

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

In the Matter of:

ELECTRONIC APPLICATION OF TELESTO )  
ENERGY PROJECT LLC FOR A CERTIFICATE OF )  
CONSTRUCTION FOR AN APPROXIMATELY 110 )  
MEGAWATT MERCHANT ELECTRIC SOLAR )  
GENERATING FACILITY IN HARDIN COUNTY, )  
KENTUCKY PURSUANT TO KRS 278.700 AND )  
807 KAR 5:110 )

Case No. 2022-00096

**POST-HEARING BRIEF**

Comes now Telesto Energy Project LLC (the “Applicant” or “Telesto”), by and through counsel, pursuant to 807 KAR 5:110 §7 and other applicable law, hereby provides this post-hearing brief.

Telesto seeks a certificate of construction from the Kentucky State Board on Electric Generation and Transmission Siting (the “Siting Board” or “Board”) for an approximately 110 megawatt (MW) solar electric generating facility in Hardin County, Kentucky (the “Project”), near the municipality of Elizabethtown. At the Board’s evidentiary hearing on November 1, 2022, the Chairman raised the issue of zoning and the implications for KRS 278.710(1)(e), which describes one of the nine criteria the Board considers before granting or denying a construction certificate. As described herein, and based on the Board’s own precedent, Telesto has complied with all the relevant statutory provisions regarding Telesto’s commitment to compliance with local zoning laws, and this matter is now ripe for a decision.

## I. Introduction

The Hardin County Fiscal Court enacted the Hardin County Development Guidance System Zoning Ordinance (the “Zoning Ordinance” or “Ordinance”) and created the Hardin County Planning and Development Commission (the “Commission”), thereby establishing local planning and zoning regulations applicable to development occurring within Hardin County boundaries. Because the Project is proposed to be on property currently located in Hardin County and outside any municipal limits, the Project falls within the Commission’s jurisdiction.<sup>1</sup>

Telesto previously sought a motion for deviation from statutory setbacks due to the invalidation of Zoning Ordinance Section 15-8 (Procedures for Non-Listed Uses), which the Applicant later withdrew, explaining that the project may ultimately be annexed into Elizabethtown, but if not, it intends to pursue in Hardin County zoning approval as a permissive use on property zoned as I-2. On June 23, 2022, the Hardin County Circuit Court invalidated Section 15-8, finding that the Commission had circumvented the Hardin County Fiscal Court’s legislative authority by enacting the provision without the fiscal court’s ratification. *Hardin Solar, LLC, et al. v. The Hardin County Planning and Development Commission, et al.*, Hardin County Circuit Court, Case No. 22-CI-00197, at 10 (hereinafter the “Hardin Solar Case”). However, the

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<sup>1</sup> Telesto acknowledges that it may pursue annexation of Project parcels by the City of Elizabethtown, as disclosed in its withdrawal of its motion for deviation. However, annexation procedures would not conclude, whether successful or failed, until after the Siting Board’s statutorily mandated December 22 deadline. Thus, requisite local planning and zoning approvals are based on Hardin County’s zoning ordinance for purposes of demonstrating the Project’s continued compliance with any applicable local zoning ordinances. If Telesto seeks annexation, Telesto certifies its compliance with the municipality’s zoning ordinances and its intent to rezone Project parcels to Regional Industrial (I-2) per Section 2.8.13 of the City of Elizabethtown’s Zoning Ordinance. As noted in Telesto’s withdrawal of its motion for deviation, the following setbacks apply in a Regional Industrial (I-2) zone: 150 feet front yard setback when abutting residential property or 50 feet when abutting all other property; 100 feet side yard setback when abutting property zoned as residential and 20 feet when abutting all other zones; and 100 feet rear yard setback when abutting property zoned as residential and 25 feet when abutting all other zones. The minimum buffer required for I-2 is 50 feet width with three large trees or two medium and two small trees plus six feet screening per 60 feet of linear boundary.

Hardin Solar Case only invalidated 15-8, not the entire Zoning Ordinance.<sup>2</sup> Because only 15-8 was invalidated, the remaining provisions of the Ordinance remain valid and in force. Thus, a motion for deviation was inappropriate as it would have improperly circumvented the County’s authority to regulate zoning within its jurisdiction.

In its Application, Telesto certified that it would comply with all local ordinances, including any planning and zoning ordinances. Application ¶¶ 16-18. Telesto’s intent, assuming it remains in Hardin County, is to secure local zoning approvals, specifically to rezone applicable properties to industrial pursuant electrical generation as a manufacturing use.<sup>3</sup> Manufacturing uses are permitted in industrial zones under the Ordinance. Development Guidance System Zoning Ordinance, Table 1: Land Use Table, Line 47.<sup>4</sup> Section 3-13 of the Ordinance established the Heavy Industrial (I-2) zoning classification and provides the following setback requirements: 1) a 50-foot minimum front yard setback; 2) a 20-foot minimum side yard setback, 40 feet if adjoining commercial zones, or 100 feet if adjoining residential and agricultural zones; and 3) a minimum 35-foot rear yard setback, 40 feet if adjoining commercial zones, or 100 feet if adjoining residential and agricultural zones. The Project as designed would far exceed the minimal setbacks prescribed by the Ordinance for I-2 zones. Because the locally established setback requirements would apply to the Project and were not invalidated alongside Section 15-8, the Siting Board’s setback

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<sup>2</sup> See Ordinance Section 1-13, “The provisions of this ordinance are separable. If a section, sentence, clause, or phrase of this ordinance is adjudged by a court of competent jurisdiction to be invalid, the decision shall not affect the remaining portions of this ordinance.”

<sup>3</sup> See Ky. OAG 01-2 (“[Electric] generating stations satisfy the statutory definition of industrial buildings because they are used to manufacture electricity, and electricity constitutes a commercial product.”) (internal quotations omitted); see also, Kentucky Electric Co. v. Beuchel, 146 Ky. 660 (Ky. 1912) (holding that Kentucky Electric Company was engaged in the business of manufacturing when it produced electricity.); see also, Kentucky Department of Revenue, Technical Advice Memorandum KY-TAM-21-01 dated April 22, 2021, “[a] solar power company’s generation of electricity is considered to be manufacturing for Kentucky ad valorem property tax purposes” and further explains that “[t]he manufacturing process of a solar power facility begins when the solar panels capture sunlight and ends when the product, the electricity, is in a form or condition for sale on the open market for the purpose for which it was intended to be used”.

<sup>4</sup> If the Project pursues annexation, it may be properly sited in a Regional Industrial (I-2) zone as a Public or Private Utility Facility. See, City of Elizabethtown Zoning Ordinance, Section 2.8.13.1.

requirements in KRS 278.704(2) do not apply and cannot be modified for a motion for deviation under 278.704(4). Thus, the I-2 setbacks will apply to the Project and have primacy over statutory setback requirements. KRS 278.704(3)(a).

## **II. The Siting Board's Statutory Framework Contemplates Asynchronous Timelines in Securing a Construction Certificate and Obtaining Local Zoning Approvals**

The Siting Board's statutory framework contemplates parallel state and local land use approval processes, as evidenced by requiring a certification of compliance with established local planning and zoning ordinances as a necessary element of an administratively complete application, while also requiring the Board to consider as part of its decision-making criteria whether the applicant will meet local planning and zoning requirements. If a proposed facility is sited in a county or municipality with established local planning and zoning, the statutes provide the Board with a limited factfinding role in local planning and zoning matters, and appropriately leave approvals and oversight with local authorities.

### *A. KRS 278.706(2)(d) Requires Certification That A Project "Will Be" In Compliance With Local Zoning, Not That It Currently Be In Compliance.*

KRS 278.706(2) provides statutory criteria for finding a construction certificate application administratively complete. Apart from the receipt of application fees, the Board may render a decision only for an application that is considered administratively complete pursuant to KRS 278.706(2). As part of an administratively complete application's necessary elements, KRS 278.706(2)(d) requires:

"A statement certifying that the proposed plant *will be in compliance* with all local ordinances and regulations concerning noise control and with any local planning and zoning ordinances. The statement shall also disclose setback requirements established by the planning and zoning commission as provided under KRS 278.704(3)[.]" (emphasis added).

Notably, the phrase “will be” implies future compliance with local planning and zoning ordinances, not a statement that the proposed facility is *currently* compliant with local planning and zoning ordinances. This not only allows applicants to negotiate the local zoning process in tandem with or following the Siting Board process, but anticipates that doing so may be the preferred course of action for applicants.

KRS 278.706(2)(d) essentially requires a demonstration that an applicant will comply with applicable local zoning, not actual possession of approvals at the time the application is filed. By not requiring an applicant to previously secure all local approvals prior to filing its application, the provision contemplates asynchronous timelines in state and local approvals processes involving merchant plants where an applicant must secure approvals from multiple administrative bodies prior to construction. Thus, submitting an otherwise complete application to the Siting Board along with a certification that the project *will* comply with local zoning, as Telesto has done here, renders the application complete or in compliance with the relevant statutory provisions.

*B. Under KRS 278.710(1)(e), Current Possession of Local Zoning Approvals Is Not a Criterion Upon Which the Board May Grant or Deny an Application*

KRS 278.710(1) provides the criteria upon which the Siting Board may grant or deny a construction certificate. Among other criteria, KRS 278.710(1)(e) authorizes the Siting Board to grant or deny a construction certificate application based on “[w]hether the proposed facility *will meet* all local planning and zoning requirements that existed on the date the application was filed[.]” (emphasis added). Like KRS 278.706(2)(d), KRS 278.710(1)(e) essentially requires a demonstration that the applicant will comply with local planning and zoning. It similarly contemplates asynchronous timelines in state and local approval processes, allowing an applicant to pursue tandem or staggered state and local approval processes. The statutory text neither establishes possession of local zoning approvals as a prerequisite to a complete application nor

institutes possession of local zoning approvals as a criterion for an application's approval or denial by the Board. Thus, the Siting Board properly found Telesto's Application administratively complete, and the Board may now adjudicate the Application.

### **III. The Siting Board Has Consistently Granted Construction Certificates to Applicants Prior to Securing Zoning Approval**

The Siting Board has consistently followed the above statutory framework by granting construction certificates to applicants who have certified compliance with local zoning regulations, but have yet to obtain those approvals. Thus, the Board's own precedent demonstrates that present possession of local zoning approvals has no bearing on the Board's authority to adjudicate an otherwise complete application. In fact, the Board routinely issues conditional approvals of construction certificates, imposing compliance with local zoning as a condition of the certificate's approval.

#### *A. Kentucky Pioneer Energy, LLC*<sup>5</sup>

The 2002 Siting Board case brought by applicant Kentucky Pioneer Energy, LLC ("Kentucky Pioneer"), perfectly demonstrates the Board's long-standing precedent. In that case, the applicant initially certified compliance with local zoning regulations in its application but later claimed the project was exempt from local zoning, and thus need not comply with local zoning laws.<sup>6</sup> The Board denied Kentucky Pioneer's application due to the applicant's adoption of a position in conflict with the one taken in its application. However, the Board subsequently approved Kentucky Pioneer's application following the applicant's adoption of its initial position

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<sup>5</sup> *In the Matter of the Application of Kentucky Pioneer Energy, LLC for a Construction Certificate Pursuant to KRS 278.704(1) to Construct a Merchant Electric Generating Facility*, Case No. 2002-00312, Order dated Nov. 10, 2003.

<sup>6</sup> *See*, Application of Kentucky Pioneer Energy, LLC, dated Nov. 26, 2002, Tab 12; *see also*, Kentucky Pioneer Energy, LLC, Order dated Nov. 10, 2002, at 7-10.

that local zoning was applicable and its commitment to secure local zoning approvals. In its order conditionally granting the certificate, the Board explained:

“[G]iven the sworn statements of Kentucky Pioneer’s President that it will not build until it has fully met the requirements specified by the local authorities, our only remaining function in regard to the planning and zoning issues presented herein would be the redundant one of overseeing the planning commission and fiscal court processes. We do not believe that such oversight is warranted. There will be a final finding of fact in regard to compliance. The issues are in the capable hands of the local authorities; and the intent of Kentucky law – that local requirements be considered in the siting of merchant generators – will be well-satisfied.”<sup>7</sup>

Consistent with its analysis above, the Board issued Kentucky Pioneer’s construction certificate on the condition that it comply with all local planning and zoning requirements, and that Kentucky Pioneer not begin construction until it filed a written certification that the local planning commission approved the facility.<sup>8</sup> Subsequent cases have followed this precedent with many of the approvals including a condition that the applicant comply with applicable local planning and zoning laws.

*B. Horus Kentucky 1 LLC*<sup>9</sup>

Horus Kentucky 1 LLC (“Horus”) sought a certificate to construct a merchant solar electric generating facility in Simpson County, which established a planning commission and enacted a local zoning ordinance. Prior to filing its Siting Board application, Horus sought two conditional use permits (CUPs) filed on January 5, 2021, and April 1, 2021, respectively.<sup>10</sup> Both CUP applications were ultimately approved. Two adjacent nonparticipating landowners intervened in the case, filing two lawsuits (one for each CUP) alleging, *inter alia*, that the Franklin-Simpson

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<sup>7</sup> Kentucky Pioneer Energy, LLC, Order dated Nov. 10, 2002, at 10.

<sup>8</sup> *Id.* at Appx. A, 3.

<sup>9</sup> *In the Matter of the Electronic Application of Horus Kentucky 1 LLC for a Certificate of Construction for an Approximately 69.3 Megawatt Merchant Electric Generating Facility in Simpson County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110*, Case No. 2020-00417, Order dated Dec. 29, 2021.

<sup>10</sup> Horus Kentucky 1 LLC sought the second CUP to construct and install solar infrastructure on additional lands acquired via lease from two adjacent landowners.

County Planning & Zoning Adjustment Board arbitrarily granted the CUPs to Horus, whose project would significantly alter the agricultural character of the area.<sup>11</sup> Although the circuit court dismissed the *Baldwin I* case with prejudice on July 26, 2021, *Baldwin II* remains in litigation with legal brief filings occurring as recently as July 2022. In its post-hearing discovery response, Horus noted that although *Baldwin II* remained in litigation, no adverse ruling has affected the validity of its CUP.<sup>12</sup> With litigation pending in one of the applicant’s two CUPs, the Siting Board issued Horus a construction certificate on December 29, 2021, finding that “the [p]roject as proposed appears to comply with the Franklin-Simpson County Zoning Regulations.”<sup>13</sup> The Board conditioned its certificate on Horus’s submission of a development plan in compliance with the Franklin-Simpson County Zoning Ordinance.

*C. Rhudes Creek Solar LLC*<sup>14</sup>

Rhudes Creek Solar LLC (“Rhudes Creek”) sought a certificate to construct a merchant solar electric generating facility in the same county as Telesto - Hardin County. Rhudes Creek sought a zoning map amendment to rezone certain residential properties to agricultural and a CUP from the Hardin County Planning Commission to authorize Rhudes Creek’s construction of its facility on the rezoned properties. However, a structural flaw in the zoning ordinance required the planning commission to jointly decide both applications, circumventing the applicant’s right to seek a separate track of approval for its CUP application from the board of adjustments. *Rhudes*

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<sup>11</sup> *Baldwin, et al v. Franklin-Simpson County Planning & Zoning Adjustment Board, et al.*, Simpson Circuit Court, Division 1 case 21-CI-00064, July 26, 2021 (“Baldwin I”); *Baldwin, et al v. Franklin-Simpson County Planning & Zoning Adjustment Board, et al.*, Simpson Circuit Court, Division 1 case 21-CI-00135, Sep. 28, 2021 (“Baldwin II”).

<sup>12</sup> Horus Kentucky 1 LLC’s Response to Siting Board Staff’s Post-Hearing Request for Information, Request No. 4, Case No. 2020-00417, dated Nov. 30, 2021.

<sup>13</sup> In the Matter of the Electronic Application of Horus Kentucky 1 LLC, *supra* note 5, at 20.

<sup>14</sup> In the Matter of the Electronic Application of Rhudes Creek Solar, LLC for a Certificate of Construction for an Approximately 100 Megawatt Merchant Electric Solar Generating Facility and a Related 138 KV Nonregulated Electric Transmission Line Approximately 1 ½ Miles in Length in Hardin County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110, Case No. 2021-00127, Order dated Mar. 4, 2022.



*Creek Solar, LLC, et al. v. Hardin County Fiscal Court, et al.*, Hardin County Circuit Court, Case No. 21-CI-00994, Sep. 13, 2021, at 6-7. At the time of the Siting Board’s decision on the Rhudes Creek construction certificate application, the Hardin County Board of Adjustment had not yet decided on Rhudes Creek’s CUP application. Although Rhudes Creek had not secured final approval of its CUP, the Siting Board conditionally granted a construction certificate to Rhudes Creek, noting in its Final Order that “[t]he Hardin County Planning and Development Commission has approved the zoning, however at present the conditional use permit (CUP) has not been approved. A CUP would be required prior to construction.”<sup>15</sup> The Siting Board conditioned the Rhudes Creek’s construction certificate on obtaining full approval from local zoning authorities, and prohibited construction prior to receiving necessary local zoning approvals.

Telesto seeks the same thing as was granted in each of these cases: a construction certificate conditioned on Telesto’s ability to secure local zoning approval prior to commencing construction. Telesto has, as required under the statute, certified the proposed project prior to construction will be in compliance with local zoning, and has thus satisfied the Board’s criteria. This remains true whether the project continues to be located in the unincorporated territory of Hardin County, or it is ultimately located within the city limits of Elizabethtown. Under either scenario, the project must secure local zoning approval prior to commencing construction. In sum, as demonstrated in the Kentucky Pioneer, Horus, and Rhudes Creek cases, as long as the applicant can certify the project will comply with local zoning, the Board is empowered to: 1) deem the application complete as an administrative matter; and 2) consider the 278.710(1)(e) criteria to be satisfied when considering whether to grant or deny the application.

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<sup>15</sup> *Id.* at 22.

#### IV. Conclusion

Telesto respectfully posits that the Siting Board has consistently demonstrated that local zoning approvals need not be secured prior to: 1) an applicant filing its construction certificate application in satisfaction of KRS 278.706(2)(d); or 2) the Board issuing a decision whether to grant or deny a construction certificate pursuant to KRS 278.710(1)(e). As such, Telesto has complied with the applicable statutory provisions and this matter is ripe for a decision.

Signed this 8<sup>th</sup> day of November, 2022

Respectfully submitted,



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