

# STATE OF NEBRASKA

## POWER REVIEW BOARD



**Pete Ricketts**  
Governor

March 21, 2016

**Timothy J. Texel**  
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Clifford F. Mesner  
Attorney at Law  
2604 26<sup>th</sup> Avenue  
P.O. Box 335  
Central City, NE 68826-0335

Dear Mr. Mesner:

As you may remember, following your presentation on community solar facilities at the Nebraska Wind and Solar Conference on November 5, 2015, I spoke with you and Chris Anderson, City Administrator for the City of Central City, regarding the community solar facility that was constructed in Central City and whether it might require approval from the Nebraska Power Review Board in order to be constructed, or in this case, to continue operating. It is my understanding you formed or played a role in forming the limited liability company that constructed the facility. A few days prior to the Wind and Solar Conference I sent a letter to Mr. Anderson requesting additional information about the solar generation facility. At the time I sent the letter I did not know that your company, not the City of Central City, was responsible for construction of the facility. Although Mr. Anderson did not respond to my letter, I believe that was because we discussed the details of the facility in person following your presentation. Based on the facts you and Mr. Anderson provided me, it was my opinion that the facility did not require Power Review Board approval.

Due to the increased interest in community solar facilities, also called “community solar gardens”, and in order for you to have a more complete description of the basis for my opinion, I have decided it would be best if I reduced my analysis of the situation to writing.

After discussing this issue with you and Mr. Anderson, in addition to the information in your Powerpoint presentation used at the Wind and Solar Conference, it is my understanding that a limited liability corporation (LLC) was formed that would oversee the construction and maintenance of the solar array. The LLC acts as a manager, but does not own any solar panels or the electricity produced. You stated that either the City involved can construct the solar facility, or a third party can be hired to perform the construction. I believe for the Central City facility a third party was hired to construct the

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facility. The solar facility was built inside the city limits of Central City. Individual residents or businesses in Central City participate in the solar facility by purchasing specific solar panels in one kilowatt increments. The resident or business then owns those specific panels, each of which have their own separate serial number. The owner is responsible for maintaining and insuring the panels belonging to that owner. If a specific panel is damaged, the owner is responsible for repairing or replacing that panel. The power generated by the specific panels is credited against the electric bill of the owner. The level of participation cannot exceed the amount of electricity that the individual participant consumes. I am not sure if each panel is metered or the total output is divided by the number of one-kilowatt panels in the array, but I assume due to the cost that each panel is not separately metered. The City of Central City is a participant in the facility, but it participates by owning one or more panels just as other participants. It does not own or maintain the facility.

As I believe you know, the rule in Nebraska is that any supplier who wishes to build or install a generation facility must obtain approval prior to commencement of construction from either the Power Review Board or, for qualifying renewable projects, from the Federal Energy Regulatory Commission. See Neb. Rev. Stat. § 70-1012 and Neb. Att’y Gen. Opinion 04024 (2004). There is also an exception for net metering facilities. See Neb. Rev. Stat. §§ 70-2001 to 70-2005. Pursuant to Neb. Rev. Stat. § 70-1001.01(3), any legal entity supplying, producing or distributing electricity within Nebraska for sale at wholesale or retail is an “electric supplier” or a “supplier of electricity.” Section 70-1011 states that “no supplier shall offer electric service to additional ultimate users outside its service area . . . without first applying to the [power review] board and receiving approval thereof . . .” The territory in and immediately surrounding the City of Central City is the retail service area of Central City. Southern Public Power District holds the retail service area rights to the territory surrounding Central City’s retail service area. So regardless exactly where the solar facility is located, it is inside an existing utility’s retail service area (either Central City’s or Southern PPD’s). Thus, if the participants were to sell the electricity to any third party at wholesale or retail the facility would be required to obtain Power Review Board approval prior to construction.

The residents and businesses owning panels in the community solar facility are legal entities producing electricity, but the electricity is not produced in order to sell it at wholesale or retail to any third party. The way the Central City solar facility is structured, I believe that it is more appropriate to characterize the activity as the participants providing themselves with electricity, or what is commonly referred to as “self-generation.” Since self-generation does not involve the sale of electricity to third parties at wholesale or retail, it is not required to obtain Power Review Board approval prior to construction or installation of the generation facility. Admittedly, the electrons from each participant’s solar panel will follow the path of least resistance and cannot be delivered directly to that owner’s residence or business. However, I believe that

constructively for the purposes of simplifying this analysis the electrons are being delivered to the panel owner's residence or business. The arrangement is analogous to a solar panel on a rooftop where the resulting electricity is used by the owner and not sold to third parties. It is important to point out that the number of one-kilowatt panels each participant can own are limited by that participant's electric usage.

Based on the facts set out above, it is my opinion that a community solar facility structured in the manner that yours is in Central City is the equivalent of aggregated self-generation, and is exempt from the normal requirement that an electric generation facility receive approval from the Power Review Board prior to commencement of construction, assuming it is not a qualifying net metering facility under Nebraska law or a qualifying facility approved by the Federal Energy Regulatory Commission under its PURPA regulations.

Please understand that this letter constitutes my opinion in my capacity as the general counsel of the Nebraska Power Review Board. The Board itself has not formally addressed the situation in an administrative order, policy or declaratory order. If you would like to obtain a formal determination from the Board, please contact me and we can discuss the best route to obtain such a ruling. I also note that other issues that could be involved in this situation are beyond the scope of this opinion. In the Central City situation the distance between the participant's residence or business and the solar facility is very short, and located entirely within Central City's retail service area. It is unresolved if the solar facility would be located many miles away from the city if the greater distance might eventually necessitate the opinion to change. Also, a question has been raised whether the fact that the electricity travels across a utility's distribution lines from the solar facility to the participant's residence or business necessarily raises transmission issues such as wheeling charges and open access to available transmission facilities. Whether the Power Review Board would have jurisdiction over these issues is not resolved. As stated, those issues are beyond the scope of this opinion, which is limited to whether Power Review Board approval is required prior to the construction of a community solar facility structured in the manner as the one in Central City. The Power Review Board may eventually need to address these additional issues.

Sincerely,



Timothy J. Texel  
Executive Director and General Counsel

cc: Chris Anderson, Central City