

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION
AND TRANSMISSION SITING

In the Matter of:

ELECTRONIC APPLICATION OF NORTHERN)	
BOBWHITE SOLAR LLC FOR A CERTIFICATE)	
OF CONSTRUCTION FOR AN)	
APPROXIMATELY 96 MEGAWATT)	CASE NO.
MERCHANT SOLAR ELECTRIC GENERATING)	2020-00208
FACILITY IN MARION COUNTY, KENTUCKY)	
PURSUANT TO KRS 278.700 AND 807 KAR)	
5:110)	

ORDER

On October 15, 2021, Northern Bobwhite Solar, LLC (Northern Bobwhite) filed a motion for rehearing to address certain issues arising from the Siting Board’s September 27, 2021 Order (Order), granting in part and denying in part Northern Bobwhite’s February 15, 2021 motion for confidential treatment. In the motion, Northern Bobwhite asks that the Siting Board grant rehearing to address whether the definition of “material terms,” as that phrase is defined and used in the Order, should be expanded to include what Northern Bobwhite refers to as all “key commercial terms” in the Landowner Agreements in its motion. Northern Bobwhite’s arguments and the Siting Board’s findings in response are detailed below.

DISCUSSION AND FINDINGS

It is Northern Bobwhite’s contention that the Siting Board’s definition of “material terms” too narrowly defines the terms that are afforded confidential treatment. Further, the public disclosure of the remaining terms, which were denied confidential treatment,

would put Northern Bobwhite at a competitive disadvantage. Northern Bobwhite argues that the Siting Board should grant rehearing to address whether the definition of “material terms” in the Order should be expanded to include all key commercial terms in the Landowner Agreements that were the subject of negotiation between Northern Bobwhite and the landowners.

The Siting Board granted confidential treatment only for the material terms of the leases and easement agreements. In that Order, the Siting Board defined “material terms” as “the lease amount, escalation of lease payments, and remedies available to the parties of the lease for nonperformance of the terms.” Northern Bobwhite argues that application of the Siting Board’s narrow definition of “material terms” would create a competitive disadvantage for Northern Bobwhite. Specifically, Northern Bobwhite contends that other negotiated key commercial terms within the leases and easement agreements should be given confidential protection because disclosure would put Northern Bobwhite at a disadvantage by harming its ability to negotiate in the future. Northern Bobwhite argues public disclosure of the following eight terms would compromise its ability to negotiate in the future:

1. The length of Northern Bobwhite’s option to execute the agreement along with any option extension rights and the lengths of such option extensions;
2. Rights of both parties to the Landowner Agreements to terminate the agreements;
3. Economic terms other than lease rates and related escalations such as signing payments, crop damage calculations, construction rent amounts, extension fees, and holdover rent amounts;

4. The structure of the lease term including the outside date for the rent commencement date;
5. Indemnification provisions, particularly to the extent that such provisions are negotiated by the parties;
6. Representations and warranties provided by the parties;
7. Provisions relating to the lease assignments or transfers; and
8. Sensitive landowner specific terms – things that may have been offered to a specific landowner that were not offered to other landowners.

Northern Bobwhite argues that none of the above-described key commercial terms are either general contract terms or boilerplate language, and that disclosure of these terms would provide other renewable energy developers and potential lessors with knowledge of the full terms and conditions that Northern Bobwhite agreed to in these transactions. Northern Bobwhite argues this would give third parties a competitive advantage, putting it at a competitive disadvantage in future negotiations, and that KRS 61.878(1)(c)(1) protects such information from public disclosure.

The Siting Board recognizes that the information included under the umbrella of the above-listed term number 3, entitled “Economic terms other than lease rates and related escalations such as signing payments, crop damage calculations, construction rent amounts, extension fees, and holdover rent amounts,” is the same type of information as the lease amount, escalation of lease payments, and remedies available to the parties of the lease for nonperformance of terms for which confidential protection was granted as material terms in the Order. Second, the Siting Board finds that above-listed term number 4, entitled “the structure of the lease term including the outside date for the rent

commencement date,” also falls under the Kentucky Open Records Act (Open Records Act) exceptions as disclosure of such negotiated information would impact Northern Bobwhite’s ability to negotiate in the future.

The Siting Board would need more information on the above-listed term number 8, entitled “Sensitive landowner specific terms – things that may have been offered to a specific landowner that were not offered to other landowners,” than was provided in Northern Bobwhite’s October 15, 2021 motion before determining whether an exception to the Open Records Act¹ potentially applies to this information. Absent some specific facts regarding “sensitive landowner specific terms,” confidential protection is denied.

All other terms Northern Bobwhite proposes to be key commercial terms, worthy of being included in the definition of “material terms” simply do not rise to the level of the either the two terms cited above or the information defined as “material terms” in the Order. The Siting Board does not believe blanket application of confidential protection is appropriate for these other terms, as the Siting Board neither believes that their public disclosure will lead to a true competitive disadvantage, nor does the Siting Board believe that these terms fall under any other Open Records exception.²

IT IS THEREFORE ORDERED that:

1. Northern Bobwhite’s motion for rehearing is granted in part and denied in part.
2. Northern Bobwhite’s motion for rehearing for the expansion of the definition of “material terms” to include term number 3 and term number 4 is granted. The definition

¹ KRS 61.870 through 61.884.

² KRS 61.878 exempts a number pf public records from disclosure upon certain conditions.

of “material terms” as it relates to the September 27, 2021 Order is expanded to include the following terms:

a. Economic terms other than lease rates and related escalations such as signing payments, crop damage calculations, construction rent amounts, extension fees, and holdover rent amounts; and

b. The structure of the lease term including the outside date for the rent commencement date.

3. Northern Bobwhite’s motion for rehearing regarding the expansion of the definition of “material terms” is denied for all other proposed key commercial terms in the Landowner Agreements.

By the Kentucky State Board on Electric
Generation and Transmission Siting



ATTEST:

A handwritten signature in blue ink that reads "Linda G. Bridwell". The signature is written in a cursive style and is positioned above a horizontal line.

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

Case No. 2020-00208

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