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

In the Matter of:

Electronic Application of Caldwell Solar, LLC for Certificate of Construction for an up to 200 Megawatt Merchant Electric Solar Generating Facility in Caldwell County, Kentucky	))))	Case No. 2020-00244

Applicant's Motion for Clarification

Applicant, Caldwell Solar, LLC, hereby moves for clarification of conditions in the Order issued April 8, 2022 ("the Order") in this case. Clarification of the Order is needed to resolve ambiguities, internal inconsistencies, or clerical errors and to give Applicant due notice of the conditions and how it can comply with them. In support of this Motion, Caldwell Solar states as follows:

On April 8, 2022, the Kentucky State Board on Electric Generation and Transmission Siting ("ESB") entered the Order, which grants a certificate for Caldwell Solar to construct an approximately 200 MW merchant electric solar generating facility in Caldwell County, Kentucky ("the Project") and also grants a requested deviation from the statutory setback requirements in KRS 278.704. The Order requires Caldwell Solar to comply with mitigation measures and conditions contained in Appendix A to the Order. Certain mitigation measures in Appendix A differ from those in previous ESB certificate-granting orders or proposed by Caldwell Solar or the ESB's consultant, are without apparent support in the record of this case, or on this record do not provide sufficient guidance for Applicant to conduct the certificated construction in compliance with the condition. These mitigation measures are paragraphs 9, 13, 16, 26, and 29 of Appendix

A. As to each, Caldwell Solar presents the existing text, with the sentences separated and numbered (for ease of reference), and proposes a clarified text. Applicant is willing to participate in an informal conference with Staff, supplement this filing, present material at a formal conference, or otherwise engage in further discussion as to the clarifications it requests and the reasons therefor.

Clarification requested for:

1. Condition No. 9 — visual buffers

The Appendix conditions relating to visual buffers and vegetative screening, Nos. 8-11, include the following Condition No. 9:

> [1] Caldwell Solar shall implement planting of the native evergreen species American Holly, Eastern Red Cedar, or white pine as a visual buffer to mitigate visual viewshed impacts, in areas where those viewshed impacts occur from residences or roadways directly adjacent to the project and there is not adequate existing vegetation.
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> [2] Eastern Arborvitae and the deciduous plantings listed in the application are not acceptable.
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> [3] If the visual buffer is not adequate, to the reasonable satisfaction of the affected adjacent property owners, then additional vegetation ten feet thick reaching six feet at maturity (in four years) will be added by Caldwell Solar between Project infrastructure and residences or other occupied structures with a line of sight to the facility.
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> [4] Such planting shall be done prior to construction of panel arrays commencing in any phase of development identified in the record.

Conditions No. 8 and 10 are generally applicable standards and are consistent with each other and Condition No. 11, which relates to the specific situation of "an affected adjacent property owner [who] indicates … that a visual buffer is not necessary." If interpreted broadly and to be generally applicable, Condition No. 9 cannot be harmonized with the other conditions relating to visual buffers and vegetative screening. In addition, such interpretation would be contrary to the record in this proceeding and previous ESB orders and also to the notice and consultative process with neighboring property owners and the community by which Caldwell Solar developed the screening proposals in this case. The statutory requirements and encouragement for public comment would be for naught if conditions imposed at the end of the certificate process could disrupt what the community reviewed and understood to be the proposed Project. Applicant requests that this Condition be clarified to apply to situations in which the planned visual buffer "is not adequate, to the reasonable satisfaction of [an] affected adjacent property owner[]," and to provide a default vegetative screen in the event that Caldwell Solar and the property owner do not reach a written agreement as to a satisfactory modification of the planned visual buffer.

As written, this new mitigation measure could be interpreted to require Caldwell Solar to establish a buffer of particular dimensions and limited to three evergreen tree types along every property with a residence and every roadway that might be deemed "directly adjacent" and for which existing vegetation might not be considered "adequate." That possible interpretation conflicts with the letter and spirit of other Conditions relating to buffers and screening. For example, Condition No. 10 requires Caldwell Solar to carry out the vegetative screening plans proposed in its filings.[1] The screens it proposed were to address where existing vegetation might

[1] Condition No. 10 refers to "the plans [Caldwell Solar] proposed in its application, SAR, its post-hearing data response concerning a nearby church, and the maps included in its submission." The vegetative screening plans are laid out in Application Exhibit J, which has been revised and supplemented; the most

not be adequate — but are inconsistent with the buffers necessitated by a broadly-interpreted Condition No. 9.[2] Caldwell Solar's plan also includes deciduous trees, deciduous shrubs, and evergreen shrubs,[3] but Condition No. 9 allows only three evergreen tree species. The initial estimate of the cost for the proposed buffers (depicted in 2nd Amended Exhibit J) is $293,400; by contrast, the extensive locations and restricted plantings under a broadly-interpreted Condition No. 9 have an estimated cost of almost $1,075,000. Another example is a conflict between the express mandates of Condition No. 8 to leave existing vegetation in place and not remove it other than as necessary for construction or operation of the Project and a broad interpretation of Condition No. 9 to require replacement of existing, mixed "inadequate" vegetation with those three evergreen types. In addition, the Condition No. 9 mandate to do the planting before any construction starts could create obstructions to construction, leading to an situation in which a row of evergreens must be planted to satisfy Condition No. 9 and then is removed (pursuant to Condition No. 8) because it impedes construction.

The text of Condition No. 9 is also unsupported by or in conflict with the ESB consultant's recommendations. Harvey Economics ("HE") concluded that "if buffers are planted according to the Applicant's proposed buffering plan, HE would expect the visual impacts associated with the presence of Project facilities to be minimal" and that "the vegetative buffers

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updated version is 2nd Amended Exhibit J, filed as part of its 1/12/22 Supplement to Response to Siting Board Staff's First Request for Information. The referenced post-hearing data response was filed 3/11/22 to Post-Hearing ESB 01.

[2] Condition No. 10 also requires Applicant to "provide a visual buffer as set forth in any plan to be submitted to the Caldwell Fiscal Court and the requirements of any permits it issues." These may also be different from Condition No. 9 specifications.

[3] This mix of deciduous and evergreen plants, shrubs, and trees emulates the existing vegetated areas in the vicinity of the Project site. *See, e.g.,* Second Amended Application Exhibit J, Sheet CDW-L-100-1; Second Amended Exhibit I Figure 2. Mixed planting would be more natural-looking than a wall of evergreens not otherwise occurring in the area. The community did not express to Applicant any reservations about including deciduous trees and shrubs in the mix.

proposed by the Applicant would largely shield Project components from view of local residents." HE Report (filed Jan. 21, 2022) at V-11, 12. Specific mitigation measures were not recommended by HE as general replacements or expansions of Caldwell Solar's proposal, but for site-specific circumstances that "may render portions of certain Project components visible in some locations at some point of the year." *Id.* at V-11.[4] Thus, if Condition No. 9 is not clarified to be specific to some circumstances or locations, there is nothing in the record to support the broad application of its restrictions and Caldwell Solar and the Board were without an adequate opportunity to present and hear evidence regarding such a preemptively broad mitigation measure.[5]

Nor could Caldwell Solar or landowners and residents in the vicinity of the Project have anticipated any mitigation measure along the lines of Condition No. 9 as worded. Nearly all previous ESB orders in other solar cases require only that the applicants maintain "existing vegetation between solar arrays and nearby roadways and homes … to help minimize the visual impacts and screen the project from nearby homeowners and travelers," as in the Order's Condition No. 8,[6] and typically adhere to visual screening plans proposed and reviewed as part of the application (as required in Condition No. 10). Only in limited instances where the applicant proposes it, has the ESB required screening roadways; any ordered roadway screening

[4] HE suggested a height criterion of 8 feet within four years for plantings used as a vegetative buffer to achieve reasonable satisfaction from owners of adjacent properties with occupied structures that had a line of sight to Project infrastructure (*id*. at VI-3, item VI.B.6) and, separately, that native evergreens — without specifying trees or shrubs, particular species, or exclusivity — be used in areas without existing vegetation to screen directly adjacent areas (*id*. item VI.B.3).

[5] *See* KRS 278.708(6). Due notice and an opportunity to choose whether to be reasonably satisfied with planned buffers or to agree to have no change made to existing viewshed vegetation (Conditions No. 9 and 11, respectively) are also lacking or impaired for affected property owners. For them, as well as Caldwell Solar, it is not clear what is the vegetative buffer to expect or plan for.

[6] Adding screens along the roadways may also block community views of farmland, crops, or animals and of area landmarks, and may pose a hazard for sight lines at intersections and entrances.

has been consistent with what was proposed or agreed to by the applicant.[7] In fact, the ESB has previously decided against imposing a condition that might have been interpreted to require screening roadways when it clarified Ashwood Solar's conditions in 2020-00280 by removing a condition which referred to planting "in areas directly adjacent to the Project without existing vegetation."[8]

Applicant requests that Condition No. 9 be re-written to clarify that it addresses situations in which an owner of an affected adjacent property is not reasonably satisfied with the planned buffer and so that it is consistent with Conditions No. 8, 10, and 11, the record in this case, and ESB precedent in other cases. Caldwell Solar respectfully suggests the following text, which draws on the ESB consultant's recommended mitigation measures:

a. Caldwell Solar will contact adjacent property owners prior to construction and provide a description of the proposed screening plan.
b. As to any adjacent property with a residence or other occupied structure with a line of sight to Project infrastructure, if the visual buffer planned by Caldwell Solar is not to the reasonable satisfaction of the owner of the property, Caldwell Solar will attempt to reach an agreement with the owner about a visual buffer for viewshed impacts on the residence or other occupied structures. Any agreement reached will be in writing and filed with the ESB.
c. If Caldwell Solar and the affected adjacent property owner do not reach an agreement, then Caldwell Solar will implement planting of (i) evergreen trees of the

[7] In Case No. 2020-00208, *Northern Bobwhite*, the applicant committed to buffering certain houses and 1.85 miles of roadway. *See* 6/28/21 Order (condition #15). Thereafter, certificate orders often refer to roadways in connection with screening, but (unless per an express commitment by the applicant) only as to leaving existing vegetation in place. *See, e.g.,* Case No. 2020-00272, *Flat Run* 9/29/21 Order (condition #9); Case No. 2020-00226, *Mt. Olive Creek* 11/3/21 Order (condition #9); Case No. 2021-00072, *Sebree Solar* 2/9/22 Order (condition #7). Prior to *Northern Bobwhite*, certificate order conditions refer only to screening residences and otherwise require consistency with proposed screening plans and to leave existing vegetative buffers in place as practicable, much like Condition Nos. 8 and 10 in the instant matter. *See, e.g.,* Case No. 2020-00208, *Horseshoe Bend* 6/11/21 Order (conditions # 1,21,24).

[8] Case No. 2020-00280, *Ashwood Solar,* 10/22/21Order pp. 3, 5 (removing condition # 27 and adding express requirement to condition #29 to follow applicant's proposed vegetative screening plan).

> American Holly, Eastern Red Cedar, or White Pine species (ii) to form a buffer at least 10 feet thick and reaching at least six (6) feet in height within four (4) years of planting (iii) to mitigate viewshed impacts that would occur from any residence or occupied structure on the affected property. This buffer for the affected adjacent property will be planted prior to operation of the facility.

If Condition No. 9 is not clarified to show that it addresses a specific circumstance (owner of property with a line-of-sight occupied structure not reasonably satisfied by planned visual buffer), then Caldwell Solar would request other clarification(s) that narrow its applicability to harmonize this Condition with the other visual buffer conditions. For example, Condition No. 9 could be clarified as requiring replacement of only the evergreen tree elements in Caldwell's buffer plan (like for like) rather than restricting plantings to those three tree types.

2. Condition No. 13 — activity time and day limits

Condition No. 13 sets time and day limits on construction-related Project site activities, varying as a function of the noise produced:

> [1] Caldwell Solar is required to limit the construction activity, process, and deliveries to the hours between 8 a.m. and 6 p.m. local time, Monday through Saturday.
>
> [2] The Siting Board directs that construction activities that create a higher level of noise, such as pile driving, will be limited to the hours of 9 a.m. to 5 p.m. local time, Monday through Friday.
>
> [3] Non-noise-causing and non-construction activities can take place on the site between 7 a.m. and 10 p.m., Monday through Sunday, including field visits, arrival, departure, planning meetings, mowing, surveying, etc.

Caldwell Solar seeks clarification about the limitation of some noise-causing construction activities ("such as pile-driving") to the time period 9 a.m. to 5 p.m., Monday through Friday.

The ESB consultant recommended a mitigation measure limiting construction activity, process, and deliveries to the hours of 8:00 a.m. to 6:00 p.m., Monday through Saturday. HE

Report at V-32 and VI-4 (measure VI.D.4). Typically, any and all construction activities have been permitted from 8 a.m. to 6 p.m. Monday through Saturday[9] — as in the first sentence of Condition No. 13. Narrower time windows are ordered when the applicant has volunteered to so limit construction activity.[10] The specific 9 a.m. to 5 p.m. limitation in the second sentence of Condition No. 13 may have been a mistaken accretion from conditions in other cases, that first arose as an applicant's proposal included in the Case No. 2020-00208, *Northern Bobwhite,* 6/18/21 final Order (condition #32), and then in the Case No. 2020-00206, *AEUG Fleming*, 11/12/21 reconsideration Order (ordering ¶ 10), to replace and harmonize time-of-day conditions (#22 and #23) that had been in that case's 5/24/21 final Order. In both those cases, the time limitation applied only if there were non-participating residences within 1000 feet of the activity, and pile driving was allowed on Saturday.[11] These more narrow restrictions of when pile-driving activity occurs appear to have been added in response to specific circumstances or by agreement of the applicant; there is no similar basis to impose such a restriction in this case.

The sound produced by pile driving at the source diminishes the greater the distance to the receptor.[12] This principle underlies the ESB consultant's recommendation that noise sup-

[9] *See, e.g.*, Case No. 2020-00226, *Mt. Olive Creek* 11/3/21Order (condition #24); Case No. 2020-00272, *Flat Run* 9/29/21 Order (condition #22); Case No. 2020-00370, *Fleming Solar* 11/24/21 Order (condition #24); *McCracken Solar* Case No. 2020-00392, 10/30/21 Order (condition #24); Case No. 2020-00417, *Horus Ky 1*, 12/29/21 Order (condition #13); Case No. 2021-00029, *Martin Co. Solar* 11/15/21 Order (condition #21); Case No. 2021-00072, *Sebree Solar* 2/9/22 Order (condition #12).

[10] *See, e.g.*, Case No. 2020-00208, *Northern Bobwhite* 6/18/21 Order (condition #32); Case No. 2020-00391, *Henderson Solar,* 12/22/21 Order (condition #13); Case No. 2020-00390, *Meade Co. Solar* 10/29/21 Order (condition #15); Case No. 2020-00387, *Green River Solar* 12/22/21 Order (condition #13).

[11] A Saturday exclusion is first seen in the Case No. 2021-00127 *Rhudes Creek* 3/4/22 Order (condition #13), suggesting that this condition was mistakenly copied into the Caldwell 4/8/22 Order Appendix, number and all. Applicant Rhudes Creek committed to the limitation of pile driving to the 9 a.m. to 5 p.m. time window, *see* 3/4/22 Order p. 15 and fn. 46 (citing applicant's Response to Siting Board Staff's First Request for Information (filed Nov. 19, 2021), Item 20a); the exclusion of Saturday is not discussed in the Order.

[12] *See* Amended Application Exh.H Attachment B; HE Report at V-24 (Exh. 5-6).

pression measures be used when pile driving occurs less than 1500 feet from a noise-sensitive receptor (HE Report at V-32 and VI-4 (measure VI.D.3), which was adopted in the Order's Condition No. 14.[13] A limiting condition on when pile driving takes place within 1000 feet of residences, like that in the *Northern Bobwhite* and *AEUG Fleming* Orders, would also key on a well-defined distance. Its interaction with Condition No. 14 would be clear: All pile driving within 1500 feet of noise-sensitive receptors must use noise-suppression measures, regardless of time, day, or type of receptor, and pile driving within 1000 feet of non-participating residences is further limited to weekdays, 9:00 a.m. to 5 p.m. local time.

Caldwell Solar requests that the ESB clarify or correct Condition No. 13 to be consistent with the application, the record, and ESB-ordered limitations in other cases, and respectfully suggests an amended second sentence in the Condition as follows:

> Caldwell Solar is required to limit construction activity, process, and deliveries to the hours between 8 a.m. and 6 p.m. local time, Monday through Saturday.
> Pile driving within 1000 feet of non-participating residences shall be limited to the hours of 9 a.m. to 5 p.m. local time, Monday through Friday.
> Non-noise-causing and non-construction activities can take place on the site between 7 a.m. and 10 p.m., Monday through Sunday, including field visits, arrival, departure, planning meetings, mowing, surveying, etc.

3. Condition No. 16 — equipment placement

Condition No. 16 addresses placement and setbacks for generating-facility equipment, including the granted deviation from the 2000-foot statutory setback from residential neighborhoods:

[13] It also underlies the allowance in Condition No. 14 to forego noise-suppression measures if Caldwell Solar employs a different panel installation method, "so long as that method does not create noise levels similar to pile driving."

> [1] Caldwell Solar shall place panels, inverters, and substation equipment consistent with the distances to noise receptors to which it has committed in its maps and site plans.
>
> [2a] The Siting Board approves Caldwell Solar's proposed setback from residences of 200 feet from any panel or string inverter.
>
> [3a] The Siting Board also approves a distance of 300 feet between any solar panel or string inverter and any residential neighborhood, and [3b] 100 feet from any exterior property line.
>
> [2b] Nevertheless, Caldwell Solar shall not place solar panels or string inverters, if used, closer than 150 feet from a residence, church or school, 25 feet from non-participating adjoining parcels, or 50 feet from adjacent roadways.
>
> [2c] Caldwell Solar shall not place a central inverter, and if used, energy storage systems, closer than 450 feet from any adjacent residences, church or school.
>
> [4a] These further setbacks shall not be required for residences owned by landowners involved in the project that explicitly agree to lesser setbacks and have done so in writing.
>
> [4b] All agreements by participating landowners to lesser setbacks must include language advising the participating landowners of the setbacks otherwise required herein.
>
> [4c] All agreements by participating landowners to lesser setbacks must be filed with the Siting Board prior to commencement of construction of the project.

Caldwell Solar seeks clarification on the requirement for a setback of "100 feet from any exterior property line" [3b]. This particular setback was not included in the proposed mitigation measures by Applicant or the ESB consultant, is unmentioned in the motion for deviation from the statutory setbacks or the ESB's grant thereof, appears unrelated to the deviation-related setback from residential neighborhoods in the same sentence [3a], and is phrased differently and potentially at odds with other listed setbacks. In addition, it would be useful to clarify the apparent confliect between the express approval of a 200-foot setback of any panel or string inverter from a residence [2a] and the allowance of a 150-foot distance for a residence, church, or school [2b].

Ordering ¶ 2 of the Order (p.23) grants Caldwell Solar's Motion requesting a deviation from the statutory requirement of a 2000-foot setback from, in applicable part, "residential

neighborhoods" (KRS 278.706(2)(e)). The Motion identified two clusters of residences that each possibly met the criteria for a "residential neighborhood" and would be within 2000 feet of facility equipment (solar panels and central inverters). As to these two residential areas,[14] Applicant requested a deviation from the statutory setback on a commitment to place solar panels and central inverters "no closer than 300 feet to any of the residences in Residential Groups 1 and 2." Motion ¶18 (p.13).[15] Ordering ¶2 expressly grants the Motion and requires "a setback of 300 feet from residential neighborhoods as set forth in the motion." Order p.23. The Condition's anomalous inclusion of a setback of "100 feet from any exterior property line" in the same sentence with the expressly approved 300-feet standard appears to be a clerical error.[16]

In addition, this 100-foot setback [3b] probably conflicts with the 25-foot setback from non-participating adjoining parcels listed in the next sentence [2a], since "non-participating adjoining parcels" and "any exterior property line" may be interpreted to be equivalents. The 25-foot setback from non-participating property lines is consistent with the record in this case[17] and with what has been ordered in other cases.[18] It also is worded consistently with other provisions in Condition No. 16, unlike the [3b] phrase.

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[14] The ESB consultant expressly assumes that each of the two clusters is a "residential neighborhood" (HE Report at III-8; *see also id.* at V-11, V-9 fn.39 and accompanying text) and the Order implicitly determines that each is a "residential neighborhood" in granting the Motion's alternative request for a deviation (p.23, Ordering ¶ 2).

[15] The HE Report finds (at V-11) that the planned placement exceeds this commitment: "All homes within Residential Group 1 would be at least 822 feet from any solar panels; homes within Residential Group 2 would be at least 707 feet from Project panels."

[16] Rhudes Creek, in Case No. 2021-00127, agreed to 100-foot setbacks from road rights-of-way and exterior perimeter property lines, and this agreement was incorporated into its final order's condition #16 (second sentence). *See* 3/4/22 Order p.15 and Appendix p.4. Condition No. 16 in the 4/8/22 final order in this case appears to have been copied over from the *Rhudes Creek* order, with the 100-foot requirement inadvertently left in.

[17] *See* HE Report at V-32 para. 5.

[18] *See, e.g.,* Case No. 2020-00226, *Mt. Olive Creek* 11/3/21 Order (condition #28); Case No. 2021-00127, *Rhudes Creek* 3/4/22 Order (condition #16).

Caldwell Solar respectfully suggests that Condition No. 16 be revised or corrected to delete the 100-foot setback language [3b] and to otherwise clarify the interaction of distances or setbacks that are other than as expressly committed by Caldwell Solar, as follows:

a. Caldwell Solar shall place panels, inverters, and substation equipment consistent with the minimum setback distances to noise receptors to which it committed in its 3/11/22 supplemental response to 1 ESB 31, unless a greater minimum distance is set by subpart b or c of this Condition or a shorter distance is allowed pursuant to subpart d.
b. Caldwell Solar shall set back any panel or string inverter at least 200 feet from residences. In addition, it shall not place any panel or string inverter less than 150 feet from a church or school, 25 feet from a non-participating adjoining parcel, or 50 feet from an adjacent roadway. Furthermore, any central inverter or energy storage must be placed at least 450 feet from any adjacent residence, church, or school.
c. Any solar panel or string inverter must be at least 300 feet from a residence in either of the two clusters of residences identified in its Motion for deviation as possibly qualifying as "residential neighborhoods."
d. The setbacks in subpart b above are not required as to residences owned by landowners participating in the project that explicitly agree to lesser setbacks in writing. Any such agreement by a participant landowner must include language advising the landowner of the setbacks otherwise required by this Condition and must be filed with the Siting Board prior to commencement of construction of the project.

4. <u>Condition No. 26 — abandonment or changes in Project ownership or control</u>

Condition No. 26 addresses changes of ownership or control of the Project or its abandonment. In full, the Condition states:

> [1] If any person shall acquire or transfer ownership of, or control, or the right to control the project, by sale of assets, transfer of stock, or otherwise, or abandon the same, Caldwell Solar or its successors or assigns shall request explicit ap-

> proval from the Siting Board with notice of the request provided to the Caldwell County Fiscal Court.
>
> [2] In any application requesting such abandonment, sale, or change of control, Caldwell Solar shall certify its compliance with KRS 278.710(1)(i).

A condition relating to changes in ownership or control (or abandonment) of the Project was not the subject of information requests or the ESB Consultant report and appears for the first time in the record as a condition to this Order. It is ambiguous as written and creates uncertain constraints that would negatively affect the ability to finance the Project by using tax equity financeing arrangements typical of the renewable energy industry. Interpretation issues include whether it would apply to internal reorganization of Caldwell Solar's parent or sales of non-controlling ownership or interests, and interpretation with a broad scope would conflict with typical loan and equity transaction default provisions. Caldwell Solar requests clarification that this Condition requires simply that the ESB and the Caldwell County Fiscal Court be notified of (a) a transfer of ownership, control, or right to control the Project or (b) an abandonment of the Project.

As worded, this Condition requires that Caldwell Solar or its successor/assign[19] "request explicit approval from the Siting Board … with notice of the request" to the Fiscal Court. It is not (and cannot be) a requirement to <u>obtain</u> such approval, which is not within the authority granted to the ESB by the legislature.[20] The ESB statutes, KRS 278.700–.718, address only a transfer of rights or obligation under a granted certificate (KRS 278.710(3)) and refer only by implication to abandonment in the provision that a certificate becomes void if construction is not

[19] It is unspecified, but presumably this is a successor/assign as to the KRS 278.710 construction certificate, replacing Caldwell Solar.

[20] An agency like the ESB is "a creature of statute" and not to exceed the authority granted by the General Assembly. *See Commonwealth ex rel. Stumbo v. Ky. PSC*, 243 S.W.3d 374, 378 (Ky. App. 2007) (addressing the PSC's authority). The 2022 General Assembly considered, but did not enact, an amendment to KRS 278.710(3) to expressly include "transfer of control," a broad definition of "control," and express approval by the ESB prior to the transfer. 22 RS BR 839, Section 7. House Bill 392, also not enacted, would have required post-transfer notice. 22 RS HB 392 / SCS1 Section 4.

begun within a two-year period of time (KRS 278.704(1)). Neither Caldwell Solar nor the ESB consultant suggested a condition like Condition No. 26. Therefore, Applicant respectfully suggests that this Condition be re-written as follows:

> The Siting Board and the Caldwell County Fiscal Court shall be notified in writing of any (a) abandonment of the Project or (b) acquisition or transfer of ownership, control, or the right to control the Project (whether by sale of assets, transfer of stock, or otherwise).
> The notice shall update the environmental compliance history provided in Caldwell Solar's application pursuant to KRS 278.706(2)(i).

This is analogous to the condition that was imposed by the November 2021 order in the *Martin Co. Solar* case, No. 2021-00029.[21]

In the alternative, if the Siting Board does not clarify Condition No. 26 as requested above, Caldwell Solar seeks clarification as to what acquisitions or transfers are subject to a requirement that it (or its successor/assign) is to request explicit approval from the Siting Board. The language of the Condition tracks that of the utility-related mandate in KRS 278.020(6), in contrast to the provisions in subsection (7) of that statute addressing indirect and partial acquisitions and transfers of ownership, control, and the right to control. Thus, the Condition should be clarified as applying to the direct sale of the entire Project, transfer or acquisition of the right to control the Project as its managing partner, or express and divesting assignment of rights or obligations under the KRS 278.710 construction certificate. Furthermore, as is expressly recognized in KRS 278.020(8)(b), any transaction by which a corporate parent or affiliate effectively

[21] *Martin Co. Solar* 11/15/21 Order, Apx. A, p. 6 ("If any person shall acquire or transfer ownership of, or control, or the right to control the Project, by sale of assets, transfer of stock, or otherwise, or abandon the same, Martin County Solar or its successors or assigns shall provide explicit notice to the Siting Board and the Martin County Fiscal Court."). This condition was taken verbatim from Martin Co. Solar's "Proposed Mitigation Measures and Conditions" (p.5 ¶24) filed November 9, 2021.

replaces Caldwell Solar as to ownership or control of the project should not be considered to trigger a requirement to request explicit approval from the Siting Board. Similarly, transfers that are involuntary for Caldwell Solar[22] cannot be included, because it has no control over the transfer.

Caldwell Solar respectfully suggests that only its direct sale of the entire Project or an express and divesting assignment of rights or obligations under the certificate can be the subject of this requirement. The proposed language for this alternative clarification of Condition No. 26 would add a sentence between the existing ones, as follows:

> If any person shall acquire or transfer ownership of, or control, or the right to control the Project, by sale of assets, transfer of stock, or otherwise, or abandon the same, Caldwell Solar or its successors or assigns shall request explicit approval from the Siting Board with notice of the request provided to the Caldwell County Fiscal Court. The following do not constitute an acquisition or transfer of ownership, control, or the right to control the Project:
>
> a) the ownership, control, or right to control the Project transferred or acquired is indirect or partial; or
> b) Caldwell Solar, its parent, or an affiliate remains as managing partner for the Project's construction or operation; or
> c) the acquisition or transfer is involuntary for Caldwell Solar upon the event of default; or
> d) a contract is executed that gives a third party the option or right to transfer or acquire ownership, control, or the right to control in the future if certain conditions are met.
>
> In any application requesting such abandonment, sale, or change of control, Caldwell Solar shall certify its compliance with KRS 278.710(1)(i).

[22] For example, a transfer is involuntary for Caldwell Solar if its default of a lending, financial security, or regulatory obligation gives the obligee the right or authority to take ownership, possession, or control of the Project.

5. Condition No. 29 — bond

The body of the Order (p.22) briefly states, "Financial security for the full cost of decommissioning must be established." In Condition No. 29, this financial security is referred to as a/the "bond" or "bond(s)":

> [1] Caldwell Solar shall file a bond with the Caldwell County Fiscal Court, equal to the amount necessary to effectuate the explicit or formal decommissioning plan naming Caldwell County Fiscal Court as a third-party obligee (or secondary, in addition to individual landowners) beneficiary, in addition to the lessors of the subject property insofar as the leases contain a decommissioning bonding requirement so that Caldwell County will have the authority to draw upon the bond to effectuate the decommissioning plan.
>
> [2] For land in which there is no bonding requirement otherwise, Caldwell County shall be the primary beneficiary of the decommissioning bond for that portion of the project.
>
> [3a] The bond(s) shall be filed with the Caldwell County Treasurer or with a bank, title company or financial institution reasonably acceptable to the county.
>
> [3b] The acceptance of the county of allowing filing the bond(s) with an entity other than the Fiscal Court, through the Caldwell County Treasurer, can be evidenced by a letter from the Judge-Executive, the Fiscal Court, or the County Attorney.
>
> [4] The bond(s) shall be in place at the time of commencement of operation of the project.
>
> [5a] The bond amount shall be reviewed every five years at Caldwell Solar's expense to determine and update the cost of decommissioning.
>
> [5b] This review shall be conducted by an individual or firm with experience or expertise in the costs of removal or decommissioning of electric generating facilities.
>
> [5c] Certification of this review shall be provided to the Siting Board or its successors and the Caldwell County Fiscal Court.
>
> [5d] Such certification shall be by letter and shall include the current amount of the anticipated bond and any change in the costs of removal or decommissioning.

Order Apx. A pp.7-8 ¶ 29. Caldwell Solar seeks clarification that "bond" is used as shorthand for various possible forms of financial security agreeable to the intended obligee, Caldwell

County, for the full costs of decommissioning. Furthermore, given that the financial security in favor of the County will cover the full decommissioning costs, reference and requirements in the existing Condition No. 29 about leases containing "a decommissioning bonding requirement" are superfluous and may create an unnecessary conflict or ambiguity about existing lease obligations with the property owners. Applicant thus also seeks clarification that the requirement is for one comprehensive bond that meets the Condition's standards.

It is common for a local government and solar project to agree to a form of financial surety, such as a letter of credit, that is not technically "a bond." The recognition by Caldwell Solar of the "need for a bond" cited in the Order (p.22), refers to "financial assurance" and posting "a financial surety" with the County,[23] and the body of the Order (p.22) refers to this requirement as one for "financial security." These are broader categories than what is encompassed by the technical or plain meaning of the word "bond." Removal of provisions about lease obligations and "land for which there is no bonding requirement otherwise" also makes it clear that the financial security in favor of the County must cover all the land and the full costs of decommissioning, rather than be a patchwork of bonds and lease obligations that collectively cover the Project's decommissioning.

Language clarifying what is included in the term "bond" would allow the parties to consider and agree upon the best option for the Fiscal Court for purposes of securing decommissioning obligations related to the Project. Applicant therefore requests that Condition No. 29 be modified to expressly allow any form of financial assurance to which the Fiscal Court agrees and to require and focus on one comprehensive "bond":

[23] Application Exh. H (SAR) p.212, Attachment E (item 8).

a. "Bond" as used in this Condition means a form of financial security in writing, including a deed or pledge of property, letter of credit, etc., or a combination of forms or securities, acceptable to the Caldwell County Fiscal Court.
b. By the time of commencement of operation of the project, Caldwell Solar shall have in place a bond or bonds (collectively, "the Bond") equal to the amount necessary to effectuate the explicit or formal decommissioning plan. The Bond should name Caldwell County Fiscal Court as an express obligee or beneficiary, so that the County will have the authority to draw upon the Bond to effectuate the decommissioning plan.
c. The Bond shall be filed with the Caldwell County Fiscal Court, through the County Treasurer, or (alternatively) with a title company, bank, or other financial institution reasonably acceptable to the County. The County's acceptance of an alternative shall be in writing, including by a letter from the Judge-Executive, the Fiscal Court, or the County Attorney.
d. The Bond amount shall be reviewed at Caldwell Solar's expense every five years from the filing of the decommissioning plan required by Condition No. 28, to determine and update the costs of decommissioning. This review shall be conducted by an individual or firm with experience or expertise in the costs of removal or decommissioning electric generating facilities. By letter to the Siting Board and the Caldwell County Fiscal Court, Caldwell Solar shall certify that this review was conducted, the current amount of the Bond, and any change in the estimated costs of removal or decommissioning since the filing of the full decommissioning plan required by Condition No. 28.

WHEREFORE, Applicant Caldwell Solar respectfully requests that the Siting Board grant the requested clarification of certain Conditions in the Order's Appendix. Applicant tenders herewith a proposed Order granting the relief requested.

Respectfully submitted,

/s/ Katherine K. Yunker

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