

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

In the Matter of:

ELECTRONIC APPLICATION OF SEBREE)	
SOLAR II, LLC FOR A CERTIFICATE TO)	
CONSTRUCT AN APPROXIMATELY 150)	
MEGAWATT MERCHANT SOLAR ELECTRIC)	CASE NO. 2022-00131
GENERATING FACILITY IN)	
HENDERSON COUNTY, KENTUCKY AND)	
WEBSTER COUNTY, KENTUCKY PURSUANT)	
TO KRS 278.700 AND 807 KAR 5:110)	

**SEBREE SOLAR II LLC'S
MOTION FOR REHEARING**

Comes now Sebree Solar II LLC, (“Solar II”), by and through counsel, and does hereby respectfully request the Siting Board to grant rehearing with regard to the following conditions included in the October 12, 2023 Order in this docket, respectfully stating as follows:

I. BACKGROUND

Sebree Solar II tendered its application to construct an approximately 150-megawatt ground mounted solar photovoltaic electric generating facility comprising of approximately 900 acres of land in Henderson County, Kentucky located near Robards, Kentucky (the “Project”) with the Siting Board on April 18, 2023. Following two rounds of information requests and a visit to the site of the proposed solar and transmission facilities, a hearing was held in this case on August 17, 2023. At the hearing, Sebree Solar II presented the testimony of five witnesses. Following an additional round of post-hearing data requests, the case stood ready for adjudication on September 6, 2023. The Siting Board issued its Final Order on October 12, 2023. The October 12, 2023 Order included thirty-six conditions attaching to the construction certificate awarded to Sebree Solar II. Sebree Solar II has reviewed the conditions set forth in the October 12, 2023 Order and

respectfully requests the Siting Board to grant rehearing with respect to four of these conditions so as to prevent unnecessary cost, delay or inefficiency in the development of the proposed Project, to maintain consistency with the conditions already applicable to the Project by virtue of mandates imposed by the Henderson City-County Planning Commission and to avoid what could amount to serious impairments of Sebree Solar II's ability to finance the Project.

II. ARGUMENT

The Siting Board is a creature of statute and, as such, may only act within the scope of its jurisdiction and authority.¹ Per KRS 278.704(1) and KRS 278.710, the purpose of the Siting Board is to review and rule upon applications to “construct” a merchant electric generating facility.² As with other administrative agencies, the Siting Board may not act arbitrarily or capriciously or in a manner inconsistent with law.³ The October 12, 2023 Order imposes a number of conditions upon the Sebree Solar II Project, the vast majority of which Sebree Solar II has no concerns. However, four of the conditions included in the October 12, 2023 Order, though no doubt well-intentioned, would lead to results which are likely unintended or that exceed the scope of the Siting Board's authority. Individually, these conditions make the Project more difficult to bring to completion. In the aggregate, they threaten the viability of the Project. There is internal inconsistency within

¹ See *Fam. Tr. Found. of Kentucky, Inc. v. Kentucky Horse Racing Comm'n*, 620 S.W.3d 595, 601 (Ky. 2020), *reh'g denied* (Jan. 21, 2021) citing *GTE v. Revenue Cabinet*, 889 S.W.2d 788, 792 (Ky. 1994) (“Notwithstanding this broad remit, the Commission, like all administrative agencies, may not exceed its statutory authority”); *Public Serv. Comm'n v. Attorney Gen.*, 860 S.W.2d 296, 297–98 (Ky. App. 1993) (“An administrative body's powers are defined and limited by the agency's enabling statute.”).

² “Commence to construct” is defined in KRS 278.700(4) as the “physical on-site placement, assembly, or installation of material or equipment which will make up part of the ultimate structure of the facility.”

³ See *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urb. Cty. Gov't*, 265 S.W.3d 190, 195 (Ky. 2008) (“Judicial review of an agency decision is limited to the determination of whether the decision was arbitrary, i.e., whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence.”) citing *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky.1964); see also *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 690 (E.D. Ky. 2016).

the Order, as it references complying with all requirements in KRS 278.710 for monitoring by the EEC, stating that even though the application was filed prior to June 29, 2023, the Siting Board shall require Sebree Solar II to comply with all the recently enacted requirements in KRS 278.710.⁴ The Commission again states this in Condition 5, however, the Order also states that the application was reviewed under the laws as of the filing date of April 18, 2023 because the modifications to the statutes were not made retroactive by the General Assembly, “so the application is reviewed under the laws as of the filing date.”⁵ Sebree Solar II respectfully requests clarification from the Siting Board to address the distinction between post construction, when the EEC will monitor the Project and prior to construction, when some of these conditions may need revisions so that financing and progress on the Project is not impeded by burdensome and conflicting requirements. Accordingly, Sebree Solar II respectfully requests the Siting Board to grant rehearing on the basis set forth herein.

A. Condition 11 – Vegetative Buffers

Condition 11 of the October 12, 2023 Order reads as follows:

Sebree Solar II Solar shall implement planting of native evergreen species 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. If it is not adequate, then vegetation ten feet thick reaching six feet at maturity (in four years) will be added by Sebree Solar II between Project infrastructure and residences, or other occupied structures, with a line of sight of sight to the facility to the reasonable satisfaction of the affected adjacent property owners. Planting of vegetative buffers may be done over the construction period; however, Sebree Solar II should prioritize vegetative planting at all periods of construction to reduce viewshed impacts. All planting shall be done prior to the operation of the facility.

⁴ October 12, 2023 Siting Board Order, at 7.

⁵ October 12, 2023 Siting Board Order, at 2.

Sebree Solar II requests that Condition 11 be revised to read as follows:

Sebree Solar II Solar shall implement planting of native evergreen species 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. If it is not adequate, then vegetation ten feet thick reaching six feet at maturity (in four years) will be added by Sebree Solar II between Project infrastructure and residences, or other occupied structures, with a line of sight of sight to the facility ~~to the reasonable satisfaction of the affected adjacent property owners~~. Planting of vegetative buffers may be done over the construction period; however, Sebree Solar II should prioritize vegetative planting at all periods of construction to reduce viewshed impacts. All planting shall be done prior to the operation of the facility.

The proposed changes to Condition 11 will limit confusion, align the obligations with those applied by the Henderson City-County Planning Commission, reduce the administrative burden of developing the Project and limit the likelihood of future litigation. The Siting Board's specific language regarding the planting of "vegetation ten feet thick reaching six feet in maturity (in four years)" is a very specific requirement. Sebree Solar II's compliance with those specific parameters should be enough to be at "the reasonable satisfaction of adjacent property owners." However, adding that language to the Condition 11 adds a subjective component that could cause Sebree Solar II to have to deviate from those specific requirements to satisfy different property owners, causing unnecessary litigation and other issues for Sebree Solar II. Sebree Solar II respectfully requests the Siting Board to adopt these proposed changes.

B. Condition 15- Construction Activity

Sebree also requests that Condition 15 be revised to remove or modify the requirement that higher level of noise construction activities be additionally limited to 9 a.m. to 5 p.m. local time. The requirement will cause the Project to lose 2 hours of work each day (1 hour on each end) and would effectively extend the overall duration of the pile-driving construction activity.

Condition 15 of the Siting Board’s October 12, 2023 Order states:

Sebree Solar II 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. *The Siting Board directs that construction activities that create a higher level of noise, such as pile-driving, will be limited to 9 a.m. to 5 p.m. local time, Monday through Friday.* (italics added) Non-noise causing and non-construction activities can take place on the site between 7 a.m. and 10 p.m. local time, Monday through Sunday, including field visits, arrival, departure, planning, meetings, mowing, surveying, etc.

In addition to the fact that removing this additional requirement would allow the Project to progress faster and decrease the overall duration of the pile-driving construction activity, removing the heightened requirement would allow the projects in the area to be consistent. The requirements set out in the Siting Board’s August 26, 2022 Order for Sebree Solar, Case No. 2021-00072 are set out as follows:

Sebree Solar is required to limit the construction activity, process, and deliveries to the hours between 8 a.m. and 6 p.m., Monday through Saturday. Non-noise causing and non-construction activities can take place on the site between 6 a.m. and 10 p.m. Monday through Sunday, including field visits, arrival, departure, planning meetings, mowing, surveying, etc.⁶

C. Conditions 18 – Error in line 4

The October 12, 2023 Order includes an error stating “The Siting Board approves Sebree Solar II’s proposed setback from residences of 350 feet from any panel or string inverter.” The length of the setback should read “150 feet” as proposed by Sebree Solar II. The Sebree Solar II Application does not contain a reference to 350 feet. Additionally, the Siting Board Order states

⁶ Case No. 2021-00072, *Electronic Application of Sebree Solar, LLC for a Certificate to Construct an Approximately 250 Megawatt Merchant Solar Electric Generating Facility and an Approximately 4.5 mile Nonregulated Electric Transmission Line in Henderson County, Kentucky and Webster County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110* (Ky. State Board on Electric Generation and Transmission Siting Board, May 12, 2023); Appendix A, Condition 12 of the August 26, 2022 Order granting rehearing on February 9, 2022 Order. (Ky. State Board on Electric Generation and Transmission Siting Board, August 26, 2022).

that it approves a distance of 300 feet between any solar panel or string inverter and any residential neighborhood and 100 feet from any exterior property line. Those distances are not referenced in any of the materials submitted by Sebree Solar II, which reflect requirements set forth by the Henderson County Zoning Ordinance.

Condition 18 of the October 12, 2023 Order states:

Sebree Solar II 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. The Siting Board approves Sebree Solar II's proposed setback from residences of 350 feet from any panel or string inverter. The Siting Board also approves a distance of 300 feet between any solar panel or string inverter and any residential neighborhood and 100 feet from any exterior property line. Nevertheless, Sebree Solar II 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. Sebree Solar II shall not place a central inverter, and if used, energy storage systems, closer than 450 feet from any adjacent residences, church, or school. 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.

Exhibit 4, Attachment A of the Application in this case filed April 18, 2023 contains the setback requirements contained in the Henderson County Zoning Ordinance for Solar Energy Systems (SES) ("Ordinance") and includes the Ordinance as an attachment. The Ordinance requires all Level 3 SES equipment be at least 25 feet from the perimeter of property lines of the Project area and it requires that equipment be at least 100 feet from any residential structure.⁷ Sebree Solar II's proposed setback requirements comply with the Ordinance and are consistent with requirements for projects under construction in the area. Sebree Solar II respectfully requests clarification on the distances contained in Condition 18 and that the condition reflects the distances as proposed in the application.

⁷ Application, Exhibit 4, Attachment A: Henderson County Zoning Ordinance, November 10, 2020, Section (1) and (3).

D. Condition 28 – Restrictions on Future Transfers

One of the conditions in the October 12, 2023 Order applies to any future transfers of ownership, control or the right to control the Project. Condition 28 reads as follows:

If any Person as defined by KRS 278.700(3) shall acquire or transfer ownership of, or control, or the right to control Sebree Solar II Solar, by sale of assets, transfer of stock, or otherwise, or abandon the same, Sebree Solar II or its successors or assigns shall request explicit approval from the Siting Board with notice of the request provided to the Henderson County Fiscal Court. In any application requesting such abandonment, sale or change of control, Sebree Solar II and any proposed entity with an ownership interest in Sebree Solar II shall certify its compliance with KRS 278.710(1)(i).

This condition was specifically addressed by legislation enacted on June 29, 2023 modifying KRS 278.704- 710. In a footnote, the Siting Board stated that because the Kentucky General Assembly did not indicate that the modifications were retroactive, this application was reviewed by the Siting Board under the laws as of the filing date,⁸ while also stating that Sebree Solar II should follow KRS 278.710 and that the Siting Board will require Sebree Solar II to “comply with all the recently enacted requirements in KRS 278.710.”⁹ Therefore, the constitutional and statutory basis for imposing Condition 28 is unclear, especially considering the Siting Board cites the statutory modifications that clearly indicate the intent of the Kentucky General Assembly to place monitoring jurisdiction with the EEC post-construction.¹⁰

As modified KRS 278.710(6) states:

Any application approval condition that requires the approval of the transfer of control of a merchant electric generating facility after construction is complete shall be void and unenforceable, but any transfer of control of a merchant electric generating facility shall be subject to compliance with the requirements of subsections (3)(d),

⁸ October 12, 2023 Order, at 2.

⁹ *Id.* at 7.

¹⁰ *Id.*

(4), and (5) of this section.

As modified, KRS 278.710 (7) states:

Notwithstanding any provision of law to the contrary, including any order issued by the board prior to June 29, 2023, after the board has approved an application for a construction certificate for a merchant electric generating facility under this section, the approved applicant has posted the bond or similar security required under KRS 278.706(2)(m)5., and the facility is constructed and begins generating electricity for sale, the board's authority to enforce any conditions of the construction certificate, including bonding and decommissioning requirements, shall end and the secretary of the Energy and Environment Cabinet shall monitor and enforce the construction certificate holder's compliance with the requirements of KRS 278.700 to 278.716 and the conditions of its construction certificate application approval.

Condition 28 clearly conflicts with the intent of the above provisions. First, the plain reading of the modified statute indicates the intent of the legislature to address any orders in conflict with the modification issued by the Siting Board even prior to June 29, 2023. So, the Siting Board's assertion the modifications were not retroactive is simply inaccurate. Second, the statute passes jurisdiction over the facility to the Energy and Environment Cabinet ("EEC") once a project meets certain conditions, including completion of construction, yet condition 28 fails to acknowledge this change in oversight and instead, appears to require any future owner or investor of the Project – whether a direct or indirect owner – to reapply for “approval” of such a transaction from the Siting Board regardless of whether the Project has completed construction. Again, this is clearly in conflict with plain intent of the legislation. Additionally, this condition is the subject of two complaints filed in the Henderson and Meade Circuit Courts seeking to clarify the intent of

the transfer provision in KRS 278.710(3).¹¹ As noted previously before the Siting Board and in those complaints, the requirement in Condition 28 goes beyond the intent of the statute, which is to provide oversight of the project up to the completion of construction and start of generating, and the requirements regarding approval of transfers has not been applied consistently across Siting Board Orders for similar facilities. Sebree Solar II has no objection to providing notice of such a transaction to the Siting Board and the Fiscal Courts of Henderson County prior to completion of construction. The new legislation has addressed the need for such a requirement after construction is complete. Condition 28 impairs the value of the construction certificate issued by the Siting Board without substantial evidence to support the condition in a manner that violates fundamental notions of due process.¹² Accordingly, Sebree Solar II respectfully requests that this condition be modified to only include a requirement prior to completion of construction that participating lessors, the Siting Board and the respective Fiscal Courts be notified if any such transfer of ownership, control or right to control takes place, as was done in Case No. 2021-00029 and as to be consistent with KRS 278.710 (7).¹³ Sebree Solar II will comply with any requirement of KRS

¹¹ Case No. 2021-00072, *Electronic Application of Sebree Solar, LLC for a Certificate to Construct an Approximately 250 Megawatt Merchant Solar Electric Generating Facility and an Approximately 4.5 mile Nonregulated Electric Transmission Line in Henderson County, Kentucky and Webster County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110* (Ky. State Board on Electric Generation and Transmission Siting Board, May 12, 2023); Case No. 2020-00387, *Electronic Application of Green River Solar, LLC for a Certificate to Construct an Approximately 200 Megawatt Merchant Solar Electric Generating Facility in Breckenridge and Meade County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110* (Ky. State Board on Electric Generation and Transmission Siting Board, September 20, 2022).

¹² See, e.g., *Wasson v. Kentucky State Police*, 542 S.W.3d 300, 303 (Ky. Ct. App. 2018).

¹³ See *In the Matter of the Electronic Application of Martin County Solar Project, LLC for a Certificate of Construction for an Approximately 200 Megawatt Merchant Electric Solar Generating Facility in Martin County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110*, Order, Case No. 2021-00029 (Ky. State Siting Bd. Nov. 15, 2021), Appendix 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.”).

278.710, prior to completion of construction, if any rights or obligations under the construction certificate are being transferred.

III. CONCLUSION

Sebree Solar II appreciates the time and attention that the Siting Board has already devoted to the review of the Project. Sebree Solar II respectfully requests clarification, and that this Siting Board take administrative notice of the revised requirements and align the conditions of the construction certificate to be consistent with the newly enacted requirements in KRS 278.710-718 because the nature of the Project requires that the conditions set by this Siting Board be guidance for the activity on this Project going forward. The requested clarification to the Siting Board's October 12, 2023 Order will ensure that the Project moves forward and positively contributes to Henderson County for decades to come.

WHEREFORE, on the basis of the foregoing, Sebree Solar II respectfully requests the Siting Board to grant rehearing and amend the various conditions of its October 12, 2023 Order as set forth herein.

This 31st day of October, 2023.

Respectfully submitted,



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