

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

In the Matter of:

ELECTRONIC APPLICATION OF HORUS)	
KENTUCKY 1 LLC FOR A CERTIFICATE OF)	
CONSTRUCTION FOR AN APPROXIMATELY)	CASE NO.
69.3 MEGAWATT MERCHANT ELECTRIC)	2020-00417
SOLAR GENERATING FACILITY IN SIMPSON)	
COUNTY, KENTUCKY PURSUANT TO KRS)	
278.700 AND 807 KAR 5:110)	

ORDER

On September 2, 2021, Horus Kentucky 1 LLC (Horus Kentucky 1) filed a motion, pursuant to 807 KAR 5:110, Section 5, and KRS 61.878, requesting that the Siting Board grant confidential protection for ten years for its responses to Siting Board Staff’s First Request for Information (Staff’s First Request) Items No. 9, 13, 14(e), 55, and 57(d). In addition, Horus Kentucky 1 filed a second motion for confidential protection on September 30, 2021. This motion requested that the Siting Board grant confidential protection for an indefinite time for its responses to Siting Board Staff’s Second Request for Information (Staff’s Second Request) Items No. 14, 47, and 38, including Exhibits C, F, and I. Finally, Horus Kentucky 1 filed responses to Siting Board Staff’s Post-Hearing Request for Information (Post-Hearing Request) on November 30, 2021, and stated it redacted certain responses because of the pending motions for confidential protection.

DISCUSSION

The Siting Board is a public agency subject to Kentucky's Open Records Act,¹ which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884.² The exceptions to the free and open examination of public records contained in KRS 61.878, should be strictly construed.³ The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.⁴

September 2, 2021 Motion

Horus Kentucky 1 stated that Staff's First Request No. 9 asked it to explain what proportion of the capital cost for the construction phase was expected to be spent on equipment and services in Kentucky or Simpson County. Staff's First Request No. 13 asked for a separate discussion of the employment, labor income, value added, and output effects of the construction phase and the operations phase of the project. Horus Kentucky 1 stated that Staff's First Request No. 14(e) asked it to explain whether the economic impacts were on a gross or net basis and to provide the raw data for the employment impact analysis. Staff's First Request No. 55 asked for cost estimates of construction purchases in Simpson County and Kentucky. Staff's First Request No. 55 also requested an estimate of the amount of sales or use tax revenue generated by purchases within Kentucky, the approximate percentage of the estimated workers that will be hired from Simpson County, and for an explanation of the estimate of construction

¹ KRS 61.870 through 61.81.884.

² KRS 61.872(1).

³ KRS 61.878.

⁴ 807 KAR 5:110, Section 5(2)(d).

labor income. Staff's First Request 57(d) asked Horus Kentucky 1 to produce its decommissioning plan.

KRS 61.878(1)(c)(1) grants confidential protection to "Records . . . [w]hich if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." Horus Kentucky 1 argued that KRS 61.878(1)(c)(1) exempts the responses described above from disclosure because the information contained in them is confidential and proprietary and would allow other businesses an unfair commercial advantage. Other companies could view the cost estimates and substantially raise prices at a disadvantage to Horus Kentucky 1. Horus Kentucky 1 argued that this material contains sensitive, proprietary commercial information concerning pricing, profit, and cost input that could be detrimental to it in future negotiations and impact its ability to be competitive. Horus Kentucky 1 argued that the material concerned its inner corporate workings.

Having considered the September 2, 2021 motion and the material at issue, the Siting Board finds that Horus Kentucky 1's motion as to its responses to Staff's First Request should be granted in part and denied in part.

The Siting Board finds that the portions of Horus Kentucky 1's decommissioning plan concerning cost estimates and salvage value contained in Horus Kentucky 1's response to Staff's First Request No. 57(d) are records that meet the criteria for confidential treatment and are exempted from public disclosure pursuant to KRS 61.878(1)(c) and 807 KAR 5:110, Section 5.

In all other respects the material referred to in the September 2, 2021 motion does not meet the standard for confidential treatment. That material does not contain

competitive pricing quotes or information upon which bids would be made, nor does it mention expected profit. General information on economic impact, tax revenue increase, and job creation was used and shared with the public and local officials in preparation for the application to the Siting Board. Such information is not generally considered confidential or proprietary sufficient to meet the burden of meeting the exception in KRS 61.878(1)(c). The exception does not apply, and the motion is denied as to those items.

September 30, 2021 Motion

Horus Kentucky 1 requested confidential protection for an Archeological Survey and an Architectural Survey, (Exhibits E and F) prepared by a third party consultant provided in response to Staff's Second Request No. 14. Horus Kentucky 1 also requested confidential protection for responses to Staff's Second Request No. 38, which asked Horus Kentucky 1 to explain the revised estimate of labor income and a table detailing payroll taxes, and for Exhibit I containing leases for the project site in response to Staff's Second Request No. 47. Horus Kentucky 1 argued all this information should be kept confidential under KRS 61.878(1)(c)(1). It argues this information could provide competitors with an unfair advantage if they learn the lease terms and amounts, the estimates for costs of labor and taxes projected to be collected, or can obtain access to the information in the surveys.

Having considered the September 30, 2021 motion and the material at issue, the Siting Board finds that Horus Kentucky 1's motion as to its responses to the Staff's Second Request for Information should be granted in part and denied in part. The Siting Board finds that only the material terms of the lease agreements in Exhibit I meet the

criteria for confidential treatment, and are therefore exempt from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:110(5). Material terms as defined for the purposes of this Order are defined as follows:

1. The lease amount;
2. Terms of escalation of lease payments;
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; and
5. Remedies available to the parties of the lease for nonperformance of the terms.

The above detailed material terms of the leases provided in responses to the Staff's Second Request for Information, are exempted from public disclosure because the terms are details that could permit a competitor of Horus Kentucky 1 an unfair commercial advantage pursuant to KRS 61.878(1)(c)(1), and 807 KAR 5:110, Section 5.

Individuals have a right of personal privacy in relation to their contact information. KRS 61.878(1)(a) exempts from public disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." For this reason, the Siting Board finds that the personal contact information in the leases such as phone numbers and email addresses will also be kept confidential pursuant to KRS 61.878(1)(a), and 807 KAR 5:110, Section 5.

The remaining terms governing the leases do not meet that criteria for confidentiality because they are general contract terms, and for those non-material terms the request for confidential treatment should be denied. The Siting Board has previously held that leases in their entirety are not entitled to confidential protection because of the failure to meet the requisite standard for exemption from disclosure. Therefore, the remaining terms of the leases do not meet the criteria for confidential treatment and are not exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:110(5).

The Siting Board finds that the remaining items listed by Horus Kentucky 1 in the second motion do not meet the standard for confidential treatment. Reports concerning the existence or significance of archeological importance or historic artifacts do not constitute information that puts Horus Kentucky 1 at a competitive disadvantage if disclosed. As to the material supplied for Staff's Second Request No. 38 it related to a revised estimate of labor income to be earned by prospective workers, and payroll taxes from those wages, which was also the subject of the September 2, 2021 motion. This is not entitled to confidential protection.

November 30, 2021 Responses to Post-Hearing Data Request

Horus Kentucky 1 filed a redacted response to Post-Hearing Request Nos. 1(a) and (b), which requested it to supply an explanation of the assumptions and inputs used to calculate the economic impact of the proposed project. Horus Kentucky 1's responses were similar to those in response to Staff's Second Request No. 38. In its filing Horus Kentucky 1 referenced its earlier filed motions but no separate motion was made. The

Siting Board finds that the material was redacted based on the earlier motions, however, it does not meet the standards for confidential treatment and the motions are denied.

IT IS THEREFORE ORDERED that:

1. Horus Kentucky 1's September 2, 2021 and September 30, 2021 motions for confidential treatment for responses to Siting Board Requests for Information are granted in part and denied in part.

2. Horus Kentucky 1's motion for confidential treatment for the cost estimates and salvage value in its decommissioning plan submitted in response to Staff's First Request Item No. 57(d) is granted.

3. Horus Kentucky 1's motion for confidential treatment for response to Staff's First Request for Item Nos. 9, 13, 14(e), and 55 is denied.

4. Horus Kentucky 1's motion for confidential treatment for the material terms of the leases in Exhibit I, filed in response to Staff's Second Request Item No. 47, is granted.

5. Horus Kentucky 1's motion for confidential treatment for Exhibits E and F, the response to Staff's Second Request Item No. 38, and the material contained in the responses to Post-Hearing Request 1(a) and (b) is denied.

6. The designated material granted confidential treatment by paragraph 2 of this Order shall not be placed in the public record or made available for public inspection for ten years or until further Order of this Siting Board.

7. The designated material granted confidential treatment by paragraph 4 of this Order shall not be placed in the public record or made available for public inspection for an indefinite time or until further Order of this Siting Board.

8. Use of the designated material granted confidential treatment by this Order in any Siting Board proceeding shall comply with 807 KAR 5:110, Section 5.

9. Horus Kentucky 1 shall inform the Siting Board if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

10. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, Horus Kentucky 1 shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If Horus Kentucky 1 is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Siting Board shall deny the request for inspection.

11. The Siting Board shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow Horus Kentucky 1 to seek a remedy afforded by law.

12. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

13. If Horus Kentucky 1 objects to the Siting Board's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to 807 KAR 5:110, Section 5(4), or judicial review of this Order pursuant to KRS 278.712(5). Failure to exercise either of these statutory rights will be deemed as

agreement with the Siting Board's determination of which materials should be granted confidential treatment.

14. Within 30 days of the date of service of this Order, Horus Kentucky 1 shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

15. The designated material for which Horus Kentucky 1's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow Horus to seek a remedy afforded by law.

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By the Kentucky State Board on Electric
Generation and Transmission Siting



ATTEST:


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

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