

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of	)	
Hecate Energy Highland 4, LLC for	)	Case No. 20-1288-EL-BGN
A Certificate of Environmental Compatibility	)	
And Public Need.	)	

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**EVS, INC.’S PETITION TO INTERVENE AND MEMORANDUM IN SUPPORT AND  
REQUEST FOR LEAVE TO INTERVENE OUT OF TIME**

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Pursuant to R.C. 4906.08(A)(3)&(B), Ohio Admin. Code 4906-2-12, and Ohio Admin. Code 4906-2-27, EVS, Inc. (“EVS”) respectfully petitions to intervene out of time in the above-captioned proceeding. The instant matter involves the Hecate Energy Highland’s solar panel project referred to as New Market Solar I and New Market Solar II (“The Project”). McCarthy Building Companies (“McCarthy”) serves as the general contractor for the Project, and in turn hired EVS to serve as the engineer of records of the design of the solar panel system.

Ohio Revised Code 4906.08(B) authorizes the Board to grant petitions for leave to intervene out of time in extraordinary circumstances for good cause shown. Further, pursuant to Ohio Admin. Code 4906-2-12(C) the Board may grant petitions to intervene out of time in extraordinary circumstances for good cause shown provided the circumstances justify the granting of the petition and the petitioner agrees to be bound by all agreements, arrangements, and other matters previously made in the proceeding.

On September 2, 2020, Hecate submitted its Application for a Certificate of Environmental Compatibility and Public Need for Solar Powered Electric Generation Facility to be located in Highland County (*See* Application, copy attached as Exhibit A). The setback as identified in the

Application identified “in consultation with Highland County” a 100-foot setback from the middle of the roads. *Id* at p.22

Pursuant to the November 18, 2020, Entry in this proceeding, petitions to intervene were due on December 30, 2020 or 30 days following the service of the notice required by Ohio Admin. Code 4906-3-09, whichever was later.<sup>1</sup> On March 18, 2021, the Ohio Power Siting Board (the “Board”) issued an Opinion and Order in this proceeding granting a certificate of environmental compatibility and public need to the Applicant for the construction, operation, and maintenance of the Project (*See* Opinion, Order and Certificate, copy attached as Exhibit B).

The requirements of the Certificate identify the following notable stipulations:

- (1) The Facility shall be installed at Hecate’s proposed site as presented in the application **and modified by supplemental filings.** *OP* at ¶70(1);
- (2) Prior to the start of any construction activities, Hecate shall conduct a preconstruction conference, which shall be attended by Staff, the Applicant, and representatives of the primary contractor and all subcontractors for the Facility. The Applicant shall provide a proposed conference agenda for Staff review prior to the conference. *Id* at ¶70(1);
- (3) Before commencement of construction activities in any affected areas, Hecate shall obtain and comply with all necessary permits and authorizations. Hecate shall provide copies of such permits and authorizations to Staff within seven days prior to the applicable construction activities. Hecate shall provide a schedule of construction activities and acquisition of corresponding permits for each activity at the preconstruction conference;
- (4) Hecate shall submit one set of detailed engineering drawings and mapping of the final project design to Staff at least 30 days before the preconstruction conference. The final project design and mapping shall be provided in the form of a PDF, which Hecate shall file in the case docket, and as geographically referenced electronic data based on final engineering drawings to confirm that the final design conforms with the certificate. *Id* at ¶70(8).

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<sup>1</sup> Entry ¶32 (Nov. 18, 2020).

What is not included in the Certificate is reference to any specific setback. Rather, the Certificate identifies the intent of Hecate to “use warning signs, fencing, and locked gates to restrict access to potential hazards within the project area, and Hecate will implement setbacks between certain equipment and the public. *Id* at ¶60. All of which was subject to further submissions to the Board and approval pursuant to the Certificate. *See* Exhibit B at ¶70(1) (Certificate). Also of significance is the Highland County setback requirement for an industrial facility which is 45 feet.

On October 18, 2022, Board Staff (“Staff”) filed a Compliance Inquiry Report related to the setbacks in place at the Project which Staff alleged are not in compliance with the Certificate (See Compliance Inquiry Report, copy attached as Exhibit C).<sup>2</sup> On February 16, 2023, the Board issued an Entry directing the administrative law judge (“ALJ”) to establish a date and time for a hearing in accordance with R.C. 4906.97 and Ohio Admin. Code 4906-7-02.<sup>3</sup> The ALJ has recently issued an Entry setting a Status Conference for August 8, 2023 and an adjudicatory hearing for October 10, 2023.

EVS seeks to intervene out of time in this proceeding as a direct result of the recent Compliance Inquiry Report and subsequent order to establish a hearing which occurred almost two years after the intervention deadline, and which were not foreseeable events prior to the intervention deadline. Further, if its petition to intervene is granted, EVS agrees to be bound by all agreements, arrangements, submissions and other matters previously made in the proceeding as required by Ohio Admin. Code 4906-2-12(C).

As set forth in the attached Memorandum in Support, EVS submits that it has a direct, real, and substantial interest in the issues and matters involved in this proceeding. EVS is situated such

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<sup>2</sup> Ohio Power Siting Board Case No. 21-1288-EL-BGN Compliance Inquiry Report p. 2 (Oct. 18, 2022). (“Compliance Inquiry Report”)

<sup>3</sup> Entry, ¶14 (Feb. 16, 2023).

that the disposition of this proceeding without EVS' participation will, as a practical matter, prejudice, impair and/or impede EVS's ability to protect its interests. Additionally, EVS' interests are not adequately represented by any other party to this matter, and its participation in this proceeding will contribute to a just and expeditious resolution of the issues and questions. Further, EVS' participation will not unduly delay the proceedings or prejudice any other party.

For these reasons, and those contained in the following Memorandum in Support, EVS respectfully requests the Ohio Power Siting Board (the "Board") grant their Petition to Intervene and Request for Leave to Intervene Out of Time and grant them full rights and privileges as a party to this proceeding.

Respectfully submitted,

/s/ Robert Dove

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**MEMORANDUM IN SUPPORT**

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**I.     INTRODUCTION**

Ohio Revised Code 4903.221 states that “[a]ny other person who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding” provided the Public Utilities Commission of Ohio (“Commission”) makes certain determinations. Pursuant to R.C. 4906.12, R.C. 4903.221 likewise applies to proceedings of the Ohio Power Siting Board. EVS seeks intervention in this proceeding in which the Board has initiated a new hearing in relation to a Compliance Inquiry Report regarding alleged violations of the certificate of environmental compatibility and public necessity related to the construction of the Project.

This proceeding began in 2020 and the original intervention deadline was December 30, 2020.<sup>4</sup> On March 18, 2021, the Board issued its Opinion and Order granting a certificate in this proceeding. Over a year and a half later, on October 18, 2022, Staff issued a Compliance Inquiry Report regarding certain setbacks that were allegedly constructed out of compliance with the certificate. Specifically, the Compliance Inquiry Report indicated that several areas of the solar array were not in compliance with a purported 100’ setback requirement. On February 16, 2023,

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<sup>4</sup> Entry ¶32 (Nov. 18, 2020).

almost a full two years after the original Opinion and Order, the Board directed the ALJ to set the matter for hearing on the alleged non-compliance.<sup>5</sup> No hearing date has been set yet.

EVS is an engineering firm hired to design the facility layout for the Project. EVS worked with the Project owner's contractor and submitted designs through multiple stages which, to EVS' understanding, were then reviewed and approved by the contractor and Project owner in consultation with Board Staff. To the extent Staff now avers that the setbacks are not in compliance with the certificate, EVS, as the design firm may be pursued by the contractor, Project owner, or both for any expenses incurred should the Board agree with Staff and require a redesign in lieu of less costly and more reasonable mitigation efforts. Therefore, because the very work EVS performed is being questioned in this proceeding EVS stands to be adversely affected by the outcome of this proceeding and no other party can adequately represent EVS' interests.

Further, because the hearing on the Compliance Inquiry Report was ordered to be set almost two years after the issuance of the original Opinion and Order and over two years from the original intervention deadline, this hearing was not contemplated under the original Entry establishing a procedural schedule. Therefore, good cause and extraordinary circumstances exist to allow EVS to intervene out of time, for the purpose of participating in this new hearing on the Compliance Inquiry Report. EVS agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding, though for reasons explained below, EVS does request a brief extension to the procedural schedule due to counsel availability, however EVS affirms that should its request be denied it will still participate in the hearing if granted intervention.

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<sup>5</sup> Entry ¶14 (Feb. 16, 2023).

## **II. INTERVENTION LEGAL STANDARD**

Ohio Revised 4906.08(A)(3) states that, upon a showing of good cause, any person may petition to intervene as a party to a Board proceeding within 30 days after the date of publication of the notice required in Section 4906.06(C). Ohio Revised Code 4906.08(B) states that the Board, in extraordinary circumstances for good cause shown may grant a petition to intervene as a party to participate to a person identified in division (A)(3) that failed to file a time petition to intervene. Under Ohio Admin. Code 4906-2-12, the Board or the Administrative Law Judge (“ALJ”) assigned to the proceeding may grant petitions to intervene upon a showing of “good cause”. The Board / ALJ may consider the following factors to determine “good cause”:

- (1) The nature and extent of the prospective person’s interest.
- (2) The extent to which the person’s interest is represented by existing parties.
- (3) The person’s potential contribution to a just and expeditious resolution of the issues involved in the proceeding.
- (4) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.<sup>6</sup>

Further, Ohio Admin. Code 4906-2-12(C) states that the Board or an ALJ may grant an untimely intervention if the petitioner can demonstrate extraordinary circumstances justify granting the petition and the intervenor agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding. Significantly, “intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be

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<sup>6</sup> Ohio Admin. Code 4906-2-12((B)(1)(a)-(d).

considered.”<sup>7</sup> Finally, this Board has held that its standard “is generally construed in favor of intervention.”<sup>8</sup>

EVS satisfies these liberal intervention standards. Further, EVS can demonstrate good cause exists for its petition as well as extraordinary circumstances which justify its untimeliness. Finally, EVS agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding, and asserts that all submissions were consistent with the Application and Certificate.

**III. EVS IS ENTITLED TO INTERVENE UNDER §4903.221, APPLICABLE TO THE BOARD THROUGH R.C. 4906.12, BECAUSE EVS “MAY BE ADVERSELY AFFECTED” BY THE OUTCOME OF THIS PROCEEDING.**

EVS is entitled to intervene in this proceeding because EVS satisfies each of the four statutory factors demonstrating that the organization and EVS “may be adversely affected” by the outcome. First, the nature and extent of EVS’ interests in the proceeding are real and substantial.<sup>9</sup> EVS is an engineering firm responsible for the design of the Project as indicated in the various submissions to the Board. More precisely, EVS worked with the Project Owner and the Project Owner’s contractor (McCarthy) and submitted designs through multiple stages. It is EVS’ understanding pursuant to the Certificate, those drawings were then reviewed and approved by the contractor and Project owner in consultation with Board Staff. Again, this was all consistent with the language of the Certificate:

(1) The Facility shall be installed at Hecate’s proposed site as presented in the application **and modified by supplemental filings.**  
See Exhibit B at ¶70(1) (Certificate);

(2) Prior to the start of any construction activities, Hecate shall conduct a preconstruction conference, which shall be attended by

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<sup>7</sup> *Ohio Consumers’ Counsel v. Pub. Util Comm’n of Ohio* (2006), 111 Ohio St. 3d 384, 388, 2006 Ohio 5853, 856 N.E.2d 940.

<sup>8</sup> *In re Icebreaker Windpower Inc.*, Case No. 16-1871-EL-BGN, Entry ¶15 (May 23, 2018).

<sup>9</sup> R.C. 4903.221(B)(1); Ohio Admin. Code 4906-2-12(B)(1)(a).



Staff, the Applicant, and representatives of the primary contractor and all subcontractors for the Facility. The Applicant shall provide a proposed conference agenda for Staff review prior to the conference. *Id* at ¶70(1);

(3) Before commencement of construction activities in any affected areas, Hecate shall obtain and comply with all necessary permits and authorizations. Hecate shall provide copies of such permits and authorizations to Staff within seven days prior to the applicable construction activities. Hecate shall provide a schedule of construction activities and acquisition of corresponding permits for each activity at the preconstruction conference;

(4) Hecate shall submit one set of detailed engineering drawings and mapping of the final project design to Staff at least 30 days before the preconstruction conference. The final project design and mapping shall be provided in the form of a PDF, which Hecate shall file in the case docket, and as geographically referenced electronic data based on final engineering drawings to confirm that the final design conforms with the certificate. *Id* at ¶70(8).

At all times EVS was working within the constraints of the information provided to it, and at no time prior to construction was any issue raised regarding the setbacks utilized in the design plans. Indeed, all progress drawings submitted to the Board for approval contained a clear setback requirement of 45' consistent with Highland County setback requirements for an industrial project. To the extent Staff now avers that the setbacks are not in compliance with the Certificate, EVS, has a vested interest in addressing this alleged noncompliance and ensuring that Compliance with the Certificate was accomplished. As such, EVS stands to be adversely affected by the outcome of this proceeding and has a real and substantial interest in this proceeding.

The Board has routinely granted petitions to intervene when the petitioner can demonstrate an individual, direct interest in the stake in the outcome of the proceeding. In this case, EVS' designs are being questioned by Staff and a hearing has been set as to whether those designs comply with the certificate granted the Project by the Board. EVS has a direct interest in defending

its own designs. Conducting the compliance inquiry hearing without EVS would be extremely prejudicial to EVS' interests.

Second<sup>10</sup>, no other party can adequately represent EVS' interests in this proceeding as the designer of the project layout now being challenged by Staff. No other party to this proceeding has the same interest and incentive to defend the designs nor can any other party provide insight or explanation into why the facility came to be designed the way it is. Additionally, even if more parties seek intervention, no party can adequately understand and protect the interests of EVS.

Third<sup>11</sup>, EVS' intervention, if granted will not unduly prolong or delay the proceeding or prejudice any party. EVS interests are in participating in the hearing ordered by the Board regarding the Compliance Inquiry Report, currently set for October 10, 2023. EVS' participation under these terms will not prejudice any party.

Ohio Admin. Code 4906-2-12(C) states that intervention out of time will only be granted upon a showing of extraordinary circumstances and good cause as well as an agreement by the intervenor to be bound by the agreements, arrangements, and other matters previously made in the proceeding. The language "agreements, arrangements, and other matters previously made" is admittedly broad but it is unclear whether this language applies only to substantive matters or also to procedural matters. The July 10, 2023, ALJ Entry set the adjudicatory hearing for October 10, 2023 but also set a status conference for August 8, 2023.<sup>12</sup> The stated purpose of the status conference is "to discuss any progress made towards resolving alleged issues in the Compliance Inquiry Report, as well as discussing potential procedural issues and deadlines concerning the adjudicatory hearing."<sup>13</sup>

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<sup>10</sup> R.C. 4903.221(B)(2); Ohio Admin. Code 4906-2-12(B)(1)(b).

<sup>11</sup> R.C. 4903.221(B)(3); Ohio Admin. Code 4906-2-12(B)(1)(d).

<sup>12</sup> ALJ Entry ¶13.

<sup>13</sup> Id. ¶14.

To the extent that the date of the hearing is still flexible, which the ALJ Entry seems to indicate, and EVS can request an extension without jeopardizing its intervention, EVS intends to seek a brief extension at the status conference due to its counsel's pre-established travel plans out of the state. However, should the ALJ determine that EVS can only be allowed to intervene if it agrees to the October 10, 2023, hearing date as an "agreements, arrangements, and other matters previously made" EVS will do so.

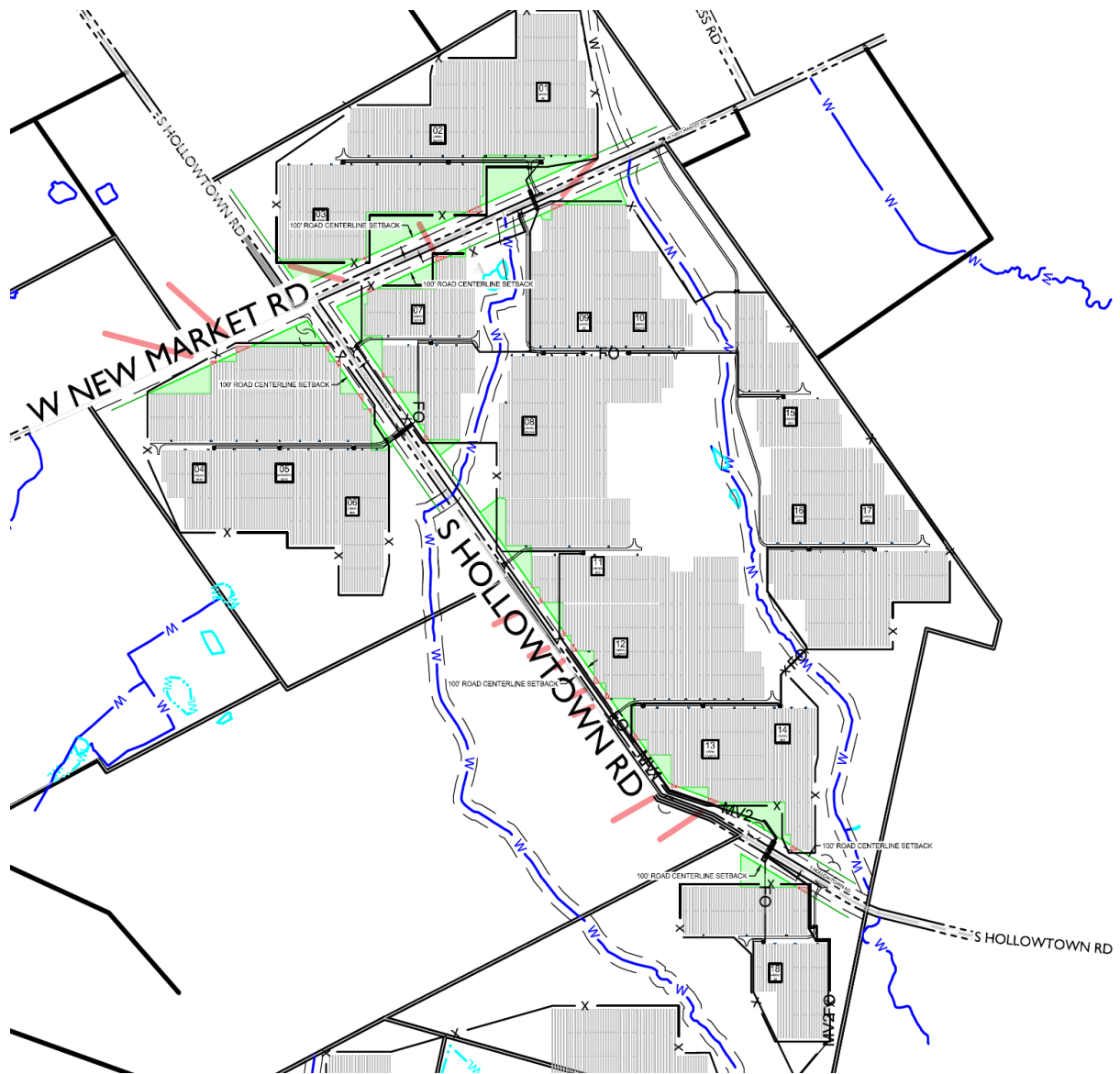
EVS would note that Ohio Admin. Code 4906-7-01(B) states that "the Board may, upon an application or motion filed by a party, waive any requirement of this chapter other than a requirement mandated by statute." Ohio Revised Code 4906.08(B) authorizes the Board to grant petitions to intervene out of time for good cause shown but does not contain any other requirements. Therefore, the requirement in Ohio Admin. Code 4906-2-12(C) to agree to be bound by prior agreements, arrangements and other matters is not mandated by statute and is waivable by the Board under Ohio Admin. Code 4906-7-01(B). EVS respectfully requests, to the extent necessary, the Board waive the requirement that EVS agree to be bound by the procedural schedule (and only the procedural schedule) established in the July 10, 2023, ALJ Entry and EVS be free to request an extension of the adjudicatory hearing if its intervention is granted.

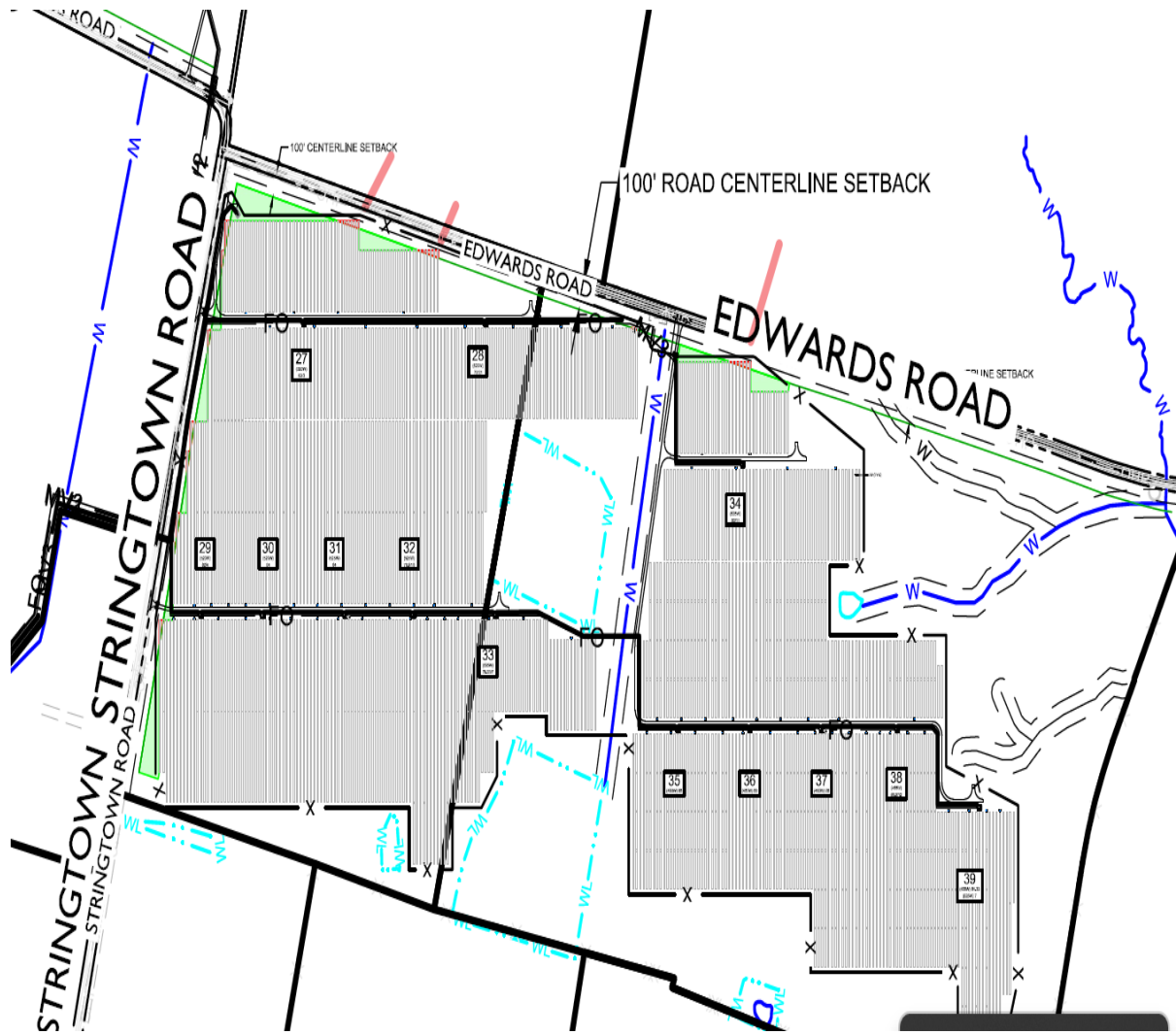
Fourth, EVS' intervention will contribute to a just and expeditious resolution of the issues in this proceeding in which EVS will significantly contribute to the full development and equitable resolution of the factual issues.<sup>14</sup> EVS has specific and unique insight on the issues in this proceeding. EVS' status as design engineers makes EVS indispensable and any resolution of these proceedings without considering EVS' interests would not be just. EVS' participation is essential to a balanced and fair disposition of the issues in this proceeding.

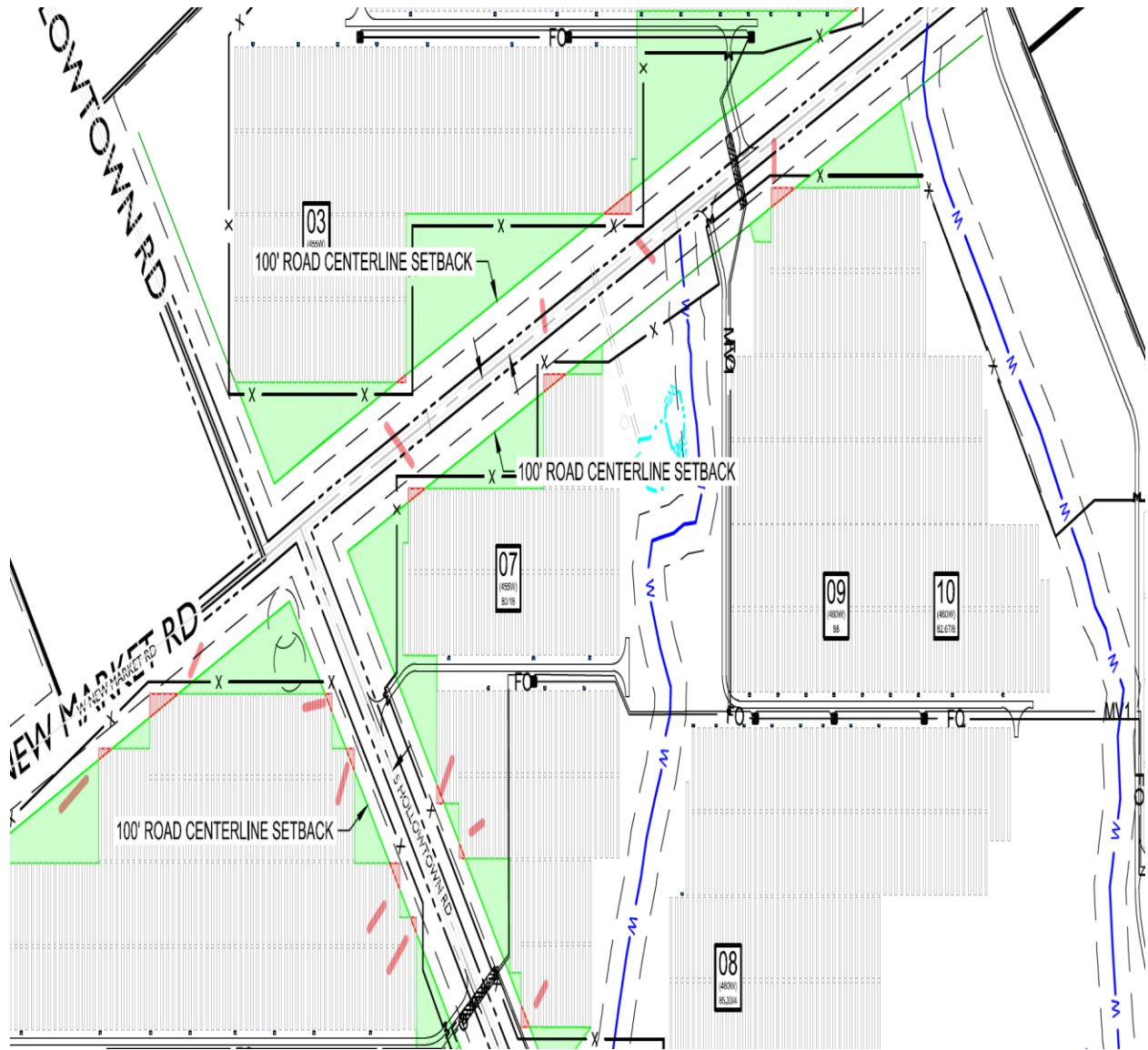
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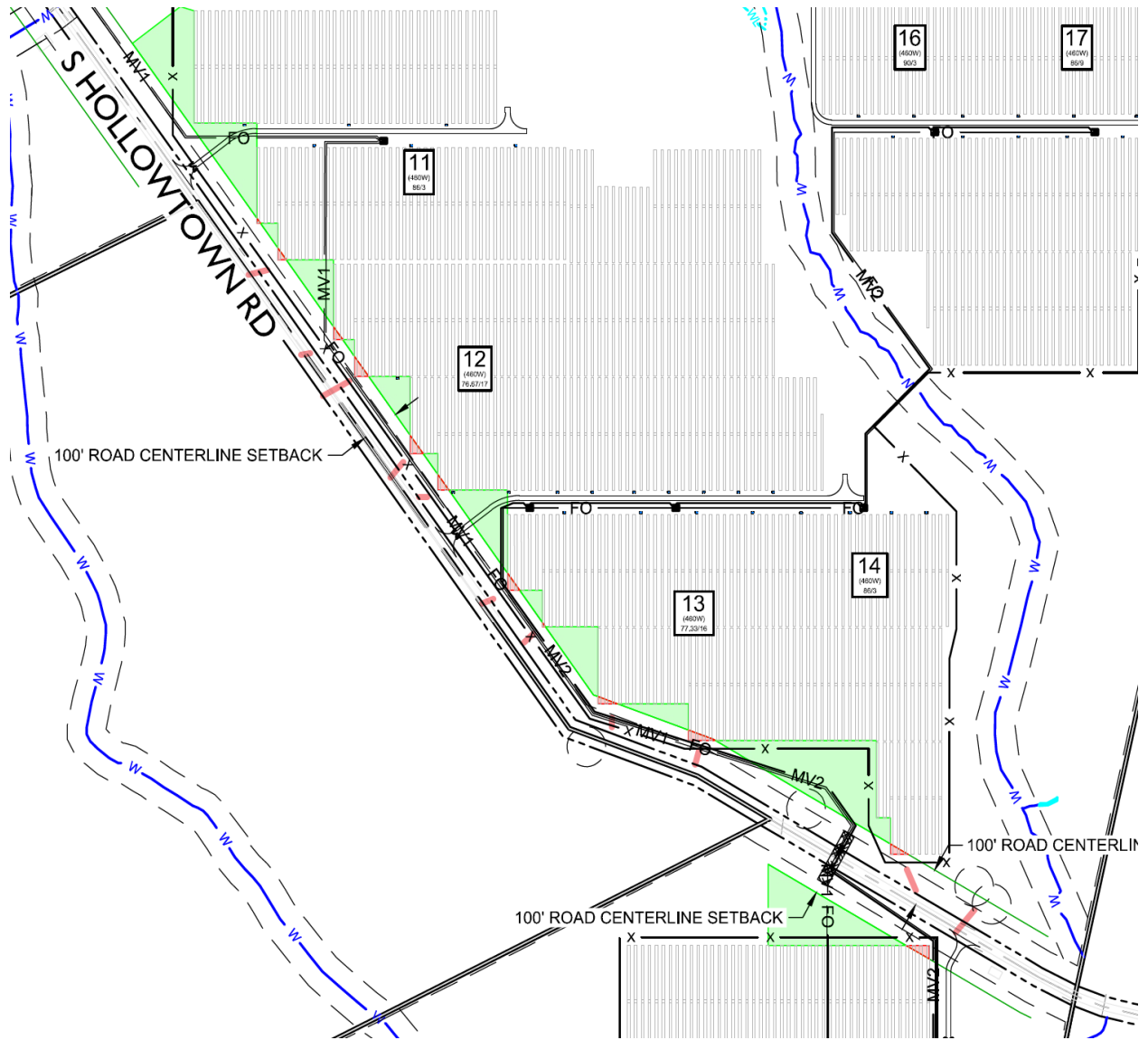
<sup>14</sup> R.C. 4903.221(B)(4); Ohio Admin. Code 4906-2-12(B)(1)(c).

Finally, it is critical for all to understand how limited the alleged encroachment is with regards to a 100' setback. The red arrows point to the limited areas at corners of the solar arrays that encroach upon a 100' setback requirement. The green shaded area represents open space significantly farther away than the 100' setback. EVS has addressed this issue above and believes that approval was given by EVS's subsequent submissions to the Board and ultimate approval and that the design complied with Highland County setback requirements. Nevertheless, the graphic analysis of the as built conditions on the site are quite striking in how limited these purported setback violations are:

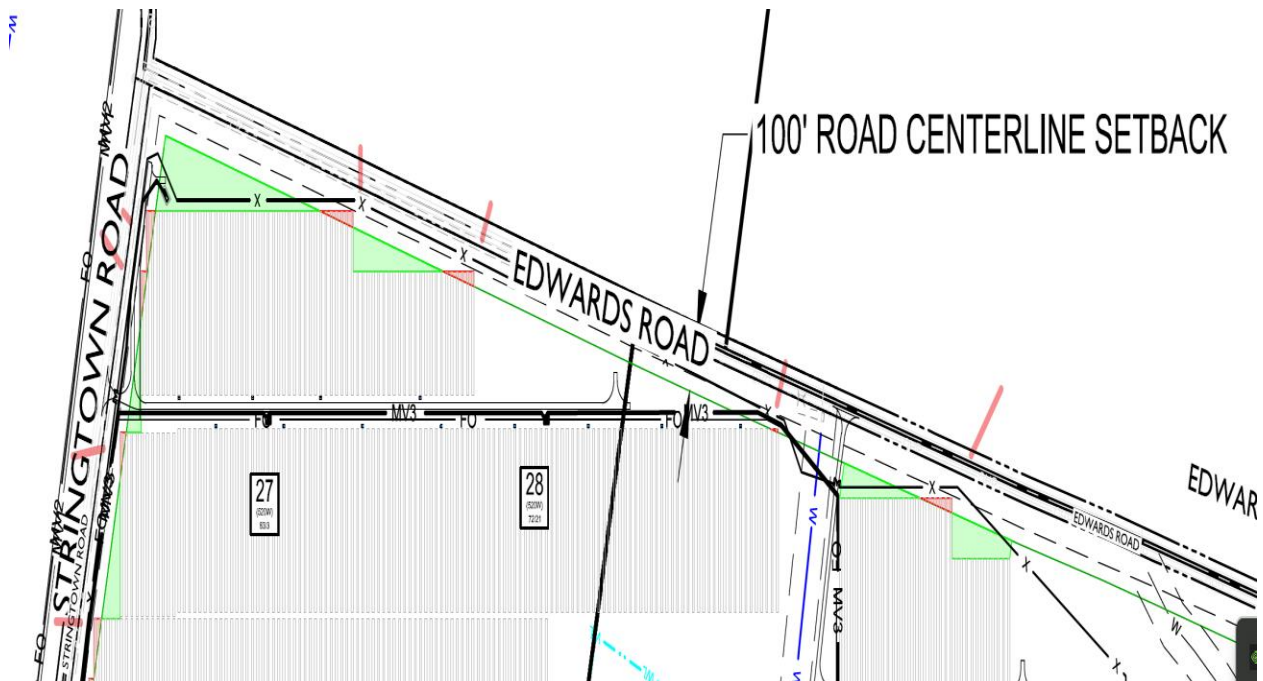
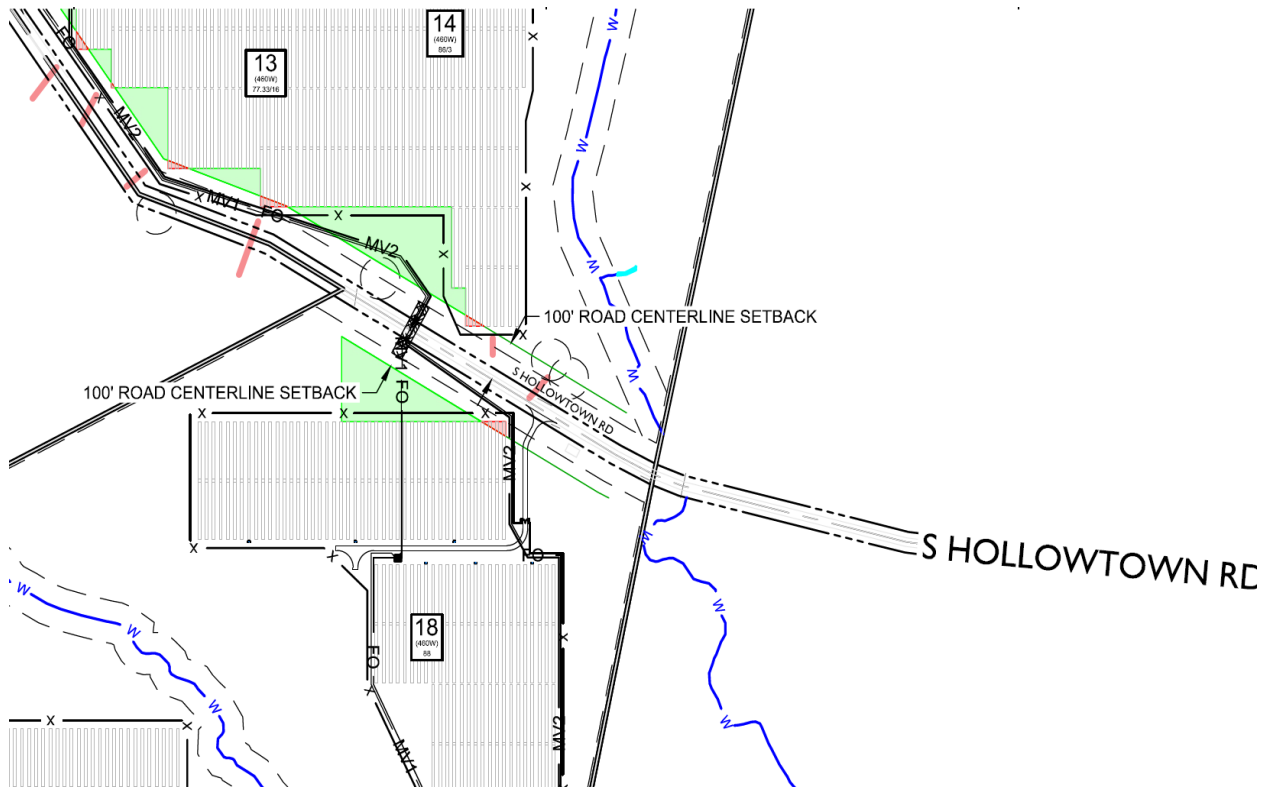












Here, the setbacks identified on the drawings as depicted by the red hatched areas are between 65 and 272 (feet) in the setback—far more than the approved drawings indicate. When factoring in the green open areas that are not remotely near 100’, the average setback is 177 feet.

**IV. BOTH GOOD CAUSE AND EXTRAORDINARY CIRCUMSTANCES EXIST TO JUSTIFY INTERVENTION OUT OF TIME**

Ohio Revised Code 4906.08(B) authorizes the Board to grant an untimely petition to intervene in extraordinary circumstances for good cause shown. The Board and the Commission has previously granted petitions to intervene out of time for a variety of circumstances.<sup>15</sup> The Commission granted intervention to numerous parties in a case procedurally similar to this proceeding.<sup>16</sup> In *Ohio Edison*, numerous parties sought to intervene in a proceeding two years after the intervention deadline had passed because the Commission initiated a new investigation within the proceeding not previously contemplated by under the original application.<sup>17</sup> The Commission found that all the interventions should be granted because the expansion of time considered under the new investigation, time periods that occurred after the original intervention deadline, constituted extraordinary circumstances.

The rules governing intervening out of time for the Commission and the Board are substantially similar, bordering identical. The circumstances in this proceeding, in which a new hearing has been set regarding the design and construction of the Project, factual issues which

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<sup>15</sup> See, e.g., *In the Matter of the Application of Seneca Wind*, Case No. 18-488-EL-BGN, Entry at ¶34 (March 27, 2019)(granting Seneca County Commissioners intervention twelve days after the deadline to intervene.); *Columbus S. Power*, Case No. 09-872-EL-UNC, Entry at ¶14 (Dec. 1, 2010)(granting Kroger intervention after the conclusion of the evidentiary hearing); *Re Ohio Power Co.*, Case No. 15-507-EL-EDI, Opinion and Order at 10 (Sept. 27, 2017) (allowing motions to intervene that were seven days late to be granted); *In the Matter of Columbus S. Power*, Case No. 08-917-ELSSO, Entry at Finding 4 (Oct. 29, 2008) (allowing late intervention (over one month late) for EnerNOC and AICUO ); *In the Matter of the Application of Ohio Power Co.*, Case No. 11-346-EL-SSO, Entry (July 8, 2011) (permitting late interventions (one week to 2 months late) for Dominion Retail, ELPC, OEC, Ormet and EnerNOC); *In the Matter of DP&L*, Case No. 89-105-EL-EFC, Entry (Dec. 28, 1989)(granting Montgomery County Board of Commissioners intervention one month after hearing had concluded and two weeks after briefs had been filed).

<sup>16</sup> *In the Matter of the Review of the Ohio Edison Co.*, Case No. 17-974-EL-UNC, Entry at ¶16 (May 18, 2021).

<sup>17</sup> Id. at ¶15.

could not have occurred by the original intervention deadline when no certificate had been issued, are like those in the *Ohio Edison* case. The new hearing on a new factual basis that did not exist prior to the original intervention deadline in this proceeding constitutes extraordinary circumstances which warrant the Board allow potential parties to intervene out of time to protect their interests. Therefore, EVS respectfully submits that good cause exists to allow EVS to intervene out of time and no party will be prejudiced by EVS' intervention.

## V. CONCLUSION

This Board sits as the governing body over energy Ohio, with the mission to “support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens, promoting the state's economic interests, and protecting the environment and land use.” There is nothing about the current as designed setback that negatively impacts any part of this Board's mission statement. To the contrary, photographs of the areas in question clearly indicate that any setback of less than 100' is benign and unimpactful.

For the foregoing reasons, EVS respectfully requests that its Petition to Intervene and Request for Leave to Intervene Out of Time be granted, and EVS be authorized to participate as a full party to this proceeding.

/s/Robert Dove  
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**Attorney for EVS Inc.**

**CERTIFICATE OF SERVICE**

I certify that The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case.

/s/ Robert Dove  
Robert Dove

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**in**

**Case No(s). 20-1288-EL-BGN**

Summary: Text Petition to Intervene and Memorandum in Support and Request for  
Leave to Intervene Out of Time electronically filed by Mr. Robert Dove on behalf of  
EVS, Inc. .