

THE SUN SHINES BRIGHT!

A Primer on Kentucky Merchant Solar Development

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Prior to 2020, Kentucky had no meaningful development and installation of utility scale solar facilities. By the end of 2021, proceedings for approval of 29 large utility scale solar projects (ranging from 40 to 250 MW) were pending before Kentucky Public Service Commission Electric Generation and Transmission Siting Board.



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A variety of factors are driving utility scale solar development in Kentucky:

- **Corporate demand:** Much of the project demand is being driven by the private sector, as internal and external forces are pushing companies to focus on sustainability, including the development of new renewable energy generation projects. When coupled with the concept of “additionality” within a specific state (when a company’s investment directly results in new renewable energy capacity), the result is increased development in the renewable energy sector, including in Kentucky.
- **Kentucky’s location in the PJM and MISO:** Kentucky sits both in the PJM Interconnection transmission system, the world’s largest electricity market, and in the MISO regional transmission interconnect. Solar generation facilities in Kentucky can supply projects throughout the PJM and MISO. In some cases, Kentucky projects can also help fulfill other states’ renewable energy requirements.
- **Access to transmission capacity:** Kentucky’s legacy industrial and fossil generation sectors required significant transmission. As Kentucky’s industry and traditional generation sector transitions, more transmission capacity has become available. For example, in 2020, Kentucky led the country in retirements of coal-fired electric plants, with many in the process of being retired at present.
- **Access to land:** Much of Kentucky is rural, with flat land located close to transmission lines available for development. Farmers are increasingly interested in solar as additional way to earn long-term income from their land, and Kentucky has a strong tradition of respecting private property rights.
- **Growing local government demand:** In addition to growing corporate demand, governmental entities within Kentucky are moving toward renewable generation and creating additional local demand. For example, in early 2020, Louisville became the first city in Kentucky to commit to attaining a goal of powering 100 percent of the city’s municipal operations with renewable energy by the year 2035.

This paper provides an overview of some of the primary considerations when developing utility scale solar in Kentucky. One of the primary development considerations is whether a project must receive an approval to construct from the Board. As a result, this paper first addresses this siting and permitting process. It then provides an overview of a number of topics that will apply to all utility scale solar projects, including site selection and real estate, as well as tax abatements. The paper concludes with a discussion on brightfield/brownfield, greenfield, and reclaimed minefield development.

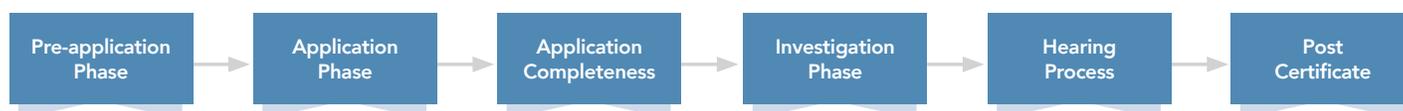
KENTUCKY PUBLIC SERVICE COMMISSION & ELECTRIC GENERATION AND TRANSMISSION SITING BOARD

Before construction can begin on any large-scale solar facility within the Commonwealth of Kentucky, approval and a Certificate of Construction ("Certificate") must be obtained from the Kentucky Electric Generation and Transmission Siting Board ("Board"), a subdivision within the Kentucky Public Service Commission ("PSC"). The Board consists of the three members of the PSC, the secretary of the Energy and Environment Cabinet or a designee, the secretary of the Economic Development Cabinet or a designee, and two local members appointed by the governor to serve for each project.

The Board has a comprehensive, multi-phase process for siting solar facilities that fall within the definition of a "merchant electric generating facility." Kentucky Revised Statutes ("KRS") § 278.700. Solar powered electric generating facilities fall within this definition if they are "capable of operating at an aggregate capacity of 10 megawatts or more; and sell the electricity they produce on the wholesale market, at rates and charges not regulated by the Public Service Commission." KRS § 278.700(2).

The Process

Broadly, the Board siting process consists of five distinct phases that generally take around a year to complete, absent any appeals: 1) Pre-application; 2) Application; 3) Application completeness; 4) Investigation; 5) Hearing process and decision; and 6) Post certificate.



Pre-application Phase

Per KRS § 278.704(6), the PSC, or any city or county governmental entity in the city or county where the project is located, may request that project representatives hold a public meeting in the county where the project will be located. The meeting shall be held not more than thirty (30) days from the date of the request. The purpose of the meeting is to fully inform landowners and other interested parties of the full extent of the project being considered, including the project timeline. Accordingly, one (1) or more representatives of the entity with full knowledge of all aspects of the project shall be present and shall answer questions from the public. Project representatives are obligated to issue public notice of the meeting in conformance with KRS § 278.704(8), which includes direct notice to adjoining landowners. On or before the date of the public meeting, project representatives shall provide notice of all research, testing, or any other activities being planned or considered to: (a) the Kentucky Energy and Environment Cabinet; (b) the PSC; (c) the Kentucky Transportation Cabinet; (d) the Attorney General; and (e) the Office of the Governor.

Prior to submitting an application to obtain a construction certificate from the Board, the project representatives must:

- Confirm and illustrate the project's conformance to all setback requirements as noted in KRS § 278.704(3), or as dictated by local planning and zoning laws.¹ Of note, Kentucky has significant statutory

¹ See below for more information on Local Zoning and the PSC.

setback requirements of 1,000 feet for non-residential areas and 2,000 feet for areas defined as “residential neighborhoods.” Variances and waivers from these setback requirements can be sought through passage of a local zoning ordinance providing for other setback distances (or adherence to existing local zoning ordinances), or by a request for waiver filed with the Board in connection with the Application. These approaches can help to tailor appropriate setback distances based upon the particular circumstances of each project.

- Produce public notice of the project, in conformance with KRS § 278.706(c), which will be issued to adjoining landowners and the general public within thirty (30) days of the application filing.
- Confirm and illustrate the project’s compliance with all local ordinance and regulations (planning and zoning, noise ordinance, business requirements, etc.).
- Conduct and produce: (i) a study detailing the projected effect on electricity transmission within the State; (ii) an economic impact study; and (iii) a site assessment/ or NEPA compliance certification.
- Demonstrate all mandatory and voluntary public involvement program activities, which may include: evidence of public meetings and coordinating public notices, use of media outlets (radio, television, newspaper) to disseminate information relating to the project to the general public, direct mailers, fliers, newsletters, additional public meetings, establishment of a community advisory group, and any other efforts to obtain local involvement in the siting process.

The project also conducts a number of environmental, cultural, visual, decommissioning, and other studies to determine the overall impact of the project on the landscape and the public. These studies are summarized within and submitted along with the application. The application requirements are outlined in KRS § 278.706, and applications should be organized by mirroring this chapter of regulations. Finally, the Board rules permit an applicant to file a motion for the waiver of certain requirements; such waiver requests are usually identified during this phase. These may include, for example, modification of setback requirements or the radius for environmental or ecological studies.

Application Phase

A key component of the Application is the required Site Assessment Report (“Report”). By statute, the completed Report must contain the following primary components:

1. A description of the proposed facility that shall include a proposed site development plan that includes:
 - Surrounding land uses for residential, commercial, agricultural, and recreational purposes;
 - The legal boundaries of the proposed site;
 - Proposed access control to the site;
 - The location of facility buildings, transmission lines, and other structures;

- Location and use of access ways, internal roads, and railways;
 - Existing or proposed utilities to service the facility;
 - Compliance with applicable setback requirements as provided under KRS 278.704(2), (3), (4), or (5); and
 - Evaluation of the noise levels expected to be produced by the facility;
2. An evaluation of the compatibility of the facility with scenic surroundings.
 3. The potential changes in property values and land use resulting from the siting, construction, and operation of the proposed facility for property owners adjacent to the facility;
 4. Evaluation of anticipated peak and average noise levels associated with the facility's construction and operation at the property boundary; and
 5. The impact of the facility's operation on road and rail traffic to and within the facility, including anticipated levels of fugitive dust created by the traffic and any anticipated degradation of roads and lands in the vicinity of the facility.

The Report shall also suggest any mitigating measures to be implemented by the applicant to minimize or avoid adverse effects identified in the Report.

In addition to these required components, the Board's inquiries to date during its investigations, during hearings, and in its post-hearing data requests demonstrate it is interested in projects reporting on a number of other considerations in addition to those strictly required by statute in the Report. These include, for example, whether the project has a decommissioning plan for managing components at the end of the project's useful life, how the project plans to address nearby abandoned oil and gas wells, and visual screening and vegetation management plans.

Application Completeness

After the application is submitted to the Board, its staff conducts a review to determine that the application is complete. This is a preliminary review to ensure that the application contains enough information for the staff to conduct its investigation. If so, the Board will either issue a "no deficiency letter" in which the Board deems the application complete, or it will reject the application as incomplete. If rejected as incomplete, the applicant will receive information about any deficiencies and start the application process over.

Once the no deficiency letter issues, the Board initiates its formal investigation of the application.

Investigation Phase

During this phase, which lasts around 60 days, the Board conducts a thorough investigation of the application. This investigation can include informal or formal questions and data requests, as well as engagement of Board consultants to assist with and opine on the application. At the end of this process, the Board and/or its consultants file reports of their investigation.

Hearing Process

The Board process allows for intervention by interested parties, including the opportunity to conduct discovery. Such requests to intervene must be submitted within 30 days after the application is found to be complete.

The Board process contemplates two hearings. The first is a local public hearing, which is required and is the opportunity for non-intervening parties to share their opinions about the project. The second is the adjudicatory hearing before the Board, in which witness testimony and argument is presented for or against the application. This includes an opportunity for the applicant to present evidence to the Board regarding any mitigation measures. Technically, the adjudicatory hearing is only held if requested a party or set by the Board, but as a practical matter, all applications to come before the Board to date have included an adjudicatory hearing in the process. If the application is contested, a written briefing may be included as part of the hearing process.

At the end of this process, the Board hopefully approves the project and issues a certificate. By statute in Kentucky, the Board has 120 days—or 180 days if an adjudicatory hearing is held, and to date they always are—to issue its decision on the application.

Post Certificate

A Board decision approving the project will include a set of conditions for the project's construction and operation. After the certificate is issued, projects will typically commence the financing process and then initiate construction. Both the project and intervenors can seek reconsideration of all or portions of the Board's decision. While not set out by statute, the Board has repeatedly permitted such requests. After the Board's final decision, the project and/or intervenors have 30 days to appeal to the Circuit Court in the county in which the proposed project is located.

The Timing

Once the project's application is filed, the Board process generally has fairly predictable timelines for completion of the completeness review, investigation, and hearings. However, a number of variables can impact the overall timing of a decision. For example, if there are multiple post-hearing issues that need to be addressed, the outcome of the proceeding may be delayed until that information is provided. Moreover, a highly contested case may involve more data requests and potentially take longer.

In all, the certificate process generally takes 9-12 months to complete, absent requests for reconsideration, post-hearing Board data requests, and any appeals. Currently, most Certificates have been granted with included conditions that prompt one or more parties to request rehearing for the purpose of adjusting or attempting to resolve issues with some of the conditions. This process can add considerable time to the overall state-level permitting process.

Additional Board Resources

Links to additional resources concerning the Board process are below:

- Application for Merchant Generating Electric Facility:
https://psc.ky.gov/agencies/psc/siting_board/forms/chk102.pdf
- Application for Transmission Line:
https://psc.ky.gov/agencies/psc/siting_board/forms/chk103.pdf

REAL ESTATE

Securing all of the necessary real estate documents (e.g., leases, easements, options, and crossing agreements) is one of the most critical and state-specific items in the development of utility-scale solar projects. Most developers have template real estate documents used for projects around the country and which are modified and updated depending on the state in which a project is located. Below are a few considerations relating to the real estate aspects of solar project development in Kentucky.

Deed requirements

In 2018, the Kentucky legislature amended its state laws governing the necessary contents of a deed to real property. Now, every such deed must include: (i) the full name and mailing addresses of the grantor(s) and grantee(s); (ii) a statement of the full consideration; (iii) a statement indicating the in-care-of address to which the property tax bill for the year in which the property is transferred may be sent; and (iv) either (a) a sworn, notarized certificate signed by the grantor or his agent and the grantee or his agent, that the consideration reflected in the deed is the full consideration paid for the property, or (b) a sworn, notarized certificate signed by the grantor or his agent and the grantee or his agent, stating that the transfer is by gift and setting forth the estimated fair cash value of the property.

Remote/ electronic notarization

Effective January 1, 2020, Kentucky law allows for both remote online notarization (a notarial act performed by a Kentucky notary public who has been authorized to perform notarizations when a signer personally appears before the notary using communication technology (e.g., Zoom or a similar platform) instead of being physically present in the same location as the notary) and electronic notarization (a notarial act performed by a notary public using his or her electronic signature on a digital document) by Kentucky notaries located within the State.

Be strategic about choosing a surveyor and title company.

Whether as part of the initial development of the project, or during the financing process, it is important to strategically select a surveyor and title company familiar with the development of energy projects in Kentucky. For example, a Kentucky surveyor with experience in the county in which the project is being developed can provide very practical advice about the local approval processes (e.g., the lot split/subdivision process) and help ensure those processes are completed more quickly and cost-effectively.

LOCAL ZONING AND THE PSC

As most developers know, each county recorder's office operates a little differently. To be safe, all legal descriptions in Kentucky should include a metes and bounds description of the relevant property (whether under an option, lease or easement), the county auditor's tax parcel number(s) and a prior instrument reference. Taking a more comprehensive approach to the legal description will increase the odds that there are no issues with getting documents recorded.

As part of the state siting process, KRS § 278.706(2)(d) requires project representatives to certify that the project is compliant with all local ordinances and regulations. Additionally, project representatives must certify that the project adheres to applicable setback requirements, either imposed at the state or local level. The Board will give deference to local zoning and land-use regulations, as it pertains to setback requirements.

The authority to enact land use and zoning regulations has been delegated, by statute, to counties and local governments.² In particular, cities and counties may enact local ordinances to facilitate planning and zoning regulation, and establish the coordinating structure and authority of a planning and zoning commission. Zoning regulation can be implemented at either the City or County level, and can vary substantially from location to location.

Although many Kentucky communities have no zoning laws, those that enact zoning or other kinds of growth management regulations must first satisfy the following administrative prerequisites.

- **Planning Unit:** The jurisdictional borders of the area to be governed by such locally-enacted land use and zoning regulations, or the "Planning Unit," must be clearly defined. Three categories of Planning Units may be selected: (i) a county or city, acting independently (an "Independent Planning Unit"), (ii) a county and the cities within its jurisdictional limits (a "Joint Planning Unit"), or (iii) a regional group of counties and the cities within their collective jurisdictional limits (a "Regional Planning Unit").
- **Planning Commission:** The Planning Unit must create a Planning Commission, consisting of 5 to 20 members, to execute various administrative powers in conjunction with regulating land use, including the review and approval (after public hearing) of amendments to any zoning regulation or zoning map within the Planning Unit.
- **Comprehensive Plan:** The Planning Commission must create a Comprehensive Plan for the Planning Unit. The Comprehensive Plan serves as the "blueprint" or "road map" for all zoning processes and regulations in the Planning Unit. The Comprehensive Plan guides future development and includes a zoning plan for orderly growth and protection of land values, which property owners and investors should be able to rely on in making investments in real estate.

² KRS, Chapter 100.

- **Board of Adjustment:** The Planning Unit must also create a Board of Adjustment, comprised of 3 to 7 members, that may, among other things, grant conditional use permits, variances, allow changes from one nonconforming use to another and hear administrative appeals.

Accordingly, developers must be mindful of applicable municipal zoning codes and classifications for each property located within the project site. In addition to land use and zoning requirements, local compliance also requires the developer’s awareness of and adherence to:

- local noise control regulations, *if applicable*;
- business operation regulations, *if applicable*;
- local waste and disposal regulations, *if applicable*; and
- local environmental regulations, *if applicable*.

In September 2020, the Kentucky Resources Council developed a Model Solar Zoning Ordinance (“Model Ordinance”) to assist localities in adopting provisions to regulate the siting of solar energy facilities within their communities. The Model Ordinance is based upon a review of best practices from across the United States and is tailored to meet the unique needs of Kentucky, with the goal of encouraging appropriate siting of solar facilities and protection of the correlative rights of landowners to the use and enjoyment of their lands. The ordinance offers a “menu” of options in certain areas, to allow local officials in conjunction with county residents, to select the options that best meet their needs. The Model Ordinance can be viewed [here](#).

SITE SELECTION: BRIGHTFIELD/ BROWNFIELD, GREENFIELD, AND MINEFIELD SOLAR DEVELOPMENT

The Kentucky Environmental and Energy Cabinet has recently invested substantial resources and expertise into developing a toolkit, called the “Hub,” for utility scale solar generation development, with an emphasis on advanced GIS capabilities to aid in identifying desirable development sites, including but not limited to on sites reclaimed minefield sites. See <https://kentucky-solar-toolkit-kygis.hub.arcgis.com/> and <https://solar-siting-potential-in-kentucky-kygis.hub.arcgis.com/>.

In addition, brightfields—defined by the U.S. Department of Energy as solar projects on brownfields (i.e. contaminated land or closed landfills)—are attractive opportunities for solar developers to diversify their development pipeline beyond traditional rooftop and greenfield locations. The number of potential locations for solar development on brightfields/brownfields is enormous. As of 2019, US EPA had pre-screened more than 80,000 brownfields and contaminated lands for renewable energy. Brownfield sites often have the right combination of characteristics—infrastructure, proximity to load centers, and low lease costs—needed to build successful projects.

Additionally, some of these sites have unique attributes that can lower development costs and shorten development timeframes. Many of these properties can offer developers a unique value proposition for renewable

energy deployment (e.g., clear ownership and site control, completed site cleanup, and a motivated “offtaker” for the energy generated), and the ability to:

- Leverage existing infrastructure;
- Offer streamlined permitting and zoning;
- Reduce land costs and provide tax incentives;
- Gain community support through land revitalization efforts; and/or
- Protect open space

But, while brightfields/brownfields offer unique opportunities, they also pose challenges. These locations are often contaminated or Superfund sites, requiring remediation and permitting with environmental regulators at the federal and state level. By way of further example, extensive, below-surface work at former landfill sites would often be prohibited. At sites such as these, to maintain the integrity of the landfill cap, developers may utilize a ballasted solar racking system in which the panels and supports rest on concrete blocks, rather than driven steel posts.

Recognizing the potential value and win-win opportunity of brightfield/brownfield development, Kentucky has created a program specific to their development. For more information on the Kentucky Brownfield Redevelopment Program, visit:

<https://eec.ky.gov/Environmental-Protection/brownfields/Pages/default.aspx>

Additionally, some states have recently begun to offer grants and other funding sources for development of both brightfields/brownfields and reclaimed minefield sites. It is wise to review these options in real time as new projects are considered.

COORDINATION WITH OTHER AUTHORITIES, STAKEHOLDERS, AND THE COMMUNITY

In addition to (and as also required by) the PSC, solar projects are subject to environmental permitting and coordination requirements with numerous state and federal agencies, including but not limited to: the Kentucky Energy and Environment Cabinet, the Kentucky Transportation Cabinet, the Kentucky Department for Environmental Protection, and the Kentucky Department of Revenue. For example, a project may require a stormwater construction general permit, wetlands-related permits, endangered species and cultural resources surveys, or some combination of these.

In combination with local official engagement, early engagement, clear communication, and careful drafting of agreements with local landowners can help to garner support for projects and avoid conflicts down the line. Project owners should consider coordinating with county commissioners, school districts, local economic development organizations, the Kentucky Cabinet for Economic Development, the Kentucky Energy and Environment Cabinet, and other local stakeholders.

TAX CONSIDER- ATIONS

Increasingly, solar project financing and local economic development go hand-in-hand. Utility scale renewable energy projects in Kentucky can benefit from certain tax considerations and incentives.

Commercial scale solar arrays are classified as “Public Service Companies,” titled as Electric Power Companies, and are subject to central taxation by the Kentucky Department of Revenue as directed by KRS § 136.120.

In 2020, the Kentucky legislature amended KRS § 103.200(1)(a) to include “solar generated electricity” as an activity, business, or industry that qualifies for the use of industrial revenue bonds. An Industrial Revenue Bond (IRB) is an economic development tool that is used by state and local governments throughout Kentucky to help finance industrial development, as defined by KRS § 103.200. That development includes merchant solar electric facilities.

There are two components to the payments that a property subject to an IRB can make: one is a payment for state taxes, and one is a payment for all types of local taxes. So, in other words, a Kentucky IRB can be issued by a county and seek both local exemptions and a state-level exemption. Often, when utility-scale solar developers engage in an IRB process with a local government entity, the parties enter into a ‘payment in lieu of taxes’ (PILOT) agreement, wherein the parties negotiate a tax payment intended to replace a portion of the local tax revenue that is forfeited through the local government’s participation in the IRB process.

Bond funds may be used to finance total project costs, including engineering, site preparations, land, buildings, machinery and equipment, and bond issuance costs.³ Generally, the government entity serves as a conduit to provide participating developers with favorable borrowing terms, including a low interest rate and extended repayment schedule. Additionally, the portion of the project financed through the IRB may be exempted from the payment of local property taxes pursuant to KRS § 132.200(7). The property may also be eligible to be taxed at a reduced rate of \$.015 per \$100 of leasehold value if such reduction receives the prior written approval by the Kentucky Economic Development Finance Authority (KEDFA) as required by KRS § 103.210 and KRS § 132.020.

³ <https://ced.ky.gov/KYEDC/pdfs/irb.pdf>



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