

Andy Beshear  
Governor

Rebecca W. Goodman  
Secretary  
Energy and Environment Cabinet



Commonwealth of Kentucky  
**Public Service Commission**  
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Frankfort, Kentucky 40602-0615  
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Kent A. Chandler  
Chairman

Angie Hatton  
Vice Chairman

Mary Pat Regan  
Commissioner

July 21, 2023

**Staff Opinion 2023-003**

*Sent electronically to brittany@hloky.com*

Brittany Hayes Koenig  
Honaker Law Office  
1795 Alysheba Way  
Ste. 6202  
Lexington KY 40509

Ms. Hayes Koenig,

Commission Staff acknowledges receipt on July 5, 2023, of your letter in which you request an opinion on behalf of East Kentucky Power Cooperative, Inc. (EKPC) whether the development of a 500 kilowatt (kW) solar project for an industrial customer is an extension of an existing facility in the ordinary course of business that does not require a Certificate of Public Convenience and Necessity (CPCN).

The facts, as you present them, are as follows. You stated that the project involves the construction of a 500 kW solar farm on Star Hill Farms d/b/a Maker's Mark (Star Hills Farm) property on land leased to EKPC. You stated that the project will be interconnected to EKPC's Owner-Member, Inter-County Energy's, distribution system and will serve the Star Hills Farm facility only. You stated that the solar farm will be designed to offset Star Hills Farm's hospitality load, including a visitor center, restaurant, gift shop, tasting room by the lake, and a toll house, in the ordinary course of business. You stated that the solar farm will be owned, operated, and maintained by EKPC for a 25-year contract period. You stated that, initially, EKPC will finance all project expenditures through funds available from normal operations or funds available through its unsecured credit facility. You stated that EKPC intends to seek additional credits and anticipated grant funding available from the Inflation Reduction Act to reduce the total cost of the project. You stated that, once completed, any short-term debt associated with the project will be refinanced using long-term debt available under EKPC's Trust Indenture from the Rural Utilities Service or other lenders. You stated that the total estimated cost is projected to be \$2,250,000 and provided a general arrangement drawing.

You stated that the cost of the project is minimal in comparison to EKPC's overall capitalization. You stated that EKPC concluded that the Star Hill Farms solar project is an ordinary course extension of EKPC's existing system under both KRS 278.020 and 807 KAR 5:001, Section 15(3). You stated that the project will not create wasteful duplication of plant, equipment, property, or facilities, and will not conflict with existing jurisdictional utilities.

You stated that the project will not involve sufficient capital outlay to materially affect the existing financial condition of EKPC. You stated that EKPC will seek cost recovery for the project through funds obtained through the Inflation Reduction Act, and that the project would not result in an increased charges to its customers.

You provided information regarding other solar projects that the Commission determined to be extensions in the ordinary course of business.

You referenced a January 13, 2016 Order in Case No. 2015-00284<sup>1</sup> in which the Commission found that EKPC should seek a Staff Opinion and not a declaratory order in cases where projects were similar to projects that the Commission determined were extensions in the ordinary course of business. You stated that, out of an abundance of caution, EKPC requested a Staff Opinion instead of a declaratory order in this issue.

Your question is whether the project, as described in your letter, is an ordinary extension in the usual course of business under KRS 278.020 and 807 KAR 5:001, Section 15(3).

KRS 278.020(1)(a) requires a utility to obtain a CPCN from the Commission prior to beginning the construction of any plant, equipment, property, or facility for furnishing utility service to the public. KRS 278.020(1)(a)(2) provides that ordinary extensions of existing systems in the usual course of business are exempt from the requirement to obtain a CPCN from the Commission prior to beginning construction of utility plant for furnishing utility service to the public. Commission regulation 807 KAR 5:001, Section 15(3) provides that a CPCN is not required for extensions in the ordinary course of business that: (1) do not create a wasteful duplication of plant or facilities, or conflict with existing certificates or service provided by jurisdictional utilities; and (2) do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

Commission Staff acknowledges that, in an Order issued seven years ago, the Commission stated that:

[F]iling an application for a declaratory order that no CPCN is required pursuant to KRS 278.020(1) can sometimes be a lengthy and resource intense process, and EKPC's filing of

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<sup>1</sup> Case No. 2015-00284, *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Expansion of the Bavarian Landfill Gas to Energy Project to be an Ordinary Extension of Existing Systems in the Usual Course of Business* (Ky. P.S.C. Jan. 13, 2016).

previous [Landfill Gas to Energy (LFGTE)] projects has allowed us to sharpen our focus on specific issues relevant to those projects. Thus, for future LFGTE projects, the Commission encourages EKPC to file a request for a Staff legal opinion rather than filing an application for a declaratory order.

Commission Staff notes that the solar farm is not an LFGTE project. Based upon the facts presented, EKPC's proposed solar farm appears to be more similar to facts presented in Case Nos. 2017-00155 and 2020-00385, in which the Commission found that solar facilities between 2 and 3 MW were ordinary extensions of existing systems in the usual course of business, and thus did not require a CPCN.<sup>2</sup> In those cases, the Commission found that the size and cost of the solar facilities would not result in a capital outlay that would materially affect the utility's financial condition or result in a rate increase. Because the solar facilities would be used to serve the utility's current customer or service territory, the Commission found that the solar facilities would not conflict with existing certificates or service of other utilities.

Commission Staff further notes that a Staff Advisory Opinion is not binding upon the Commission and cannot be cited as precedent in any future matters. Consistent with Kentucky Bar Association Ethics Opinion KBA E-445 (issued March 16, 2018), Commission Staff may provide generalized information regarding the Commission's procedures, rules, and regulations, and cannot provide legal advice or legal conclusions. Finally, the Commission speaks through its Orders after weighing the evidence of record. For these reasons, and because your request is for statutory interpretation, Commission Staff is of the opinion that a Staff Advisory Opinion is not the appropriate forum to obtain binding confirmation regarding the Commission's interpretation of the meaning and scope of KRS 278.020 and 807 KAR 5:001, Section 15(3) as applied to the proposed project.

Commission Staff is of the opinion that, to obtain a binding decision regarding the proposed project by the Commission, EKPC should file an application for a declaratory order in accordance with 807 KAR 5:001, Section 19, regarding the statutory interpretation and application of KRS 278.020 and 807 KAR 5:001, Section 15(3) to the proposed project. Commission Staff encourages applicants for a declaratory order to state in a prominent place in the application, in bold text, if there is a date by which applicants request an Order to be issued.

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<sup>2</sup> Case No. 2020-00385, *Electronic Application of Duke Energy Kentucky, Inc. for an Order Declaring the Construction of Solar Facilities is an Ordinary Extension of Existing Systems in the Usual Course of Business* (Ky. PSC Mar. 1, 2021); Case No. 2017-00155, *Electronic Application of Duke Energy Kentucky, Inc. for an Order Declaring the Construction of Solar Facilities is an Ordinary Extension of Existing Systems in the Usual Course of Business* (Ky. PSC July 10, 2017).

July 21, 2023  
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This opinion is advisory in nature and not binding on the Commission should the issues addressed in this Staff Advisory Opinion be formally presented for Commission resolution. Questions concerning this opinion should be directed to Nancy J. Vinsel, General Counsel, at 502-782-2582, or [nancy.vinsel@ky.gov](mailto:nancy.vinsel@ky.gov).

Sincerely,

A handwritten signature in blue ink that reads "Nancy Vinsel for". The signature is written in a cursive, flowing style.

Linda Bridwell, PE  
Executive Director

Attachment: Request for Staff Advisory Opinion

July 5, 2023

*VIA Email to PSCED@ky.gov*

Ms. Linda C. Bridwell, P.E.  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40602

**RECEIVED**

**JUL 05 2023**

**PUBLIC SERVICE  
COMMISSION**

Re: *Request for Staff Advisory Opinion*

Dear Ms. Bridwell:

On behalf of East Kentucky Power Cooperative, Inc. (“EKPC”), please accept this letter as a request for a formal written staff advisory opinion as to whether the development of a 500 kW solar project for an industrial customer, Star Hill Farms d/b/a Maker’s Mark (Star Hill Farms), may be properly considered an extension of an existing facility in the ordinary course of business which does not require a separate Certificate of Public Convenience and Necessity (“CPCN”).

As background for this request, EKPC is a not-for-profit generation and transmission rural electric cooperative corporation, formed under KRS Chapter 279, with its headquarters in Winchester, Kentucky. EKPC provides wholesale electricity to its sixteen Owner-Member Cooperatives, which in turn serve approximately 525,000 Kentucky homes, farms, and commercial and industrial customers in eighty-seven (87) Kentucky counties.

The project at issue involves the construction of a 500 kW Solar Farm on Star Hill Farms property on land leased to EKPC. The project will be interconnected to the Owner-Member, Inter-County Energy’s, Distribution system and will only serve the Maker’s Mark facility. The solar farm will be designed to offset the hospitality load (including the visitor center, restaurant, gift shop, tasting room by the lake, and the toll house) in the ordinary course of business. The solar farm will be owned, operated, and maintained by EKPC for the twenty-five (25) year contract period. Initially, EKPC will finance all project expenditures through funds available from normal operations or funds available through its unsecured Credit Facility. Furthermore, EKPC intends to seek additional credits and anticipated grant funding available from the Inflation Reduction Act to reduce the total cost of the project. Once completed, any short-term debt associated with the project will be refinanced using long-term debt available under EKPC’s Trust Indenture from the Rural

Utilities Service or other lenders. The total estimated cost is projected to be \$2,250,000. A general arrangement drawing is attached.

The cost of the project is minimal in comparison to EKPC's overall capitalization. EKPC believes the Star Hill Farms solar project to be an ordinary course extension of its existing system under both KRS 278.020 and 807 KAR 5:001, Section 15(3). The project will not create wasteful duplication of plant, equipment, property or facilities. Neither will it conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the Commission that are in the general or contiguous area in which EKPC renders service. The project will not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved. EKPC will seek cost recovery for the project through funds obtained through the Inflation Reduction Act, the project would not result in an increased charges to its customers.

In its March 30, 2017 Order, the Commission found that seven similar solar projects proposed by Big Rivers Electric Corporation ("Big Rivers") were projects commenced in the ordinary course of business.<sup>1</sup> Similarly, in its January 13, 2016 Order,<sup>2</sup> the Commission found that that EKPC should seek a Staff Opinion preferably over a declaratory order in cases where projects were similar to those found to be extensions of existing systems in the ordinary course of business. The Commission's January 13, 2016 Order examined the issue in terms of land fill gas-to-energy facilities, however the projects are comparable to the solar facilities discussed as EKPC believes that the projects are relatively small in size and capacity, and extensions to existing facilities that will be financed by means that will not materially impact EKPC's financial condition or customer rates. Out of an abundance of caution, EKPC seeks confirmation that the Commission's policy with regard to construction of low-capacity solar facilities has not changed and that the interpretation of Kentucky law evidenced by both EKPC's course of conduct and the Commission's Order in Case No. 2016-0409 is correct. EKPC believes that a separate CPCN is not needed for the Star Hill Farms solar project. If Staff could confirm or clarify EKPC's understanding and interpretation of the applicable authorities, it would be much appreciated.

Should you have any questions or require additional information, please do not hesitate to contact me.

Very truly yours,



Brittany Hayes Koenig

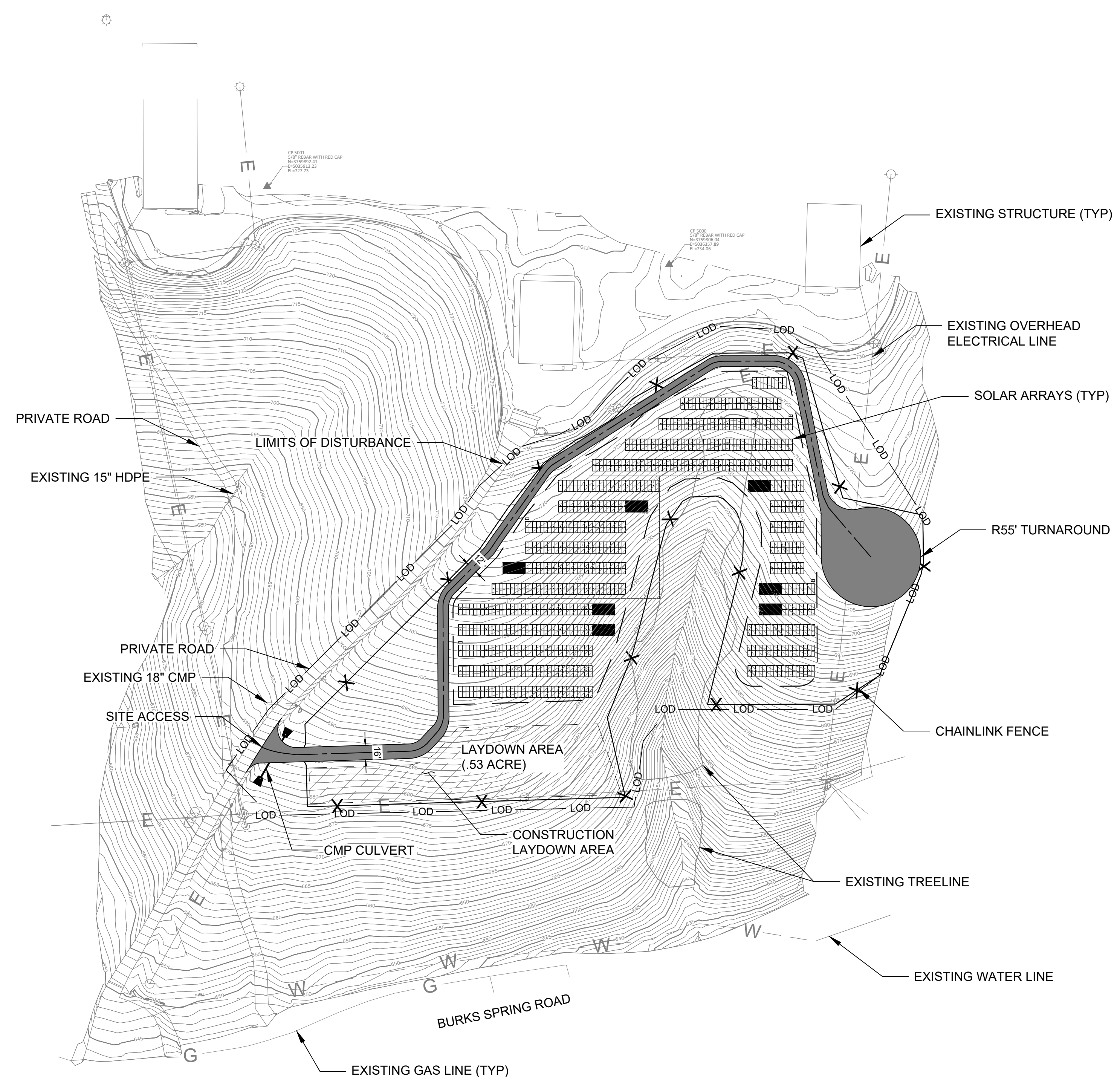
Enclosure

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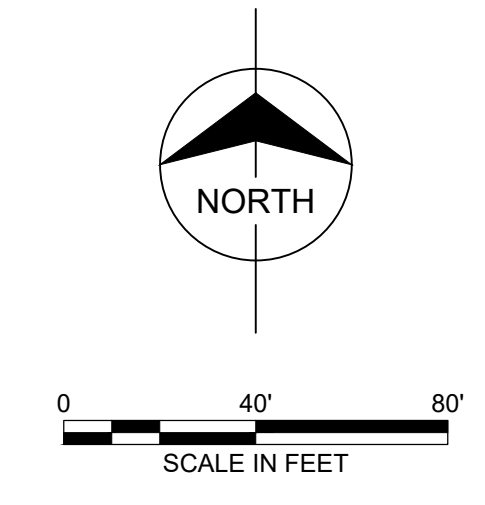
<sup>1</sup> *Application of Big Rivers Electric Corporation for an Order Declaring the Construction of Seven Solar Power Facilities to be Ordinary Extensions of Existing Systems in the Usual Course of Business*, Order, Case No. 2016-00409 (Ky. P.S.C. Mar. 30, 2017).

<sup>2</sup> *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Expansion of the Bavarian Landfill Gas to Energy Project to be an Ordinary Extension of Existing Systems in the Usual Course of Business*, Order, Case No. 2015-00284 (Ky. P.S.C. Jan. 13, 2016).

- LEGEND:**
- MINOR CONTOURS
  - MAJOR CONTOURS
  - X— CHAINLINK FENCE
  - - - LAYDOWN AREA
  - — — ROAD CENTER
  - ELECTRICAL LINE
  - LOD — LIMITS OF DISTURBANCE



Millimeters  
 Scale For Microfitting  
 Inches



**PRELIMINARY - NOT FOR CONSTRUCTION**

**BURNS MEDONNELL**  
 9400 WARD PARKWAY  
 KANSAS CITY, MO 64114  
 816-333-9400  
 Burns & McDonnell Engineering Co., Inc.  
 Firm License No. 43

designed: B. COUFAL | detailed: J. SOTO

**STAR HILL FARMS SOLAR**  
 MARION COUNTY, KENTUCKY

SITE PLAN	
project	contract
158404	-
drawing	rev.
<b>CC101 - A</b>	
sheet	of sheets
-	-
file 158404-CC-101.DWG	

no.	date	by	ckd	description	no.	date	by	ckd	description
A	05/26/23	JPS	DGK	ISSUED FOR OWNER REVIEW					