public opinions." This is a curious distinction, since OPSB's Opinion does not refer to the local communities' views as "public opinions."

Kingwood's argument mischaracterizes the Board's Opinion. The Board did not consider only the expressions of local opposition in its analysis of public interest, convenience, and necessity. OPSB also identified the Project's overall perceived benefits and weighed them against the adverse impacts on the local community to determine that the balance favored denial of the certificate. (Opinion, pp. 61-62, 64, ¶¶ 144, 149 (Appx. 61-62, 64)) The Opinion explicitly states that the Board "must balance projected benefits against the magnitude of potential negative impacts on the local community." (Id., ¶ 144 (Appx. 62)) Accordingly, OPSB considered and balanced the Project's effects on the entire public. The Board did not limit its analysis to the public interests of local communities. Nor did OPSB ignore the public interests of the segment of the public living near the Project, despite Kingwood's demands to do so.

Kingwood argues that OPSB should not have considered the local public's "perception" of the Project, noting that the dictionary defines "perception" to include an "observation." However, the local public's observations about a project and its negative effects on their surroundings absolutely should be considered in determining what is in the public interest. To ignore the public's observations and pay attention only to Kingwood's perceptions may be Kingwood's goal, but OPSB is responsible for considering all evidence for and against a project.

Kingwood's attempted dichotomy between public interest and public opinion is a false one. The testimony from citizens and local officials, government resolutions, and the public's comments were expressions about how the Project does not serve the public interest, convenience, and necessity. Kingwood's testimony below implicitly recognized that OPSB can consider the parties' testimony about what is in the public interest. After all, Kingwood asked OPSB to consider

its witnesses' opinions on whether the Project is in the public interest, convenience, and necessity. For example, Kingwood project manager Dylan Stickney submitted written direct testimony opining at length that "[t]he Project will serve the public interest" under R.C. 4906.10(A)(6). (Kingwood Exh. 6, p. 35, line 12 to p. 37, line 3) He again expressed that opinion in his rebuttal testimony. (Kingwood Exh. 107, Stickney Rebuttal Testimony, pp. 6-14, Answers 8-12, 15) Kingwood witness English also opined that the Project serves the purposes of R.C. 4906.10(A)(6). (Kingwood Exh. 18, Suppl. English Testimony, p. 4, Answer 9) Thus, even Kingwood regards witness opinions about compliance with R.C. 4906.10(A)(6) to be relevant. Kingwood can hardly complain about OPSB's consideration of the same genre of testimony from citizens and local officials. The Staff and the Board members were well within their authority to consider everyone's positions on public interest, not just Kingwood's.

Kingwood's theory that OPSB's decision is based solely on public opinion is too simplistic. Public opposition does not occur without a reason, and the Project's unpopularity is not based simply on the community not wanting it in their back yards. The Project's widespread unpopularity did not occur in a vacuum, but was fed by its many threats to the community. The Board considered the judgment of local officials and residents about these impacts, since they are the most familiar with the area. The Staff Report recognizes this fact, stating that its recommendation of disapproval under R.C. 4906.10(A)(6) was based on the fact that local officials "have responsibility for preserving the health, safety, and welfare within their respective communities" and therefore their interest in and strong opposition to the Project is "especially compelling." (Staff Exh. 1, Staff Report, p. 44 (OPSB Supp. 360)) The Board's Opinion concurred in the Staff's position. (Opinion, pp. 62-63, ¶¶ 145-147 (Appx. 62-63))

Thus, while the county commissioners and township trustees recognized their constituents' widespread opposition to the Project, these officials also based their positions on the reasons for their citizens' opposition. Contrary to Kingwood's assertions, the local officials' grounds for opposing the Project are not vague, generic statements, and the hearing testimony establishes that their concerns have not been eliminated by Kingwood's changes to Project design. The county commissioners' resolution recited that Kingwood sited the Project within a relatively densely and growing populated area in close proximity to 51 non-participants' houses, its proximity to numerous cultural, historic, scenic, and recreational resources, its visibility from roads leading to those vital resources, its potential economic threat to tourism, its narrow setbacks from parcel lines and public rights-of-way, and its incompatibility with the county's policies for development of renewable energy and farmland preservation, as some of the reasons for the county's opposition to the Project. (Greene County Exh. 2 (OPSB Supp. 373-375)) Xenia Township's resolution of opposition cited reasons for opposing the Project that include its displacement of farmland, its negative impacts on neighboring property values, its placement in an area with a history of violent weather events, and its inconsistency with the principles for safeguarding the public as enunciated in the township's zoning ordinance, the township's land use policies, and the county's land use plan. (Xenia Township Exh. 1, Combs Direct Testimony, Attachment A (OPSB Supp. 391-392)) Miami Township's resolution of opposition cited the Project's occupation of prime farmland and its proximity to three long-protected natural areas as grounds for its opposition. (Kingwood Exh. 65, Miami Township's resolution of November 15, 2021 (OPSB Supp. 388)) Cedarville Township's resolution of opposition listed the Project's short setbacks, its displacement of agriculture from farmland, its incompatibility with township and county land use plans and policies, its visual impacts, its proximity to numerous residences, its negative impacts on property

values, and its placement in an area with a history of violent weather events as reasons for opposing the Project. (Kingwood Exh. 86, Cedarville Township's resolution of December 8, 2021 (OPSB Supp. 384-385)) The witnesses for the local governments and Citizens explained these and other concerns.

OPSB's Opinion summarizes and elaborates these concerns as support for its determination that the Project does not satisfy R.C. 4906.10(A)(6). (Opinion, pp. 62-63, ¶¶ 146-147 (Appx. 62-63)) OPSB's certificate denial was not based solely on the Project's unpopularity, because it considered the reasons expressed by the local governments and citizens for their opposition. Rather, OPSB balanced the local public interest against the Project's purported overall benefits and found that the balance favored denial of the certificate. (Opinion, pp. 61-62, 64, ¶¶ 144, 149 (Appx. 61-62, 64)) The court should rebuff Kingwood's argument that the Board should have excluded the local public interest from its consideration of the public interest.

III. Intervenors' Response to Kingwood's Third Proposition of Law:

The Board Has Not Delegated Its Decision-Making Authority To Local Governments.

Kingwood argues that the Board has delegated its authority to local governments for approving or denying certificates. This argument is easily dismissed under the precedent of *In re Application of Am. Transmission Systems, Inc.,* 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427, ¶¶ 18-28. In that case, a party contended that the Board delegated its authority to grant a certificate under R.C. 4906.10(A) to the administrative law judge (ALJ), because the ALJ drafted the certificate. Id., ¶¶ 18, 24. The court held that the dispositive fact proving that the Board rather than the ALJ had made the decision was evidenced by the certificate's opening and closing representations that the Board had made the decision:

> The order states, "The Ohio Power Siting Board * * * hereby issues its Opinion, Order and Certificate …," and concludes by stating, "[T]he Board approves the application and hereby issues a certificate…."

In the same vein, the Opinion's opening in this case states that "[t]he Ohio Power Siting Board … denies the application of Kingwood Solar I LLC for a certificate…." (Opinion, p. 1, ¶ 1 (Appx. 1)) The Opinion's conclusion states: "Based on the record, the Board finds that Kingwood's application for a certificate … is denied consistent with this Opinion and Order." (Id., p. 71, ¶ 183 (Appx. 71)) The Opinion indicates its approval by seven Board members. (Id., at p. 72 (Appx. 72)) Thus, the Board members, not local officials, made the decision to deny the Certificate.

Although Kingwood correctly states that R.C. 4906.13(B) preempts local governments from requiring separate local approvals for energy projects under OPSB's jurisdiction, its statement that local governments "have no say over whether, where, or how major utility projects may be built or run" is incorrect. The legislature did not intend this preemption to leave the local community without a role in siting the energy projects that can destroy their environment. Recognizing the draconian impact of this preemption, the Ohio General Assembly instituted a restraint on OPSB's authority to make sure that local community interests are considered rather than trampled roughshod when deciding applications for certificates. This restraint, found in R.C. 4906.10(A)(6), assigned to OPSB the responsibility to make sure that any energy project "serve[s] the public interest, convenience, and necessity."

Kingwood contends that OPSB found its Project has "met every technical criteria." Although OPSB may have opined that the Project complies with the other criteria of R.C. 4906.10(A) – a conclusion with which the Intervenors disagree – the Board correctly found that the Project did not meet the criterion in R.C. 4906.10(A)6). Kingwood must satisfy all of the criteria to demonstrate entitlement to a certificate, not just some of them.

The Staff, and then the Board members, reviewed and considered the hearing testimony and government resolutions opposing the Project and properly used this information as evidence that the Project does not comply with R.C. 4906.10(A)(6). It was OPSB, not the local governments, that weighed the local community's interests against the Project's perceived benefits to find out whether the Project is in the public interest as a whole. This process in no way abdicated OPSB's decision-making to local governments or the public.

IV. Intervenors' Response to Kingwood's Fourth Proposition of Law:

OPSB's Consideration Of Local Public Interests Is Consistent With Prior Board Decisions And Its Opinion Satisfactorily Explains The Rationale For This Practice.

A. OPSB's Decision Does Not Diverge From Prior OPSB Precedent.

Kingwood contends that the Opinion breaks from prior OPSB precedent by factoring local public impacts and local opposition into the Board's determination as to whether the Project serves the public interest, convenience, and necessity. Kingwood cites some OPSB decisions for its proposition that OPSB previously has not considered local public opposition or local impacts in deciding whether a project complies with R.C. 4906.19(A)(6). A review of the cited decisions shows that OPSB's current practice does not reverse prior Board practice. None of these decisions stated that OPSB does not take local opposition or local interests into account.

In one of these decisions cited by Kingwood as precedent for prior Board practice, OPSB stated that it "allows for local citizen input, while taking into account local government opinion and impact to natural resources," and "balance[s] projected benefits against the magnitude of potential negative impacts on the local community." *Ross County Solar,* 2021 WL 4974122, at *23, ¶ 135. In that case, OPSB determined that its balancing of local and non-local public interests favored the project's approval. Id., ¶ 136.

Prior to Kingwood, OPSB issued four other decisions that considered local opposition and local impacts in the Board's balancing of public interests under R.C. 4906.10(A)(6). *In re Cepheus Energy Project*, Case No. 21-293-EL-BGN, 2023 WL 370719, at *30-*34, ¶¶ 121-131 (Jan. 19, 2023); *In re Birch Solar 1, LLC*, Case No. 20-1605-EL-BGN, 2022 WL 15476256, at *12–15, ¶¶ 68-72 (Oct. 20, 2022); *In re American Transmission Systems, Inc*., Case No. 19-1871, 2022 WL 1689512, at *20–21, ¶¶ 79-81 (May 19, 2022); *In re Republic Wind*, Case No. 17-2295-EL-BGN, 2021 WL 2667132, at *1, *18, ¶ 91 (June 24, 2021). These decisions found that overwhelming local opposition was an important factor in OPSB's determination that the projects did not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). OPSB's Opinion in the instant case recounted that the *Birch Solar* decision recognized the need to fully consider the impact on individuals who are most directly affected, *i.e*., primarily residents living near the project. (Opinion, p. 60, ¶ 142 (Appx. 60)) OPSB issuance of a certificate to Kingwood would have deviated from this precedent.

B. Even If OPSB's Decision Had Changed Its Precedent, The Board Has Satisfactorily Explained The Rationale For Its Decision.

An administrative agency must "respect its own precedents." *In re Application of Ohio Power Co.,* 2015-Ohio-2056, 144 Ohio St.3d 1, 5, 40 N.E.3d 1060, 1065, ¶ 16. "This does not mean, however, that the commission may never revisit a particular decision, only that if the commission does change course, it must explain why." Id. "Agencies undoubtedly may change course, provided that the new regulatory course is permissible." Id., ¶ 17. The court further noted:

> The court has not set the explanatory hurdle very high. In a case in which the commission did not follow its earlier precedent, we said that if the commission had put "[a] few simple sentences" in its order to explain why the earlier case was no longer controlling, it would have been sufficient.

Id., ¶ 16, citing *Consumers' Counsel v. PUCO,* 16 Ohio St.3d 21, 21–22, 475 N.E.2d 786 (1985).

The court has indicated that it will not second-guess an agency's reason for changing its precedent, as long as there are good reasons for it:

> [A]n agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."

Ohio Power Co., ¶ 17, quoting from *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009). Thus, the court has stated it will defer to the agency's modified interpretation of a statute if it is reasonable. *Ohio Power Co.,* ¶ 28.

OPSB has adequately and persuasively explained its rationale for considering local impacts, as expressed by local opposition, in this case. The Board explained that the public interest must be examined through a broad lens in order to consider and balance the interests on the entire public, including the Project's impacts on the local public rather than basing its decisions solely on the applicants' views. (Order on Rehearing, pp. 7-8, ¶ 30 (Appx. 7-8) OPSB noted that the local individuals are the "most directly affected by the Project." (Id., p. 17, ¶ 47)

The public interest, convenience, and necessity must be an "expansive" standard to provide an administrative agency with broad discretion to consider any factor relevant to attaining the goals and objectives of the act. *National Broadcasting Co.*, 319 U.S. at 219, 63 S. Ct. at 1010. This standard also provides the flexibility necessary to adjust regulatory practices "[i]f time and changing circumstances reveal that the 'public interest' is not served." Id., 319 U.S. at 225, 63 S. Ct. at 1013. Even if OPSB's protection of local public interests in its balancing test were a change in direction, R.C. 4906.10(A)(6) authorizes this approach.

V. Intervenors' Response to Kingwood's Fifth Proposition of Law:

The Evidentiary Record Contains Admissible Evidence That The Numerous Public Comments Submitted To The Case Docket Overwhelmingly Opposed The Project.

Kingwood quibbles with the Opinion's reference to "the overwhelming number of public comments filed in the case, which largely disfavor the Project," arguing that these comments are not in the evidentiary record. (Opinion, p. 65. ¶ 151 (Appx. 65)) However, the Staff Report finds:

> While some local opposition is common in many siting projects, considering the above opposition filed in the docket and expressed at the local public hearing, Staff recognizes that in this proceeding it has been especially prominent, one-sided, and compelling. . . . Board Staff believes that any benefits to the local community are outweighed by this overwhelming public opposition and, therefore, the Project would not serve the public interest, convenience, and necessity.

(Staff Exh. 1, p. 44 (OPSB Supp. 360)) (Emphasis added.) The report's observation about the overwhelming "opposition filed in the docket" describes the public comments in the case docket. This description provides evidentiary support for the Board's finding in Opinion Paragraph 151.

R.C. 4906.07(C) mandates the admission of the Staff Report into the evidentiary record, and the report including its analysis of public comments was admitted into evidence without objection. The failure to object to the admission of evidence waives any objection. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 70; *N. Canton City Sch. Dist. v. Stark Cnty. Bd. of Revision*, 152 Ohio St.3d 292, 2018-Ohio-1, 95 N.E.3d 372, ¶ 10.

The public's submission of comments is an important component of an OPSB proceeding. The Staff has a duty to review and consider them in determining whether a certificate should be issued. Otherwise, OPSB would be inviting the public to engage in a useless exercise and misleading the public into believing their comments will be considered. The Staff Report reflects that the Staff fulfilled its duty to consider the comments. The court should reject Kingwood's plea to assign no significance to these comments.

Kingwood also discussed the public comments in its own testimony. Project manager Stickney's written rebuttal testimony contains an extensive discussion about the public comments.

(Kingwood Exh. 107, pp. 2-5, ¶ 6) A party waives an objection to a tribunal's use of documents by relying on their contents. *N. Canton,* 152 Ohio St.3d 292, ¶ 10.

The overwhelming percentage of public comments opposed to the Project complement other substantial evidence of public opposition in the record. Ohio Adm.Code 4906-2-09(A) provides that the evidentiary hearing consists of two sessions: (1) a local public hearing session in which the public at large is invited to testify; and (2) the hearing session in Columbus at which only parties can present testimony. R.C. 4906.09 provides that "[a] record shall be made of the hearing and of all testimony taken." (Emphasis added.) In compliance with this mandate, the testimony at both sessions was sworn, subject to cross-examination, and transcribed into the record. R.C. 4906.10(A) requires OPSB to base its decision on this record – the entire record.

The testimony at the local public hearing session was especially one-sided against the Project, as proven by the transcript of this session. (Transcript of public hearing, Nov. 15, 2021) This was also displayed in the OPSB forms signed by non-speakers at the hearing. The volume of opposition was all the more impressive given that Kingwood had earlier initiated its campaign in August 2021 to pay people not to oppose the Project. (Stickney, Tr. I 61:9-12)

The considerable testimony by the Citizens and local government officials at the evidentiary hearing also demonstrates the overwhelming nature of public opposition to this ill-conceived Project. The Board's findings about the one-sided public opposition to the Project, including the public comments in the docket, are fully supported by the record.

VI. Intervenors' Response to Kingwood's Sixth Proposition of Law:

OPSB's Denial Of Kingwood's Request To Subpoena Theresa White Was Lawful, Reasonable, And Constitutional.

Intervenors agree with the response to this proposition of law described in OPSB's Merit Brief. Intervenors add the points described below.

Kingwood argues that the requirement in R.C. 4906.07(C) for the Staff Report to "set forth the nature of the investigation" means that the Staff Report had to describe the contents and reason for every call the Staff made to the local governments. The term "nature" as used in this context means "the type or main characteristic (of something)." Cambridge Dictionary. https://dictionary.cambridge.org/us/dictionary/english/nature (last accessed on Jan. 21, 2023). The section on Pages 2 and 3 of the Staff Report entitled "Nature of Investigation" describes the "type or main characteristic" of the investigation. (Staff Exh. 1 (OPSB Supp. 318-319)) Nothing in the meaning of "nature" suggests that the report must document every phone call and communication in order to describe the investigation's type or main characteristic.

Kingwood contends that the Staff did not disclose Executive Director Theresa White's motive for directing her subordinates to contact the local officials for their input and that the ALJs should have compelled Ms. White to testify to explain the reason for this outreach. However, the record identifies the purpose of this outreach. The Staff had both the authority and the obligation to obtain input from the public on whether the Project "will serve the public interest, convenience, and necessity." (Emphasis added.) Juliana Graham-Price, the staffer who contacted the local officials, testified about what these communications revealed about the local officials' positions on the Project. (Graham-Price, Tr. VIII 1927-1942 (OPSB Supp. 538-553)) The Staff used this information to gauge the public's views on the Project, and Kingwood questioned her about it.

Kingwood argues that it must be allowed to question Ms. White to find out whether additional contacts were made to ascertain the local government officials' positions on the Project. However, the local officials expressed their positions unequivocally both before and during the evidentiary hearing. Even if the Staff had made additional contacts with them, that information would be "needless presentation of cumulative evidence" that a tribunal is free to exclude under

Ohio Rule of Evidence 403(B). OPSB "has the discretion to decide how … it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Am. Transmission Systems,* 125 Ohio St.3d 333, ¶ 17.

Kingwood complains that the Staff's recommendation to deny the certificate "emboldened" the Project's opponents to ramp up their opposition and disincentivized settlement negotiations. This argument is both inaccurate and irrelevant. The opposition to the Project was well-established before the Staff Report. Kingwood argues that the four governmental entities' participation in the evidentiary hearing is evidence that their opposition "picked up and coalesced" after the Staff Report. However, the governments could participate in the hearing only after the Staff Report, because the Staff Report was filed prior to the hearing. Moreover, while Kingwood claims that the county's opposition was first expressed to Ms. Graham-Price on the day prior to the Staff Report's release on October 29, 2021, Kingwood's argument that the county amended its land use plan in August 2021 to influence the Board's decision tacitly admits that the Staff knew about the county's opposition months earlier. (Kingwood Merit Br., p. 16, fn. 2) All three Townships also informed the Staff prior to the Staff Report that they would oppose the Project. (Ewry, Tr. VI 1521:21-25; Graham-Price, Tr. VIII 1936:1-13, 1960:7-21 (OPSB Supp. 547, 571)) Public opposition was already at full strength before the Staff Report, and that is why the Staff announced in its Staff Report that local opposition was overwhelming. Moreover, Kingwood's implication that the Staff should have recommended Project approval to intimidate the community into submitting to Kingwood's settlement demands is not only arrogant and irresponsible, but irrelevant to whether Ms. White should have been subpoenaed to testify.

Kingwood contends that something must be amiss about the Staff's decision to recommend denial of the certificate on the day before issuing the final Staff Report while a preliminary draft

of the Staff Report had recommended approval. However, there is nothing unusual about making changes to preliminary drafts of agency documents prior to finalizing them. The Staff, like any administrative agency, circulated a preliminary draft to the committee of staffers working on the case for comment, discussion, and deliberation. This deliberative process indicates that the Staff's recommendation was based on a careful and thoughtful examination of the evidence. In fact, Staffer Grant Zeto testified that the Commissioners' resolution was just "a factor" in the final recommendation, which also was based on "all the details within the case on the docket here, the Intervenors' public comments, the kind of information that we had been receiving from the public on it, to name – amongst others." (Zeto, Tr. VII 1843:8-14 (OPSB Supp. 525)) That evidence was submitted to the Board's members, who actually made the decision.

As to the timing of the Staff's contacts with local officials, Kingwood questions why the Staff contacted local officials on October 28, 2021, the day prior to issuing the Staff Report. The answer to that inquiry is obvious. The ALJ's Entry of August 26, 2021 required the Staff to file the Staff Report by October 29, 2021. Since the Board is required to gauge the public interest under R.C. 4906.10(A)(6), the Staff needed to confirm the local governments' positions on whether the Project would serve the public interest so that the Staff could make an informed recommendation. The Staff contacted the local officials on October 28, 2021, because the Staff needed the information prior to finishing the Staff Report due the next day. There is nothing curious about the timing of that outreach.

Kingwood criticizes the Staff for asking Greene County and township officials for their input on whether the Project should be approved. As context for the absurdity of Kingwood's argument, the court should consider the fact that the Staff routinely asks applicants for information to inform the Staff's recommendations. In this case, the Staff sent Kingwood at least four sets of

data requests for that purpose. (ICN 38, 39, 48, 49) Yet Kingwood complains about a single Staff request for input from local officials. Kingwood has no monopoly on communications with the Staff, so there is nothing improper about the Staff obtaining information from local officials or anyone else. Kingwood has provided OPSB with no basis for subpoenaing Ms. White.

VII. Conclusion

The Board's denial of the certificate sought by Kingwood is more than justified under R.C. 4906.10(A)(6). The court should affirm the Board's decision.

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APPENDIX

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R.C. § 118.02

118.02 Public purpose to assure political subdivision fiscal integrity; relation to other laws

Currentness

(A) Pursuant to the authority of the general assembly to provide for the public health, safety, and welfare and to limit and restrict the powers of municipal corporations, counties, and townships to borrow money, contract debts, and levy taxes to prevent the abuse of such powers and to require reports and examination of their financial condition, transactions, operations, and undertakings, it is hereby declared to be the public policy and a public purpose of the state to require fiscal integrity of municipal corporations, counties, and townships so that they may provide for the health, safety, and welfare of their citizens, pay when due principal and interest on their debt obligations, meet financial obligations to their employees, vendors, and suppliers, and provide for proper financial accounting procedures, budgeting, and taxing practices. The failure of a municipal corporation, county, or township to so act is hereby determined to affect adversely the health, safety, and welfare not only of the people of the municipal corporation, county, or township but also of other people of the state. It is further determined that the fiscal emergency conditions described in division (A) of section 118.03 of the Revised Code result from and constitute abuses of the powers of a municipal corporation, county, or township to borrow money, contract debts, and levy taxes, and that such conditions impair and threaten the health, safety, and welfare of the people of the state within and beyond the municipal corporation, county, or township.

(B) The intention of the general assembly, under this chapter, is to enact procedures, provide powers, and impose restrictions to assure fiscal integrity of municipal corporations, counties, and townships, as set out in division (A) of this section, while leaving principal responsibility for the conduct of the affairs of a municipal corporation, county, or township in the charge of its duly elected officials and leaving to their discretion the choices for and manner of expenditures of available revenues, consistent with the requirements for satisfying the public policy and purpose herein set forth.

(C) Unless otherwise indicated, the provisions of this chapter are supplemental to other provisions of law, including Chapters 133. and 5705., sections 717.15 and 717.16, and other provisions of the Revised Code, and to the charter, ordinances, and resolutions of the municipal corporation, county, or township, consistent with this chapter. Any provisions of Chapters 133. and 5705., sections 717.15 and 717.16, or other provisions of the Revised Code, and the charter, ordinances, or resolutions of the municipal corporation, county, or township may be utilized in the issuance of debt obligations under this chapter. The provisions of this chapter prevail over such other provisions of law and the charter, ordinances, or resolutions of the municipal corporation, county, or township to the extent of any conflict or inconsistency between this chapter and such other laws, charter, ordinances, or resolutions.

CREDIT(S)

(1996 H 462, eff. 9-3-96; 1979 H 132, eff. 11-29-79)

R.C. § 118.02, OH ST § 118.02
Current through File 12 of the 135th General Assembly (2023-2024) and 2023 Statewide Issue 1 (November Election).

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Effective: September 10, 2012

R.C. § 4906.07

4906.07 Hearing on application; fixing date; investigation; written report

Currentness

(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.

CREDIT(S)

(2012 S 315, eff. 9-10-12; 1985 H 381, eff. 10-17-85; 1981 H 694; 1972 S 397)

Notes of Decisions (8)

R.C. § 4906.07, OH ST § 4906.07
Current through File 15 of the 135th General Assembly (2023-2024) and 2023 Statewide Issues 1 and 2 (November Election).

End of Document

4906.09 Record of hearing; rules of conduct

R.C. § 4906.09

4906.09 Record of hearing; rules of conduct

Currentness

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.

CREDIT(S)

(1981 H 694, eff. 11-15-81; 1972 S 397)

R.C. § 4906.09, OH ST § 4906.09
Current through File 12 of the 135th General Assembly (2023-2024) and 2023 Statewide Issue 1 (November Election).

End of Document

Effective: October 11, 2021

R.C. § 4906.10

4906.10 Granting, denying, or withdrawal of certificates; conditional certificate

Currentness

(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.

CREDIT(S)

(2021 S 52, eff. 10-11-21; 2019 H 166, eff. 10-17-19; 2017 H 49, eff. 9-29-17; 2012 S 315, eff. 9-10-12; 2003 H 133, eff. 4-7-04; 1999 S 3, eff. 10-5-99; 1999 H 163, eff. 6-30-99; 1996 H 572, eff. 9-17-96; 1991 H 15, eff. 10-15-91; 1988 H 662; 1984 S 225; 1982 S 78; 1981 H 694; 1972 S 397)

Notes of Decisions (28)

R.C. § 4906.10, OH ST § 4906.10

Current through File 12 of the 135th General Assembly (2023-2024) and 2023 Statewide Issue 1 (November Election).

End of Document

4906.13 Exclusion from state or local jurisdiction

OH ST § 4906.13 • Baldwin's Ohio Revised Code Annotated • Title XLIX. Public Utilities • Effective: October 22, 2019 (Approx. 2 pages)

Effective: October 22, 2019

R.C. § 4906.13

4906.13 Exclusion from state or local jurisdiction

Currentness

(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.

CREDIT(S)

(2019 H 6, eff. 10-22-19; 2017 H 49, eff. 9-29-17; 2008 H 562, eff. 6-24-08; 1972 S 397, eff. 10-23-72)

Notes of Decisions (6)

R.C. § 4906.13, OH ST § 4906.13
Current through File 12 of the 135th General Assembly (2023-2024) and 2023 Statewide Issue 1 (November Election).

End of Document

2005 Ohio Laws File 33 (Am. Sub. H.B. 218)

OHIO 2005 SESSION LAW SERVICE
126TH GENERAL ASSEMBLY

Additions are indicated by Text; deletions by
~~Text~~ . Changes in tables are made but not highlighted.

File 33
Am. Sub. H.B. No. 218
PUBLIC UTILITIES COMMISSION—SCOPE OF AUTHORITY—WHOLESALE AND ADVANCED TELECOMMUNICATIONS SERVICES—INTERNET PROTOCOL-ENABLED SERVICES

To amend sections, 4927.02, 4927.03, and 4927.04 and to enact sections 4905.041 and 4905.042 of the Revised Code to revise state telecommunications policy, authorize the Public Utilities Commission to allow alternative regulation of basic local exchange service provided by larger companies, and specify the scope of Commission authority regarding wholesale telecommunications services, advanced services, and internet protocol-enabled services.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4905.04, 4927.02, 4927.03, and 4927.04 be amended and sections 4905.041 and 4905.042 of the Revised Code be enacted to read as follows:

<< OH ST 4905.04 >>

(A) The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

(B) ~~Division~~ Subject to sections 4905.041 and 4905.042 of the Revised Code, division (A) of this section includes such power and jurisdiction as is reasonably necessary for the commission to perform ~~the acts of a state commission~~ pursuant to ~~the "Telecommunications Act of 1996," Pub. L. No. 104-104, 110 Stat. 56~~ federal law, including federal regulations, the acts of a state commission as defined in 47 U.S.C. 153.

<< OH ST 4905.041 >>

(A) The public utilities commission shall not establish any requirements for the unbundling of network elements, for the resale of telecommunications services, or for network interconnection that exceed or are inconsistent with or prohibited by federal law, including federal regulations.

(B) The commission shall not establish pricing for such unbundled elements, resale, or interconnection that is inconsistent with or prohibited by federal law, including federal regulations, and shall comply with federal law, including federal regulations, in establishing such pricing.

<< OH ST 4905.042 >>

Regarding advanced services or internet protocol-enabled service as defined by federal law, including federal regulations, the public utilities commission shall not exercise any jurisdiction over those services that is prohibited by, or is inconsistent with its jurisdiction under, federal law, including federal regulations.

<< OH ST 4927.02 >>

(A) It is the policy of this state to:

(1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;

(2) ~~Maintain~~ Rely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service;

(3) Encourage innovation in the telecommunications industry;

(4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state;

(5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate;

(6) Consider the regulatory treatment of competing and functionally equivalent services in determining the scope of regulation of services that are subject to the jurisdiction of the public utilities commission;

(7) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and

(8) Protect the affordability of telephone service for low-income subscribers through the continuation of lifeline assistance programs.

(B) The public utilities commission shall consider the policy set forth in this section in carrying out sections 4927.03 and 4927.04 of the Revised Code and in reducing or eliminating the regulation of telephone companies under those sections as to any public telecommunications service.

<< OH ST 4927.03 >>

(A)(1) ~~Except as provided in division (B) of this section, the~~ The public utilities commission, upon its own initiative or the application of a telephone company or companies, after notice, after affording the public and any affected telephone company a period for comment, and after a hearing if it considers one necessary, may, by order, exempt any such telephone company or companies, as to any public telecommunications service ~~except~~ , including basic local exchange service, from any provision of Chapter 4905. or 4909., or sections 4931.01 to 4931.35 of the Revised Code or any rule or order adopted or issued under those ~~chapters~~ provisions, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; provided the commission finds that any such measure is in the public interest and either of the following conditions exists:

(a) The telephone company or companies are subject to competition with respect to such public telecommunications service;

(b) The customers of such public telecommunications service have reasonably available alternatives.

(2) In determining whether the conditions in division (A)(1)(a) or (b) of this section exist, factors the commission shall consider include, but are not limited to:

(a) The number and size of alternative providers of services;

(b) The extent to which services are available from alternative providers in the relevant market;

(c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions;

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(3) To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that there are no barriers to entry. Further, as to an exemption with respect to basic local exchange service, the commission shall not exempt a telephone

company from sections 4905.20, 4905.21, 4905.22, 4905.231, 4905.24, 4905.241, 4905.242, 4905.243, 4905.244, 4905.25, 4905.26, 4905.30, 4905.32, 4905.33, 4905.35, and 4905.381 of the Revised Code.

(B) ~~As used in this division, "basic local exchange service" has the same meaning as in section 4927.01 of the Revised Code, but excludes within a local service area exchange areas to which extended area service is provided.~~

~~The public utilities commission shall not approve or authorize any exemption from or modification of any provision of Chapter 4905. or 4909. of the Revised Code or any rule or order issued under them which would impair the exclusive right of any telephone company under those chapters, rules, or orders to provide basic local exchange service in the local service areas in which such service is provided by the company on the effective date of this section. Nothing in this division, however, shall be construed to require the withdrawal or prevent the offering by any telephone company of interexchange inward calling services terminating on a local exchange access line or interexchange services that employ dedicated access between the customer's premises and the telephone company's facilities merely because incidental use of such services by the customer for basic local exchange service is possible. Such offering shall not be promoted or marketed as basic local exchange service. Nothing in this division affects the commission's authority and duties under sections 4905.241 to 4905.25 of the Revised Code.~~

~~(C)~~ In carrying out this section, the public utilities commission may prescribe different classifications, procedures, terms, or conditions for different telephone companies and for the public telecommunications services they provide, provided they are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any telephone company.

~~(D)~~ (C) The public utilities commission has jurisdiction over every telephone company providing a public telecommunications service that has received an exemption or for which alternative regulatory requirements have been established pursuant to this section. As to any such company, the commission, after notice and hearing, may abrogate or modify any order so granting an exemption or establishing alternative requirements if it determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest. No such abrogation or modification shall be made more than ~~eight~~ five years after the date an order granting an exemption or establishing alternative requirements under this section was entered upon the commission's journal, unless the affected telephone company or companies consent.

~~(E)~~ (D) The public utilities commission shall adopt such rules as it finds necessary to carry out this section. It shall adopt rules initially implementing the amendment of this section by H.B. No. 218 of the 126th general assembly within one hundred twenty days after the effective date of the amendment. In adopting those rules, the commission shall consider the establishment of elective alternative regulation specific to a telephone company that is an incumbent local exchange carrier as defined in 47 U.S.C. 251(h) having fewer than fifty thousand access lines.

<< OH ST 4927.04 >>

(A)(1) In considering an application pursuant to section 4909.18 of the Revised Code, the rates and charges for ~~basic local exchange service or~~ any ~~other~~ public telecommunications service for which the public utilities commission has not provided an exemption or alternative regulatory requirements under section 4927.03 of the Revised Code may be established by the commission, upon its own initiative or the request of ~~the~~ an applicant telephone company, by a method other than that specified in section 4909.15 of the Revised Code, provided the commission finds the use of the alternative method of establishing rates and charges to be in the public interest and provided, in instances where the alternative method is proposed by the commission, the applicant consents. Alternative methods may include, but are not limited to, methods that maintain universal telephone service in the state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any telecommunications service to the entity or service that causes such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by telephone companies; or provide sufficient flexibility and incentives to the telecommunications industry to achieve high quality, technologically advanced, and universally available telecommunications services at just and reasonable rates and charges.

(2) An application ~~which~~ that proposes an alternative method of establishing rates and charges ~~which~~ that could result in an increase in any rate or charge for ~~basic local exchange service or~~ any ~~other~~ public telecommunications service for which the public utilities commission has not provided an exemption or alternative regulatory requirements under section 4927.03 of the Revised Code ~~without further action by the commission~~ shall be deemed, without further action

by the commission, to be an application for an increase in rates and charges under section 4909.18 of the Revised Code, notwithstanding whether an immediate increase in rates and charges is proposed.

(3) An application pursuant to section 4909.18 of the Revised Code ~~which~~ that is not for an increase in rates and charges, but ~~which~~ that proposes an alternative method of establishing rates and charges for ~~basic local exchange service or~~ any ~~other~~ public telecommunications service for which the public utilities commission has not provided an exemption or alternative regulatory requirements under section 4927.03 of the Revised Code, shall include the exhibits specified in divisions (A) to (D) of section 4909.18 of the Revised Code, unless otherwise ordered by the commission. Notwithstanding any provision of section 4909.18 of the Revised Code to the contrary, after the date such application is filed, any person may file a request for hearing on the application. If it appears to the commission that the request sets forth reasonable grounds for holding a hearing, the commission shall set the matter for hearing and shall give notice of such hearing as provided in section 4909.18 of the Revised Code.

(B) Upon the application of any telephone company that is an incumbent local exchange carrier as defined in 47 U.S.C. 251(h) having fewer than ~~fifteen~~ fifty thousand access lines, the public utilities commission, by order, may exempt such company, with respect to any public telecommunications service it provides, from any provision of Chapter 4905. or 4909. of the Revised Code that is specified and requested in such application, except sections 4905.20, 4905.21, 4905.22, 4905.231, 4905.24, 4905.241, 4905.242, 4905.243, 4905.244, 4905.25, 4905.26, 4905.30, 4905.32, 4905.33, 4905.35, and 4905.381 of the Revised Code; or may establish alternative regulatory requirements to apply to such company and service, provided the commission finds that the alternative requirements are in the public interest.

(C) In carrying out this section, the public utilities commission may use different methods of establishing the rates and charges of different telephone companies, provided that the methods are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any telephone company.

(D) The public utilities commission shall adopt such rules as it finds necessary to carry out this section.

SECTION 2. That existing sections 4905.04, 4927.02, 4927.03, and 4927.04 of the Revised Code are hereby repealed.

SECTION 3. The amendment of sections 4927.03 and 4927.04 of the Revised Code by this act does not invalidate any rule adopted or order issued by the Public Utilities Commission under those sections and in effect prior to the effective date of the act.

Date Passed: June 21, 2005

Approved August 5, 2005

Act. Eff. November 4, 2005

OH LEGIS 33 (2005)

End of Document

R.C. § 4929.08

4929.08 Gas company granted an exemption or alternative rate regulation subject to jurisdiction of public utilities commission

Currentness

(A) The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 of [1] 4929.05 of the Revised Code, ass [2] to any such company, the commission, upon its own motion or upon the motion of any person adversely affected by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority only under both of the following conditions:

(1) The commission determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest;

(2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.

(B) After receiving an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code, no natural gas company shall implement the exemption or alternative rate regulation in a manner that violates the policy of this state specified in section 4929.02 of the Revised Code. Notwithstanding division (A) of this section, if the commission determines that a natural gas company granted such an exemption or alternative rate regulation is not in substantial compliance with that policy, that the natural gas company is not in compliance with its alternative rate plan, or that the exemption or alternative rate regulation is affecting detrimentally the integrity or safety of the natural gas company's distribution system or the quality of any of the company's regulated services or goods, the commission, after a hearing, may abrogate the order granting such an exemption or alternative rate regulation.

CREDIT(S)

(1996 H 476, eff. 9-17-96)

Notes of Decisions (5)

Footnotes

1 So in original.

2 So in original.

R.C. § 4929.08, OH ST § 4929.08

Current through File 12 of the 135th General Assembly (2023-2024) and 2023 Statewide Issue 1 (November Election).

End of Document

4906-2-09 Hearings

OH ADC 4906-2-09 • Ohio Administrative Code (Approx. 4 pages)

OAC 4906-2-09

4906-2-09 Hearings

Currentness

(A) Unless otherwise ordered, all hearings shall be held at the principal office of the board. However, where practicable, the board shall schedule a session of the hearing for the purpose of taking public testimony in the vicinity of the project. Reasonable notice of each hearing shall be provided to all parties.

(B) The administrative law judge shall regulate the course of the hearing and conduct of the participants. Unless otherwise provided by law, the administrative law judge may without limitation:

(1) Administer oaths and affirmations.

(2) Determine the order in which the parties shall present testimony and the order in which witnesses shall be examined.

(3) Issue subpoenas.

(4) Rule on objections, procedural motions, and other procedural matters.

(5) Examine witnesses.

(6) Grant continuances.

(7) Require expert or factual testimony to be offered in board proceedings to be reduced to writing, filed with the board, and served upon all parties and the staff prior to the time such testimony is to be offered and according to a schedule to be set by the administrative law judge.

(8) Take such actions as are necessary to:

(a) Avoid unnecessary delay.

(b) Prevent the presentation of irrelevant or cumulative evidence.

(c) Prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The administrative law judge may, upon motion of any party, direct that a portion of the hearing be conducted in camera and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information or

confidential research, development, or commercial materials and information. The party requesting such protection shall have the burden of establishing that such protection is required.

(d) Assure the hearing proceeds in an orderly and expeditious manner.

(C) Members of the public to offer testimony may be sworn in or affirmed at the portion or session of the hearing designated for the taking of public testimony.

(D) Formal exceptions to rulings or orders of the administrative law judge are unnecessary if, at the time any ruling or order is made, the party makes known the action which he or she desires the presiding hearing officer to take, or his or her objection to action which has been taken and the basis for that objection.

Credits

HISTORY: 2015-16 OMR pam. # 5 (E), eff. 12-11-15.

Periodic review date(s): 11-30-20

Rules and appendices are current through July 7, 2023. Emergency rules are more current.
OAC 4906-2-09, OH ADC 4906-2-09

End of Document

CERTIFICATE OF SERVICE

I hereby certify that, on February 7, 2024, a copy of the foregoing Merit Brief and Appendix was served upon the following counsel of record by electronic mail:

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