

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

ELECTRONIC APPLICATION OF)	
STONEFIELD SOLAR, LLC FOR A)	
CERTIFICATE OF CONSTRUCTION FOR)	
AN APPROXIMATELY 120 MEGAWATT)	
MERCHANT ELECTRIC SOLAR GENERATING)	Case No. 2022-00011
FACILITY AND NONREGULATED)	
TRANSMISSION LINE IN HARDIN COUNTY,)	
KENTUCKY PURSUANT TO KRS 278.700)	
ET SEQ. AND 807 KAR 5:110)	

MOTION FOR RECONSIDERATION

Applicant Stonefield Solar, LLC (“Stonefield” or “Applicant”) respectfully submits this Motion for Reconsideration of the Kentucky State Board on Electric Generation and Transmission Siting’s (“Siting Board” or “Board”) July 24, 2024 Order (“Order”) finding that Stonefield’s Notice of Intent (“NOI”) has expired. In support of this Motion, Stonefield states as follows.

I. BACKGROUND

Stonefield submitted its NOI to construct a proposed 120-megawatt (“MW”) merchant electric generating facility on June 9, 2022. *See* NOI, filed June 9, 2022. The Siting Board filed its letter of no deficiency on June 10, 2022 and accepted the NOI as administratively complete.¹ Stonefield then filed its construction certificate application (the “Application”), including the necessary exhibits containing all reports and studies required under KRS 278.706 and KRS 278.708, on August 19, 2022.² The Application asserted Stonefield’s intent to construct the

¹ *See*, Siting Board Letter, filed June 10, 2022.

² *See* Application and accompanying Exhibits, filed August 19, 2022

proposed solar electric generation facility and transmission line (“Project”) in Hardin County, Kentucky, on property zoned Heavy Industrial (I-2).

After the Application was filed, the Siting Board issued several Notices of Deficiency (collectively “NODs”) for reasons related to local permitting issues. The first Notice of Deficiency stated that the Application was deficient due to the inapplicability of setbacks established by Hardin County’s invalidated zoning ordinance.³ Stonefield responded by clarifying that only a portion of the ordinance had been rescinded and that the Applicant was not reliant upon the invalidated portions of the ordinance, and therefore remained in compliance with the requirements for I-2 zoning.⁴

The second Notice of Deficiency followed shortly thereafter and asserted that the proposed Project was not a listed use for I-2 and therefore ineligible for the setbacks established in those zones.⁵ Stonefield responded by demonstrating that the Project planned to seek a zoning map amendment to rezone participating Project properties from agricultural zoning (A-1) to I-2 as a manufacturing use, which is a listed use for I-2.⁶

Finally, the third Notice of Deficiency (“Third NOD”) found that the Application was deficient because the Applicant was required to either state that the setbacks established in Hardin County’s ordinance would apply to the Project, or alternatively to seek a deviation from statutory setbacks as required by KRS 278.704(4), and that Applicant had failed to do either.⁷ Rather than responding to the Third NOD in the same manner as the prior two responses, Stonefield sought an

³ See Notice of Deficiency, filed August 22, 2022.

⁴ See Response to Notice of Deficiency, filed August 24, 2022.

⁵ See Notice of Deficiency, filed August 26, 2022.

⁶ See Response to Second Notice of Deficiency, filed September 22, 2022.

⁷ See Notice of Deficiency, filed October 10, 2022.

informal conference (“IC”) with the Siting Board to request clarification regarding what further information was needed to cure the alleged deficiencies.⁸

The Board denied Stonefield’s IC request, stating the Project could not comply with current local ordinances because the zoning designation for the majority of the Project’s underlying properties was not currently I-2. The Board also reiterated that that the Board must review the application in light of the current residential zoning until the property is rezoned.⁹ On February 6, 2024, Stonefield filed a Notice of Status Update (“Notice”) to notify the Board that it had successfully rezoned the Project properties to I-2 and was in the process of finalizing its development plan. The Notice explained that Stonefield intended to formally respond to the Board’s Third NOD once the development plan has been finalized, and then proceed with processing its Application. The Board did not respond to this Notice. Stonefield submitted its formal response to the third NOD on June 10, 2024. The Response to the Third NOD provided evidence that the zoning map amendment was granted and the development plan finalized, thereby curing the alleged deficiencies listed in the Board’s NODs.¹⁰ Stonefield concluded its response to the Third NOD with a request that the Board deem the prior NODs to be rescinded or cured.

In response, the Board entered the Order that is at issue in this Motion. The Order did not discuss Stonefield’s efforts to address the NODs, instead finding that the Application was merely “tendered but not accepted for filing” in the six months following the filing of the NOI due to the as yet uncured deficiencies.¹¹ The Board cited 807 KAR 5:001 Section 4(9)(a), a Public Service Commission regulation, to support its assertion that the Application is not deemed filed until it meets all applicable requirements of KRS Chapter 278 and 807 Title KAR. The Board also found

⁸ See Motion for Informal Conference, filed October 31, 2022.

⁹ See December 20, 2022 Order.

¹⁰ See Response to Third Notice of Deficiency, filed June 10, 2024.

¹¹ See Order.

that since Stonefield's NOI automatically expired after six months, the Application was not deemed filed because the deficiencies were not cured within that time.¹² The Board then effectively closed the matter. This Motion now follows.

II. ARGUMENT

a. The Siting Board and the Kentucky Public Service Commission are Separate and Distinct Entities with Separate and Distinct Laws.

The Siting Board and the Kentucky Public Service Commission (PSC or "Commission") are two different entities with different statutory authority and separate regulations. While the Board is attached to the PSC for administrative purposes, the Board's authorizing statutes and implementation regulations are separate.¹³ This can also be demonstrated by simply reviewing the separate regulations promulgated by the Commission and the Board.

807 KAR 5:001 provides the Rules of Procedure applicable to Commission proceedings. The statutory authority for those regulations is KRS 278.040(3), 278.260(2), and 278.310. Those statutes provide, in order, the jurisdiction of the PSC, jurisdiction over complaints as to rates and service of Commission-regulated utilities, and the rules for Commission hearings and investigations. Accordingly, the stated Necessity, Conformity, and Function of 807 KAR 5:001 applies exclusively to Commission authority and actions, and identifies that this administrative regulation establishes requirements with respect to formal and informal proceedings before the Commission.

In contrast, 807 KAR 5:110 provides the regulations for Board procedures applicable to Siting Board matters. The statutory authority for those regulations is KRS 278.702(3), 278.706(2)(c), and 278.712(2). Those statutes provide, in order, the jurisdiction of the Siting

¹² *Id.*

¹³ *See* KRS 278.702(3).

Board, the requirements for providing notice of an application to the Siting Board for a certificate to construct a merchant electric generating facility, and the rules for the Siting Board when holding a hearing on an application for a construction certificate. The stated Necessity, Conformity, and Function of 807 KAR 5:110 identifies that it establishes procedures related to applications, filings, notice requirements, hearings, and confidential material.

These distinct regulations demonstrate that the Siting Board and PSC have separate and distinct authority for the unique proceedings of each. The Siting Board must apply only those statutes and regulations for which it has explicit authority to the construction certificate cases it oversees. For example, 807 KAR 5:001 Section 4(9)(a) (which was cited in the Order in support of the Board's position to reject Stonefield's Application) is a Commission regulation that applies only to paper filings in utility matters that are before the Commission. This regulation requires that the filing must be physically received by the executive director at the Commission to be "deemed filed." This is not applicable to the instant matter and should not be used to reject an electronic filing with the Siting Board. The Siting Board must instead look to the specific statutes and regulations that authorize it to take action on filed applications similar to Stonefield.

b. The Application was Filed Timely and in Compliance with Applicable Law.

Per 807 KAR 5:110, Section 2(1), Stonefield had until December 9, 2022, to file its Application. As discussed above, the NOI was filed on June 9, 2022 and the Application was filed on August 19, 2022. Thus, Stonefield complied with Siting Board requirements by filing the Application within the required six months. However, the Board's Order found that because the Application was not accepted by the Board within six months of filing the NOI, that the NOI automatically expired, and thus "the Application was deemed not filed." *See* Order, p. 3. This interpretation is based on 807 KAR 5:110, Section 2(1), which states in part, "[i]f an applicant fails

to file an application within six (6) months of the filing of the Notice of Intent to File Application, the Notice shall automatically expire...” (emphasis added).

The common meaning of words is often determined by reference to dictionary definitions.¹⁴ The word “file” is defined by Meriam-Webster “as to place among official records as prescribed by law.”¹⁵ The effect of the Order is to instead interpret the word “file,” as used in 807 KAR 5:110, Section 2(1), to mean “accepted by the Board.” This interpretation has no explicit basis in Board statutes or Board regulations and further appears to have no precedent at the Board. Additionally, 807 KAR 5:110 uses the word “file” or “filed” twenty-nine times and it uses the word “filing” seven additional times. Notably, no version of the word “filed” is defined in either KRS 278.700 *et seq.* or the applicable regulations in 807 KAR 5:110. To define the word alternatively from its usual understanding creates a question regarding the interpretation of the rest of the regulation.

When a regulation is clear, “[t]o defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create a *de facto* new regulation.”¹⁶ Interpreting 807 KAR 5:110, Section 2(1), which is easily understood and harmonious with the common meaning, to mean something entirely different would be a *de facto* new regulation. The common meaning of “file” provides both clarity and guidance for those complying with 807 KAR 5:110 Section 2, as Stonefield did by filing its Application prior to expiration of the NOI.

c. The Siting Board Regulations Do Not Provide for Notices of Deficiency.

The Board’s authorizing statutes and regulations do not provide explicit authority to issue an NOD on an application. “[A]n administrative agency’s authority ‘is limited to a direct

¹⁴ *Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 719 (Ky.2012).

¹⁵ <https://www.merriam-webster.com/dictionary/file> (last accessed on August 11, 2024).

¹⁶ *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 474–75 (6th Cir. 2008).

implementation of the functions assigned to the agency by the statute.”¹⁷ This is in contrast to the Commission, which has promulgated a regulation allowing the discretion to issue NODs on applications; the Board has no such regulation.^{18 19} Thus, there is no explicit Siting Board authority to issue an NOD, and the Siting Board should not use an NOD to bar an application from being accepted or denied when the application is filed in accordance with the plain language of the regulation, as Stonefield’s Application was in this matter.

III. CONCLUSION

The Siting Board statutes and regulations do not provide a definition for the term “file” that supports rejecting the Application in this instance. Pursuant to the commonly accepted meaning of “file,” Stonefield complied with Board procedural requirements by filing the Application within the time period allotted by 807 KAR 5:110. Stonefield notes that the Board has broad powers once the application has been accepted to hold local public information meetings, provide additional notice to the local community, and to require the Applicant provide additional notice to the local community once the construction certificate has been issued. Those powers do not extend to the use of Commission regulations to reject a filing that was made under and in compliance with Siting Board authority.

¹⁷ *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 798 (Ky. App. 2000) (citing *Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Department of Highways, Ky.*, 928 S.W.2d 344, 347 (Ky. 1996)).

¹⁸ See 807 KAR 5:001, Section 16(9) (“The commission shall notify the applicant of any deficiencies in the application within thirty (30) days of the application’s submission. An application shall not be accepted for filing until the utility has cured all noted deficiencies”).

¹⁹ 807 KAR 5:001, Section 16(2) is a Commission regulation which requires a utility to file a Notice of Intent (NOI) at least 30 days but no more than 60 days before filing an application for an adjustment of rates. Even though Section 16(9) specifies that an application shall not be accepted for filing until the utility has cured all noted deficiencies, the Commission does not reject filings with deficiencies that are cured well after the 60-day expiration. See generally Ky. PSC Case No. 2020-00290, *In the Matter of Electronic Application of Bluegrass Water Utility Operating Company LLC for an Adjustment of Rates and Approval of Construction*. In *Bluegrass Water*, the NOI was filed 8/28/20. Bluegrass Water filed its application on 9/30/20; the Commission issued a letter of deficiency on 10/30/20. Bluegrass Water filed the appropriate information to cure the deficiency on 11/19/20, and the Commission found that this was the date that the Application was “deemed filed” despite being 83 days after the filing of the NOI. This contradicts the treatment of the Stonefield application by the Board in the instant matter.

For the foregoing reasons, Stonefield respectfully requests that the Board reconsider its decision that Stonefield's NOI expired on December 9, 2022 and enter an order finding that Stonefield's Application is administratively complete, and that the three NODs issued by the Siting Board on August 22, 2022, August 26, 2022, October 10, 2022, respectively, be deemed either rescinded or cured without need for any further filing by the Applicant.

Dated this 15th day of August 2024.

Respectfully submitted,



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