

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

In the Matter of:

Electronic Application Banjo Creek Solar LLC for a)	
Certificate of Construction for an Approximately 120)	
Megawatt Electric Generating Facility in Graves)	
County, Kentucky Pursuant to KRS 278.700 and 807)	Case No. 2023-00263
KAR 5:110)	

BANJO CREEK SOLAR LLC’S MOTION TO STRIKE

Banjo Creek Solar, LLC (“Banjo Creek”), by counsel, respectfully moves the Siting Board for an order striking the Intervenors Residents of Banjo Creek’s (“Intervenors”) Response and Objection to Banjo Creek Solar’s Post-Hearing Brief (“Response”). In summary, the Intervenors’ Response was filed after the deadline for post-hearing briefs and violates Banjo Creek’s due process rights as it attempts to add additional evidence in this case without Banjo Creek’s opportunity to respond and would set poor precedence for future cases in which intervenors could be encouraged to intentionally subvert Siting Board regulations. In support of its motion, Banjo Creek states as follows:

The Intevenors’ filed their motion to intervene on September 20, 2023, stating that their intervention “will allow them to express their approvals, concerns, ideas, contributions, and suggestions to the Board (through counsel)” On October 3, 2023, the Siting Board granted the Intervenors’ motion to intervene and stated: “The Residents of Banjo Creek, intervening as a group, also ensures their participation will not unduly interrupt the proceedings.” The Intervenors have not actively participated in this matter. They sought no information from Banjo Creek in either of the two rounds of written discovery requests, nor did they attend the

evidentiary hearing on January 23, 2024.¹ The Intervenors collectively did not attempt to provide any evidence or information in this case until their Response filed on February 2, 2024, which was ten days after the evidentiary hearing. The Siting Board's willingness to consider the information contained in the Intervenors' Response would violate Banjo Creek's due process rights and would set poor precedent for future cases in which intervenors would be encouraged to not actively participate in the case, waiting to intentionally submit unsolicited information after the evidentiary hearing.

The hallmark of due process is notice and a meaningful opportunity to be heard on an issue. Counsel for Banjo Creek is not aware of Siting Board decisions related to this situation, but the Public Service Commission has concluded similar conduct violates an opposing party's due process rights. In Case No. 2012-00470, the Commission held that a water district's attempt to introduce evidence after the close of testimony, which was otherwise available at the time of the hearing, "deprived the intervenors of . . . any opportunity to address this evidence or to confront the Water District's claim of conflicting positions."² The Commission further stated that "[s]uch notice and opportunity are the essence of due process."³ Furthermore, in striking a letter filed by a witness after the close of testimony, the Commission held in Case No. 1989- 00349 that "[t]he Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the opportunity to confront and cross examine adverse witnesses"⁴ These due process principles apply equally to the Siting Board.

¹ One or more of the individuals in the group of Intervenors' provided public comment in this matter.

² *Jessamine-South Elkhorn Water District*, Case No. 2012-00470, at 4-5 (Ky. PSC Apr. 30, 2013).

³ *Id.*

⁴ *Kentucky Utils. Co.*, Case No. 89-349 (Ky. PSC May 21, 1990).

Not only does the Intervenor's Response violate Banjo Creek's due process rights, it also violates the Siting Board's regulations. Section 7 of 807 KAR 5:110 states: "Filing of Briefs. If applicable, a party of record shall file a brief no later than seven (7) days after the conclusion of the evidentiary hearing." To the extent that the Intervenor's Response includes legal arguments, the Response was filed after the deadline set by regulation for a post-hearing brief. Simply put, the Response also violates the Siting Board's regulations and should be stricken from the record.

Allowing unsolicited information to be entered into the record of the case without an opportunity for the opposing party to respond would violate the opposing party's due process rights. In addition, it would encourage future intervenors to employ the same tactics in future cases, which would be prejudicial to the applicant, as well as the Siting Board who must evaluate each case on the evidence presented to it.

For these reasons, Banjo Creek respectfully requests that the Siting Board strike the Intervenor's Response.

Respectfully submitted,



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