

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION  
AND TRANSMISSION SITING

In the Matter of:

ELECTRONIC APPLICATION OF AEUG	)	
FLEMING SOLAR, LLC FOR A CERTIFICATE	)	
OF CONSTRUCTION FOR AN	)	
APPROXIMATELY 188 MEGAWATT	)	CASE NO.
MERCHANT ELECTRIC SOLAR GENERATING	)	2020-00206
FACILITY IN FLEMING COUNTY, KENTUCKY	)	
PURSUANT TO KRS 278.700 AND 807 KAR	)	
5:110	)	

ORDER

On August 3, 2021, AEUG Fleming Solar, LLC (AEUG Fleming) filed a petition for reconsideration, clarification, and for a formal conference to address certain issues arising out of the Siting Board's May 24, 2021 and July 26, 2021 Orders, which collectively are the final Order that conditionally approved a certificate to construct an approximately 188-megawatt (MW) merchant solar electric generation facility (Project), subject to full compliance with the conditions prescribed in the May 24, 2021 Order. In the petition, AEUG Fleming asks that the Siting Board revise several mitigation measures in Appendix A of the May 24, 2021 Order. Its arguments, and the Siting Board's findings in response, are detailed below.

DISCUSSION AND FINDINGS

Modifications to the Site Plan

AEUG Fleming first takes issue with Mitigation Measure 3, arguing that it is overly broad and could be interpreted as requiring an evaluation of any small change to the site

development plan by the Siting Board. To rectify this AEUG Fleming requests to revise the mitigation measure by adding language to limit what types of changes must be reviewed by the Siting Board, limiting it to changes that impact noise levels or external view for nearby landowners. The proposed additional language states: “If AEUG Fleming modifies its site development plan from the version originally submitted with its Application in a manner that negatively impacts noise levels or external view, such as moving project infrastructure closer to adjoining neighbors, then it will similarly submit such information to the Siting Board for review as specified above.”

Based upon the petition and the May 24, 2021 and July 26, 2021 Orders and being otherwise sufficiently advised, the Siting Board in reviewing this mitigation measure agrees that the language proposed by AEUG Fleming will clarify the mitigation measure. The proposed additional language serves the intent of the Siting Board regarding its obligation to review changes to the site development plan by the Applicant.

#### Compatibility with Scenic Surroundings

AEUG Fleming next takes issue with Mitigation Measure 7. The measure states that “AEUG Fleming will not remove any existing vegetation unless the existing vegetation needs to be removed for placement of solar panels.” AEUG Fleming argues the measure could potentially prevent vegetation from being removed for necessary internal roadways or for the substation. AEUG Fleming asks that the entire measure be removed or, in the alternative, that Siting Board revises the mitigation measure to say AEUG Fleming “will not remove any existing vegetation, except to the extent it must remove such vegetation for the construction and operation of Project components.”

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing this mitigation measure agrees that Mitigation Measure 7 should be modified to expand the ability to remove vegetation for other necessary things in the construction process other than for placement of solar panels. The language AEUG Fleming suggests in the alternative is appropriate and in keeping with prior language approved in prior Siting Board cases.

AEUG Fleming next takes issue with Mitigation Measures 9 and 10 that regulate visual buffers. Mitigation Measure 9 requires AEUG Fleming to “address concerns related to the visual impact of the solar facility on its neighbors”, and Mitigation Measure 10 requires AEUG Fleming to provide a buffer “to the satisfaction of” the affected property owners for residences and other occupied structures that are within 300 feet of the proposed solar facility. AEUG Fleming argues that the mitigation measures as written could lead to it having to attempt to address and satisfy unreasonable demands. AEUG Fleming seeks that a “good faith” effort component be added to both the measures.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing Mitigation Measures 9 and 10 finds that a “good faith” component is unnecessary for either mitigation measure. The Siting Board advises that issues relating to the obligations to provide visual buffers outlined by these two mitigation measures can always be brought back to the Siting Board via complaint or motion. If nearby landowners are making unreasonable demands, the developer can merely file a motion with the Siting Board seeking an order determining that the developers actions have been in accordance with Mitigation Measures 9 and 10.

Additionally, outside of the proposed “good faith” requirement requested by AEUG Fleming for Mitigation Measures 9 and 10, the Siting Board takes this opportunity to address unclear language in Mitigation Measure 10. The word “should” will be replaced with the word “shall” throughout this mitigation measure to clarify the obligation AEUG Fleming has to provide vegetative visual buffers to address concerns of nearby landowners.

Next, AEUG Fleming seeks to have Mitigation Measure 12 removed after the glare study it provided was approved and accepted by the Siting Board in the July 26, 2021 Order. Mitigation Measure 12 requires the applicant to provide proof glare will not occur. AEUG Fleming contends that an absence of glare is not a possibility or the applicable standard, arguing that the standard is that no “red glare” be allowed to occur and that the glare study accepted in the Siting Board’s July 26, 2021 Order confirms that no red glare will occur.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing Mitigation Measure 12 agrees that Mitigation Measure 12 should be struck from the final Order because the Glare Study has been accepted by the Siting Board and the condition has been satisfied.

#### Impact on Roadways

Next AEUG Fleming requests that Mitigation Measure 15 be revised, arguing that it is unclear from this requirement how road damage will be assessed or allocated to AEUG Fleming and with which regulatory body AEUG Fleming should work to confirm compliance with this mitigation measure. AEUG Fleming requests that the obligation to fix or pay for any road damage be clarified to be an obligation to fix or pay for damage it

causes or to which it materially contributes in accordance with all transportation permits obtained from state and local road authorities.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing Mitigation Measure 15 finds that AEUG Fleming's obligation to repair damage should not be limited purely to damage occurring during activities regulated by the permitting process, and rejects the proposed revisions of AEUG Fleming. The Siting Board instead will require AEUG Fleming, as written in Mitigation Measure 15, "to fix or fully compensate the appropriate transportation authorities for any damage or degradation to roads or bridges that it causes or to which it materially contributes to." However, the Siting Board will add the following language to Mitigation Measure 15 for clarity: "For damage resulting from vehicle transport in accordance with all permits, those permits will be controlling."

Next AEUG Fleming seeks to have Mitigation Measure 20 revised. Currently the measure requires it avoid Lazy Oaks Lane during construction and operations, because the bridge under Lazy Oaks Lane is structurally deficient. AEUG Fleming argues that Lazy Oaks Lane is open to the public and that the mitigation measure should be modified to minimize use of the road and divert traffic to other roads, but not ban its use entirely.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing Mitigation Measure 20 has determined that this mitigation measure will remain unchanged. The Siting Board has determined that this mitigation measure is necessary to avoid any possibility of confusion during the construction or operation process. The bridge under Lazy Oaks Lane cannot sustain the weight of certain large vehicles that will be on site during construction and

should be avoided entirely by such vehicles. The Siting Board also notes that the occasional car or light duty truck with no trailer or load does not run afoul of this mitigation measure.

#### Timing of Construction Activities

Next, regarding work hours, AEUG Fleming requests Mitigation Measure 22 and 23 be modified to clarify that pre-construction activities like the arrival of worker passenger vehicles and staff meeting are allowed to take place before the defined construction and delivery time that is limited to 8 a.m. to 6 p.m. Monday through Saturday. AEUG Fleming proposes that both measures be struck and replaced with the following language:

AEUG Fleming should limit the construction activity and deliveries to the hours of 8 a.m. and 6 p.m. Monday through Saturday. These hours represent a reasonable timeframe to ensure that nearby property owners are not too impacted by the construction activities. Pre-construction meetings, arrival on site, and other on-site activities to prepare for the delivery of equipment are permitted to occur before 8 a.m.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing Mitigation Measures 22 and 23 clarifies that 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. The Siting Board further clarifies that construction activity, which includes process and deliveries, may only take place between 8 a.m. and 6 p.m., Monday through Saturday. The Siting Board also finds that pile-driving activities within 1,000 feet of non-participating homes should be limited to 9 a.m. to 5 p.m., Monday through Saturday.

#### Anticipated Noise Level

AEUG Fleming next asks that Mitigation Measures 25 and 27 be revised because terms “unduly high” or “annoying” defining its obligation to nearby residents to mitigate noise are too subjective and could lead to unreasonable demands. AEUG Fleming asks that such language be replaced with the specific noise level of 50 dBA, which it contends is the standard.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing these mitigation measures finds that Mitigation Measures 25 and 27 should not be changed and do not need any additional clarification. The Siting Board finds that though these mitigation measures may be subjective, that is of little concern and is not unusual, as many, if not most, of nuisance-related standards are subjective. The Siting Board finds that restricting AEUG Fleming’s obligation to nearby residents to mitigate noise to the specific noise level of 50 dBA would shift the burden to the nearby residents rather than AEUG Fleming and render Mitigation Measures 25 and 27 ineffective; the local residents are not in position to measure the noise level so precisely and AEUG Fleming will not be measuring the sound levels again as the construction certificate has been issued. Furthermore, just as with AEUG Fleming’s obligation to provide visual buffers in response to complaints from nearby residents under Mitigation Measures 9 and 10, the Siting Board finds that issues relating to the obligations to mitigate noise effect outlined in Mitigation Measures 25 and 27 can always be brought back to the Siting Board via complaint or motion. If nearby landowners are making unreasonable demands, the developer can merely file a motion with the Siting Board seeking an order determining that the developer’s actions have been in accordance with Mitigation Measures 25 and 27.

## Decommissioning

Lastly, AEUG Fleming seeks to have ambiguities removed from Mitigation Measure 35, which details the decommissioning obligation. AEUG Fleming asks that the entire measure be struck and replaced with the following language:

Prior to the beginning of construction, AEUG Fleming shall file a bond with the Fleming Fiscal Court naming the Fleming Fiscal Court as obligee, equal to the amount necessary to effectuate the explicit or formal decommissioning plan. The bond amount should be reviewed every five years at AEUG Fleming's expense to determine and update the cost of removal amount. 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. Certification of this review shall be provided to the Siting Board or its successors and the Fleming County Fiscal Court. 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.

Based upon the motion and the May 24, 2021 and July 26, 2021 Orders, and being otherwise sufficiently advised, the Siting Board in reviewing this mitigation measure is in agreement with AEUG Fleming that Mitigation Measure 35 should be modified as proposed by AEUG Fleming. AEUG Fleming's proposed language adds specificity regarding bonding filing and recording requirements, the bond obligor, and the required periodic review. The Siting Board finds the proposed language in keeping with the standard of recent Siting Board cases in which the decommissioning obligation is detailed in the final order. However, the Siting Board adopts the proposed language with a slight change, as the word "should" must be replaced with the word "shall". Thus, the phrase within the proposed language is changed to: "The bond amount **shall** be reviewed every five years at AEUG Fleming's expense to determine and update the cost of removal amount."



The Siting Board also modifies the language in Mitigation Measure 34 in conjunction with its modification of Mitigation Measure 35. Mitigation Measure 34 is revised and modified in that the word “should” is replaced with the word “shall” throughout the mitigation measure. Mitigation Measure 34 now states that “AEUG Fleming shall develop an explicit or formal decommissioning plan to carry out the land restoration requirements set forth in the various lease agreements”, and that “This plan shall commit AEUG Fleming to removing all facility components from the project site and Fleming County at the cessation of operations.” Further revision of Mitigation Measure 34 by the Siting Board clarifies that if the facility components are properly disposed of at a permitted facility, they do not have to be physically removed from Fleming County.

#### Formal Conference

AEUG Fleming advised that in requesting that its motion for reconsideration and clarification be heard at a formal conference before the Siting Board it sought the opportunity to provide clarity to the Siting Board as to why the matters requested provide clear guidance to all parties. AEUG Fleming’s counsel advised the Siting Board that the primary purpose for the formal conference was to allow the Siting Board to ask any questions to clarify AEUG Fleming’s motion. The Siting Board, in review of the motion, has no questions and needs no clarification. Accordingly, the formal conference is unnecessary and the request is denied.

IT IS THEREFORE ORDERED that:

1. AEUG Fleming’s petition for reconsideration, clarification and for a formal conference is granted in part and denied in part.

2. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measure 3 is granted. Mitigation Measure 3 is stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

The Siting Board will determine if any deviation in the boundaries (as set forth in Mitigation Measure 2) is likely to create a materially different pattern or magnitude of impacts. If not, no further action is required; but if that is the case, AEUG Fleming will support the Siting Board's effort to review its assessment of impacts and mitigation requirements. If AEUG Fleming modifies its site development plan from the version originally submitted with its Application in a manner that negatively impacts noise levels or external view, such as moving project infrastructure closer to adjoining neighbors, then it will similarly submit such information to the Siting Board for review as specified above.

3. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measure 7 is granted. Mitigation Measure 7 is stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

AEUG Fleming will not remove any existing vegetation, except to the extent it must remove such vegetation for the construction and operation of Project components.

4. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measures 9 and 10 is denied.

5. Mitigation Measure 10 is stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

For residences and other occupied structures that are within 300 feet of the proposed solar facility's boundary and having an unobstructed line of sight of the facility, AEUG Fleming shall provide a buffer to the satisfaction of the affected property owners. If vegetation is used, plantings shall reach eight feet high within four years. That vegetation shall be maintained or replaced as needed. To the extent an affected property owner indicates to AEUG Fleming that such a buffer is not necessary, AEUG Fleming will need to obtain that

property owner's written consent and submit such consent in writing to the Siting Board.

6. Mitigation Measure 10 is stricken from Appendix A to the May 24, 2021 Order. Mitigation Measure 12 is struck because the Glare Study has been accepted by the Siting Board confirming no red glare will result from the solar facility and satisfying this Condition.

7. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measure 12 is denied.

8. Mitigation Measure 15 is stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

AEUG Fleming has committed to fix or fully compensate the appropriate transportation authorities for any damage or degradation to roads or bridges that it causes or to which it materially contributes to. For damage resulting from vehicle transport in accordance with all permits, those permits will be controlling.

9. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measure 20 is denied.

10. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measures 22 and 23 is granted. Mitigation Measures 22 and 23 are stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

Non-noise-causing and non-construction activities shall take place on the site between 7 a.m. and 10 p.m. Monday through Sunday. Construction activities, which includes process and deliveries, shall only take place from 8 a.m. to 6 p.m., Monday through Saturday, and pile-driving activities within 1,000 feet of non-participating homes shall be limited to 9 a.m. to 5 p.m., Monday through Saturday.

11. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measures 25 and 27 is denied.

12. AEUG Fleming's petition for reconsideration and clarification for Mitigation Measure 35 is granted. Mitigation Measure 35 is stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

Prior to the beginning of construction, AEUG Fleming shall file a bond with the Fleming Fiscal Court naming the Fleming Fiscal Court as obligee, equal to the amount necessary to effectuate the explicit or formal decommissioning plan. The bond amount shall be reviewed every five years at AEUG Fleming's expense to determine and update the cost of removal amount. 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. Certification of this review shall be provided to the Siting Board or its successors and the Fleming County Fiscal Court. 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.

13. Mitigation Measure 34 is stricken from Appendix A to the May 24, 2021 Order and replaced with the following:

AEUG Fleming shall develop an explicit or formal decommissioning plan to carry out the land restoration requirements set forth in the various lease agreements. This plan shall be filed with the Siting Board or its successors. This plan shall commit AEUG Fleming to removing all facility components from the project site and Fleming County at the cessation of operations.

14. AEUG Fleming's petition its motion for reconsideration and clarification be heard at a formal conference is denied.

By the Kentucky State Board on Electric  
Generation and Transmission Siting



ATTEST:

A handwritten signature in blue ink, appearing to read "Linda L. Bidwell".

Executive Director  
Public Service Commission  
*on behalf of* the Kentucky State  
Board on Electric Generation  
and Transmission Siting

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