

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

In the Matter of:

In the Matter of the Application of Lost City)	
Renewables LLC for a Certificate of Construction for)	
an Approximately 250 Megawatt Merchant Electric)	Case No. 2024-00406
Solar Generating Facility in Muhlenberg County,)	
Kentucky Pursuant to KRS 278.700 and 807 KAR)	
5:110		

**LOST CITY RENEWABLES LLC’S RESPONSE TO
INTERVENORS’ MOTION FOR REHEARING**

Lost City Renewables LLC (“Lost City”), by counsel, provides this Response to the Intervenor’s¹ Motion for Rehearing.

I. Background

On July 28, 2025, the Siting Board the Kentucky State Board on Electric Generation and Transmission Siting (“Siting Board”) issued a construction certificate to Lost City to construct a proposed 250-megawatt solar merchant electric generating facility in Muhlenberg County. The Siting Board required Lost City to comply with 34 mitigation measures, including a 1,000-foot setback from solar panels to residential neighborhoods, which is a greater distance than any other setback ordered by the Siting Board that was not requested by the solar developer. On August 20, 2025, the Intervenor’s filed a Motion for Rehearing, in which they raise issues about Siting Board

¹ The Intervenor’s in this matter are Brad Reed, Sherrie Reed, Aaron Cobb, Amy Cobb, Shelia Richards, Frank Richards, Jay McElwain, Sudith Whitney, Tim Johnson, Lisa Johnson, Daniel Elitzer, Keira Elitzer, Mike Saye, Brian Cottongim, Danny Mitchell, Dana Mitchell, Rhonda Wood, and Stephen Wood.

members participating in the decision and about the Siting Board's analysis regarding setbacks. Lost City addresses these issues below.

II. Siting Board members' participation in the decision-making process.

In the Motion for Rehearing, the Intervenors raise issues regarding participation of the Siting Board's ad hoc members in this case. Because Lost City is not privy to the Siting Board's decision-making process, Lost City cannot take a fully informed position on this issue. Nevertheless, there are three points worth making. First, the Intervenors failed to submit evidentiary support for its position, which leads to questions as to whether the Intervenors had ex parte communications with the Siting Board's ad hoc member. Although the Motion for Rehearing references an email, it was not attached to the Intervenors' filing, and as such, it is not known to whom the email is addressed. Second, Lost City reiterates its belief that Judge/Executive McGehee should have recused himself. The arguments presented in the Motion to Recuse filed on June 12, 2025, are adopted herein. Third, even if the two ad hoc members of the Siting Board voted to deny the construction certificate, the other five members of the Siting Board would still carry a 5-2 majority supporting the decision.

III. Substantial evidence supports the Siting Board's decision to grant a deviation from the applicable default setback set forth in KRS 278.704 and KRS 278.710(1)(g).

Without citing any guiding legal standard, the Intervenors attempt to argue that there was no factual basis for the Siting Board to grant a deviation from the applicable default setback set forth in KRS 278.704 and KRS 278.710(1)(g). The lack of legal authority in the Motion for Rehearing is glaring and leaves the Siting Board in the untenable position of guessing what standard the Intervenors believe should be applied.

KRS 278.712 indicates that a Siting Board decision could be vacated if the ruling is arbitrary, capricious, or otherwise unlawful or unreasonable. An administrative agency decision is considered “unlawful” if it violates a statute or constitutional provision. *Nat’l Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503 (Ky. App. 1990). But the Intervenor’s argument on this issue does not raise questions of whether the Siting Board’s decision violates a statute or constitutional provision. An administrative agency decision is arbitrary, capricious, or unreasonable if the decision is not supported by substantial evidence. *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998). Substantial evidence has been defined as, “evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people.” *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky. App 2003). Arbitrariness is determined by whether the agency acted within the scope of its granted powers, whether there was procedural due process, and whether the decision is supported by substantial evidence. *Id.* at 458. Additionally, an agency’s decision must be upheld if there is substantial evidence, even if there is conflicting evidence in the record. *Southern Bluegrass Racing, LLC v. Kentucky Horse Racing Auth.*, 136 S.W.3d 49, 52 (Ky App 2004) (citing *American Beauty Homes Corp. v. Louisville and Jefferson Cnty. Planning and Zoning Comm’n*, 379 S.W.2d 450 (Ky. 1964)).

Simply put, there is substantial evidence in the record of this case supporting the Siting Board’s decision to grant Lost City a setback deviation.² KRS 278.704(4) requires the Siting Board to consider “the goals” of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216, 278.218, and

² Although Lost City acknowledges that there is substantial evidence to grant a deviation to the default setbacks, Lost City respectfully disagrees that the deviation to setback should be 1,000 feet and that the setback to a neighborhood not be based on a parcel’s boundaries. Nevertheless, Lost City is willing to accept the Siting Board’s ordered mitigation measures in this case at this time.

278.700 to 278.716 when considering a setback deviation for proposed electric generating facilities at a distance closer than 2,000 feet from any residential neighborhood.³

The Siting Board began its analysis of setbacks in this matter with a review of the statutory scheme referenced in KRS 278.704(4). The Siting Board explained that KRS 278.010, KRS 278.212, and KRS 278.218 support but do not articulate the “goals” the legislature intended the Siting Board to consider when granting a deviation.⁴ KRS 278.010 provides the “general definitions” for KRS Chapter 278,⁵ while KRS 278.212 relates to the allocation of costs for transmission upgrades for interconnections and KRS 278.218 details transfers in utility property and related setback requirements.⁶ Importantly, and most relevantly, the Siting Board determined, “the goals of KRS 224.10-280, KRS 278.216, and KRS 278.700 to KRS 278.716, which, as discussed above, look at the effects of the generation on nearby properties and the environmental effect of the generation”⁷

The Siting Board specifically addressed these “goals” as it assessed the evidence in the record relating to any potential effects of generation on nearby properties and the environment. First, the Siting Board reviewed potential environmental impact. Lost City’s project will contain a “25-foot buffer around jurisdictional streams and wetlands where trees would not be cleared.”⁸ Lost City’s Landscape Plan, which the Siting Board evaluated, adds approximately 26 acres of trees and bushes, consisting of over 2,000 trees and nearly 5,000 bushes, as part of a vegetative buffer between the project and neighboring properties.⁹ Further, the Siting Board noted that Lost City will “implement Best Management Practices (BMPs), including vegetative filter strips,

³ KRS 278.704(2).

⁴ Final Order at 27 (KSB July 28, 2025).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 5-6 (citing RFI 1-18).

⁹ *Id.*

sediment traps and basins, silt fence, rock check dams, and temporary and permanent vegetation to combat possible erosion during construction.”¹⁰ The Siting Board then analyzed the project’s impact on neighboring properties from evidence in the record. The Siting Board concluded:

[the] facility will not have any significant adverse impact on nearby property values so long as proper mitigation measures are implemented. The characteristics of the solar facility’s operations are passive, and the facility will be temporary, with the land returned to its natural state after a few decades of operation. Pursuant to the case record, the facility does not produce any air, noise, waste, or water pollution nor does it create any traffic issues during operation.¹¹

Based on the “the totality of the mitigation measures proposed by Lost City Renewables, the nature of the surrounding property, and the mitigation measures the Siting Board has imposed in Appendix A,”¹² the Siting Board determined that the Lost City project satisfies the statutory goals for granting a project setback deviation as outlined in identified in KRS 224.10-280, KRS 278.216, and KRS 278.700 to KRS 278.716.

The Siting Board considered the 49 mitigation measures Lost City proposed to the Siting Board with its application. Nineteen of Lost City’s proposed mitigation measures specifically addressed any potential impact to the environment, scenic surroundings, and neighboring properties.¹³ Additionally, Elliot Engineering (“Elliot”) recommended mitigation measures relating to “site development, compatibility with scenic surroundings, fugitive dust plans, and notice and communication with adjacent landowners.”¹⁴ The Siting Board, upon consideration of the mitigation measures both Lost City and Elliot proposed, imposed 34 mitigation measures on the project. The Siting Board’s mitigation measures contained 14 measures to alleviate potential

¹⁰ *Id.* at 6-7 (citing Response to KSB RFI 1-29).

¹¹ *Id.* at 10-11.

¹² *Id.* at 28.

¹³ Site Assessment Report at 10-15 (proposed measures 10, 11, 12, 13, 14, 15, 19, 20, 30, 31, 32, 36, 40, 43, 44, 45, 46, 47, 49).

¹⁴ Final Order at 4 (citing Elliot Engineering Site Assessment Review at 50).

concerns relating to the environment or neighboring properties.¹⁵ The combination of all mitigation measures the Siting Board imposed mitigates any potential adverse effects on the environment or neighboring properties and satisfies the criteria in KRS 278.704(4) for a setback deviation.¹⁶

Additionally, the Siting Board considered the totality of the record when reviewing Lost City's application and granting a setback deviation. The Siting Board recounted its analysis in this application in a 31-page order with two appendices.¹⁷ As it relates to the environment or neighboring property impacts, the Siting Board made careful reference in its Order to Lost City's Site Assessment Report,¹⁸ Landscape Plan,¹⁹ responses to requests for information,²⁰ Property Value Impact Analysis,²¹ and Lost City's proposed mitigation measures,²² testimony from the June 13, 2025 hearing,²³ and the Consultant's Report²⁴ in its analysis.

Lost City put forth ample evidence in the record that it designed the project to minimize any adverse impact the project could have on neighboring properties. Based on public comments, Lost City revised preliminary designs to increase setbacks to the nearest property with a residence to 339 feet and greater to other neighboring properties with a residence to mitigate potential impacts to the residence owner,²⁵ and it increased the distance from the project substation from approximately 600 feet from any adjacent residence.²⁶ Lost City has modified the project's design to address any potential concerns that neighboring property owners may have about the project.²⁷

¹⁵ Final Order, Appendix A p. 1-9 (measures 1, 2, 3, 8, 9, 10, 11, 12, 16, 28, 31, 32, 33, 34).

¹⁶ Final Order at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 4-10.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 5-8.

²¹ *Id.* at 10; Site Assessment Report, Appendix A.

²² *Id.* at 3-15.

²³ *Id.* at 2.

²⁴ *Id.* at 28; Elliot Engineering Site Assessment Review.

²⁵ Site Assessment Report, Appendix B. Page 10 of Appendix B shows the closest residence to be 339.59 feet to the nearest panel.

²⁶ VR 6/13/2025, 4:41:57.

²⁷ Response to KSB RFI 1-54.

Further, as the record reflects, Lost City will minimize the following potential sources of harm to the environment or neighboring landowners: limit the vegetative clearing that will occur;²⁸ plant approximately 26 acres of trees and bushes to provide vegetative buffer between the project and neighboring properties,²⁹ including a double planting of vegetation, approximately 40 feet in width, where project boundaries abut a residence;³⁰ implement setbacks from jurisdictional streams, wetlands, and the 100-year flood plain;³¹ and use of stormwater best management practices during construction to protect from any weather impacts.³²

The setback deviation of 1,000 feet from a residential neighborhood near Lost City is more burdensome than general Siting Board precedent. The Siting Board has granted deviations of less than 1,000-foot setbacks to residential neighborhoods 11 times.³³ In fact, in *Mt. Olive Creek Solar, LLC*, the Siting Board granted a two setback deviations of 150 feet and 160 feet from residential neighborhoods adjoining the project site,³⁴ and it has on several occasions granted setback

²⁸ Response to KSB RFI 1-18.

²⁹ Response to KSB RFI 1-18; Site Assessment Report, Appendix E.

³⁰ Response to KSB RFI 1-32; Site Assessment Report, Appendix M.

³¹ Response to KSB RFI 1-20.

³² Response to KSB RFI 1-27.

³³ *Turkey Creek Solar, LLC*, Case No. 2020-00040, Order at 4 (July 22, 2021) (300-foot setback deviation); *Flat Run Solar, LLC*, Case No. 2020-00272, Order at 1-2 (October 7, 2021) (700-foot setback deviation); *Horseshoe Bend Solar, LLC*, Case No. 2020-00190, Order at 39 (June 11, 2021) (600-foot setback deviation); *Northern Bobwhite Solar, LLC*, Case No. 2020-00208, Order at 48 (June 18, 2021) (625-foot setback deviation); *Fleming Solar, LLC*, Case No. 2020-00370, Order at 50 (November 24, 2021) (setback deviations from various neighborhoods of 362, 415, 462, and 800 feet); *Mt. Olive Creek Solar, LLC*, Case No. 2020-00226, Order at 52 (November 3, 2021) (setback deviations from various neighborhoods of 150, 160, 550, 720, 180, 1,030 feet); *Martin County Solar Project, LLC*, Case No. 2021-00029, Order at 31 (November 15, 2021) (590-foot setback deviation); *Caldwell Solar, LLC*, Case No. 2020-00244, Order at Appendix A, p. 4 (April 8, 2022) (300-foot setback deviation); *Golden Solar, LLC*, Case No. 2020-00243, Order at Appendix A, p. 4 (February 21, 2023) (300-foot setback deviation); *Thoroughbred Solar, LLC*, Case no. 2022-00115, Order at Appendix A, p. 4 (April 10, 2023) (300-foot setback deviation); *Hummingbird Energy, LLC*, Case No. 2022-00272, Order at Appendix A, p. 4 (December 13, 2023) (300-foot setback deviation).

³⁴ *Mt. Olive Creek Solar, LLC*, Case No. 2020-00226, Order at 52 (November 3, 2021).

deviations of 300 feet³⁵ – all of which are significantly less than the 1,000-foot setback deviation the Siting Board granted Lost City.

Intervenors attempt to misrepresent the Siting Board’s analysis in their Motion for Rehearing by stating that the Siting Board ignored their concerns and arguments raised at the hearing and in the Intervenors’ post-hearing briefing and did not “weigh[] all the facts.” Yet, the Intervenors’ own Motion for Rehearing notes, “Judge McGehees’s correspondence confirms his understanding of what setbacks would be imposed. He is clear he did approve the setbacks adopted by the Board.”³⁶ Based on the Intervenors’ own characterization, the Siting Board “weighed all the facts” to reach this agreement on the setback deviation.

The Intervenors fail to note that they did not put forth any evidence at any point in this matter. Despite the Intervenors’ stated purpose for participation in this application to “protect their substantial property rights and raise environmental and conservation issues that will be associated with the proposed construction . . . ,”³⁷ they failed to produce a shred of evidence in the record relating to their property rights and environmental concerns.³⁸ The Intervenors never filed any expert reports that would indicate any factual basis of opposition to the reports filed by Lost City’s experts and Elliot, the Siting Board’s consultant; and the Intervenors failed to provide a timely

³⁵ *Caldwell Solar, LLC*, Case No. 2020-00244, Order at Appendix A, p. 4 (April 8, 2022); (*Golden Solar, LLC*, Case No. 2020-00243) Order at Appendix A, p. 4 (February 21, 2023); *Thoroughbred Solar, LLC*, Case no. 2022-00115, Order at Appendix A, p. 4 (April 10, 2023); *Hummingbird Energy, LLC*, Case No. 2022-00272, Order at Appendix A, p. 4 (December 13, 2023).

³⁶ Motion for Rehearing at 2 (August 20, 2025).

³⁷ Motion to Intervene at 1 (February 20, 2025).

³⁸ Public comments were submitted to the Siting Board during the application. However, public comment is not considered evidence. *New Cingular Wireless Pcs, LLC d/b/a AT&T Mobility for Issuance of A Certificate of Pub. Convenience & Necessity to Construct A Wireless Commc'ns Facility in the Commonwealth of Kentucky in the Cnty. of Breathitt*, No. 2020-00306, 2021 WL 122952, at *1 (Jan. 8, 2021) (citing *Cellco Partnership v. Franklin Co. KY*, 553 F. Supp. 2d 838, 852 (E.D. Ky. 2008), *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 800 (6th Cir. 2012)). Evidence that a party submits, whether through documents or witness testimony, must be subject to cross-examination, and public comments are not subject to cross-examination. *New Cingular Wireless Pcs, LLC d/b/a AT&T Mobility for Issuance of A Certificate of Pub. Convenience & Necessity to Construct A Wireless Commc'ns Facility in the Commonwealth of Kentucky in the Cnty. of Grayson*, No. 2021-00398, 2023 WL 3844646, at *1 (June 1, 2023).

witness list in advance of the June 13, 2025 hearing and ultimately presented no witnesses for testimony.

The Siting Board properly considered the evidence in the record and mitigation measures when it evaluated the effects of Lost City's project on nearby properties and the environment. The setback deviation the Siting Board granted Lost City complies with all goals and requirements set forth in KRS 278.704(4). As such, Intervenor's Motion for Rehearing as it relates to the setback deviation should be denied as there is no factual or legal basis to grant a rehearing on this issue.

IV. The 1,000-foot setback from generating facility to property boundary does not apply to solar merchant electric generating facilities like Lost City.

The Intervenor's argue that the 1,000-foot setback from generating facilities to property boundaries identified in KRS 278.704(2) should apply to Lost City. But the Intervenor's erroneously interpret the clear statutory language. The 1,000-foot setback from generating facility to property boundary only applies to utilities seeking a site compatibility certificate. It does not apply to Lost City. The Intervenor's completely ignore detailed analysis on pages 2-9 in Lost City's Response Brief filed on July 3, 2025 when they maintain that "Lost City failed to consider language in KRS 278.704(2)." Lost City's Response Brief fully addresses this issue and incorporates it in response to the Motion for Rehearing.

There are numerous flaws in the Intervenor's arguments on this issue, but the most glaring one is the suggestion that "the Public Service Commission and Siting Board have not addressed this issue." To the contrary, the Public Service Commission has directly addressed this issue. It confirmed that the second sentence of KRS 278.704(2) specifically applies to utilities seeking to obtain a site compatibility certificate, stating:

Notably, the reference to site compatibility certificates required pursuant to KRS 278.216, which are only required for utilities as defined by KRS 278.010, indicates that the legislature intended for

KRS 278.704(2) to establish explicit setback requirements for utilities that must be met in order to obtain a site compatibility certificate.

Kentucky Utils. Co., Case No. 2023-00361 at 24 (Ky. PSC July 12, 2024). The Commission's holding confirms that the 1,000-foot setback in KRS 278.704(2) applies to *utilities*—not solar merchant electric generating facilities. In addition, the Siting Board would have required compliance with that provision in the dozens of cases it has previously decided if that provision applied to merchant electric generating facilities. Accordingly, the Intervenor's arguments must be rejected.

V. Conclusion

As discussed above, the Intervenor's arguments on whether a deviation from statutory setbacks should be granted and its erroneous interpretation of KRS 278.704(2) must be rejected.

Respectfully submitted,



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