

**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 RESPONSE TO INTERVENORS’ MOTION

Banjo Creek Solar LLC (“Banjo Creek Solar”), by counsel, submits the following response to the Intervenor the Residents of Banjo Creek’s (“Intervenors”), Motion to Continue/Reschedule Local Public Hearing and Objection to Virtual Meeting.

The Siting Board scheduled a local public hearing to be held at the Graves County Public Library on January 16, 2024. At 9:10 a.m. Eastern Standard Time on that morning, counsel for the Intervenor advised the undersigned counsel via email that the Graves County Public Library had announced its closure for that date due to inclement weather. At 9:17 a.m., the undersigned counsel forwarded the e-mail message to the Siting Board’s staff with a courtesy copy to the Intervenor’s counsel. At 9:26 a.m., the Siting Board’s Executive Director advised the parties’ attorneys that they planned to hold the meeting virtually. The Siting Board and its Staff acted quickly and arranged for the meeting to be held virtually. A formal order was later entered in the record of the case. Intervenor thereafter filed a motion requesting that the meeting be rescheduled.

It appears that the Siting Board and its Staff's action in providing notice was successful. At least one member of the public received notice of the virtual meeting.¹

Banjo Creek Solar acknowledges the value of public input on administrative hearings. As the Siting Board Chairman noted during the virtual meeting, there are additional opportunities for public comments, including prior to the evidentiary hearing and in writing submitted to the Public Service Commission. Banjo Creek Solar believes these additional opportunities are sufficient, but it will not object if the Siting Board determines that another public meeting should be held in Graves County. Banjo Creek Solar, however, seeks to respond to statements made in the Intervenor's motion.

Contrary to the Intervenor's position, KRS 278.712(1) does not require a local public hearing. It states, in part: "The board may convene a local public hearing upon receipt of a request by not less than three (3) interested persons that reside in a county or municipal corporation in which the facility is proposed to be constructed to consider the application for a construction certificate." KRS 278.712(1) (emphasis added). Under Kentucky law, the General Assembly's use of the word "may" denotes an action that is permissive and is not mandatory. *See* KRS 446.010. This demonstrates that the Siting Board is not required to hold a local public meeting. The Chairman has previously mentioned this fact at prior local public hearings.²

In addition, Banjo Creek does not believe that the Siting Board violated the Open Meetings Act. Initially, it must be noted that it is not clear that these local public meetings fall under the Open Records Act. The Open Meetings Act applies when a quorum of public agency members

¹ *See* Public Comment of Deborah Smith dated January 16, 2024 6:51PM, filed in the case record on January 17, 2024.

² *See Russellville Solar LLC*, Case No. 2021-00235 at VR:6/15/22 at timestamp [0:42](#) ("Pursuant to the question that was asked earlier, public meetings in these cases are not required. The Siting Board can choose to have them upon request of three members of the public.")

discuss public business or when an agency takes action. KRS 61.810(1). Although there may have been a quorum of Siting Board members observing the virtual meeting, the Siting Board was not taking any action, nor were the Siting Board members themselves discussing various alternatives to a given issue. *See Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998).³

Even if the meeting fell within the purview of the Open Meetings Act, the Siting Board properly noticed the meeting due to the emergency, which is permitted by KRS 61.823 and KRS 61.826. Although the Intervenor's question whether there was an emergency, the Office of the Attorney General has signaled its approval of an emergency when a state of emergency has been declared. *See Ky. Op. Atty. Gen. 22-OMD-017*, 2022 WL 302560 (Jan. 27, 2022). The Governor declared a State of Emergency through Executive Order 2024-034.⁴ The Graves County Public Library also closed that day because of the weather. As courts have indicated, public health must be a priority, even when considering issues under the Open Meetings Act. *See Campbell Cnty. Bd. of Educ. v. Moellman*, No. 2022-CA-1033-MR, 2023 WL 5491580, at *4 (Ky. App. Aug. 25, 2023) (“The public health was regulated through the competing executive and court orders and legislative actions. For this reason, we excuse, as did the circuit court, any issue with the order provision of

³ The intent of the Open Meetings Act is to ensure members of the public can observe certain deliberations of public agencies. Because the local public meeting was not intended for Siting Board deliberations, which would otherwise be exempt under KRS 61.810(1)(j), it is not clear that this type of meeting is intended to fall within the Open Meetings Act. *See Campbell Cnty. Bd. of Educ. v. Moellman*, No. 2022-CA-1033-MR, 2023 WL 5491580, at *7 (Ky. App. Aug. 25, 2023) (“KRS 61.826(2) does not require public agencies to ensure that members of the public are seen or heard. The Attorney General has repeatedly explained that the Act does not require public agencies to permit public comments during meetings. ‘The Open Meetings Act does not guarantee the right for the public to be able to comment.’ While a live-stream option would not have allowed Moellman to comment, it would have allowed him to view the meeting, which is what the law requires.”)(internal citations omitted). Pursuant to RAP 40(H), Banjo Creek notes that a motion for discretionary review related to this decision has been filed, and the opinion is therefore not final.

⁴ Executive Order 2024-034, available at https://governor.ky.gov/attachments/20240114_Executive-Order_2024-034_State-of-Emergency_Continuing-Weather-Event.pdf.

the open meetings law for those meetings during which a public health provision governed.”⁵ The Siting Board’s actions demonstrated a commitment to protecting public health.

Banjo Creek reiterates that it will not object if the Siting Board determines that another public meeting should be held in Graves County for the purpose of receiving public comment. It simply disagrees with the Intervenor’s argument that the Siting Board violated KRS Chapters 278 or 61 when the Siting Board changed the in-person meeting to a virtual meeting due to inclement weather.

Respectfully submitted,



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⁵ See *supra* note 3.