

**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 MERCHANT SOLAR ELECTRIC) Case No. 2020-00208
GENERATING FACILITY IN MARION COUNTY,)
KENTUCKY PURSUANT TO KRS 278.700 AND)
807 KAR 5:110)

**NORTHERN BOBWHITE SOLAR LLC’S
MOTION FOR REHEARING**

Pursuant to KRS 278.400 and other applicable law, Northern Bobwhite Solar LLC (“Bobwhite”) respectfully submits this motion for rehearing of the Kentucky State Board on Electric Generation and Transmission Siting’s (“Siting Board”) September 27, 2021 Order in this case (the “Order”). The Order granted in part and denied in part Bobwhite’s February 15, 2021 motion for confidential treatment which sought, in relevant part, confidential treatment, in their entirety, of the leases and easement agreements contained in Exhibit K of its responses to Siting Board Staff’s First Request for Information (the “Landowner Agreements”). The Order granted confidential treatment only for the “material terms” of the Landowner Agreements, but then narrowly defined “material terms” to include only the lease amount, escalation of lease payments, and remedies available to the parties of the lease for nonperformance of terms.¹ The Order’s definition of material terms too narrowly defines the terms that are afforded confidential treatment, and the disclosure of the remaining terms would put Bobwhite at a competitive disadvantage. Accordingly, the Siting Board should grant rehearing to address whether the definition of “material

¹ Order at 2-3.

terms” should be expanded to include all key commercial terms in the Landowner Agreements that were the subject of negotiation between Bobwhite and the landowner.

Law and Argument

A. Standard for Rehearing

KRS 278.400 authorizes “any party to the proceedings” to apply for rehearing of a Commission order within 20 days of service of the order.² The Commission interprets the statute as “provid[ing] closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings.”³ The statute requires and the Commission expects “the parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their cases and serves to prevent piecemeal litigation of issues.”⁴ However, the Commission nevertheless enjoys the discretion to grant rehearing when required to address any errors or omissions in the Commission’s orders.⁵

Bobwhite sought confidential treatment of the Landowner Agreements in their entirety because the Landowner Agreements contained terms and conditions that, if disclosed to competitors and other potential lessees, would put Bobwhite at a competitive disadvantage. Bobwhite accepts that the Siting Board has limited confidential treatment of the Landowner Agreements to certain material terms and not the Landowner Agreements in their entirety. However, the Siting Board’s narrow definition of material terms leaves potentially exposed terms

² KRS 278.400 provides for rehearing of an order of the Public Service Commission of Kentucky (“Commission”). The Siting Board, however, incorporated the rehearing procedures for Commission Orders into this matter in the Order. Order at 5-6 (Ordering Paragraph 11).

³ Order, *In the Matter of Application of Kentucky-American Water Co. for a Certificate of Pub. Convenience and Necessity Authorizing Construction of the Northern Div. Connection*, Case No. 2012-00096 at 4 (Ky. P.S.C. January 23, 2014).

⁴ *Id.*

⁵ Order, *In the Matter of Application of Jessamine-South Elkhorn Water Dist. for a Certificate of Pub. Convenience and Necessity to Construct and Finance a Waterworks Improvement Project Pursuant to KRS 278.020 and 278.300*, Case No. 2012-00470 at 11 (Ky. P.S.C. Jan. 3, 2014); Order, *In the Matter of DPI Teleconnect, L.L.C. v. Bellsouth Telecomm., Inc. D/B/A AT&T Kentucky Dispute Over Interpretation of the Parties' Interconnection Agreement Regarding AT&T Kentucky's Failure to Extend Cash-Back Promotions to DPI*, Case No. 2009-00127, at 3 (Ky. P.S.C. Mar. 2, 2012).

and conditions that if disclosed will put Bobwhite at a competitive disadvantage. It is the question of whether the definition of material terms in the Order should be expanded that Bobwhite respectfully requests the Siting Board address on rehearing.

Northern Bobwhite's Motion for Rehearing

A. The Order Fails to Evaluate All of the Terms that If Disclosed Would Result in Competitive Disadvantage to Bobwhite.

1. Standard for Granting Confidential Treatment

807 KAR 5:110, Section 5 requires that the party seeking confidential treatment must establish “each basis upon which the petitioner believes the material should be classified as confidential” under the Kentucky Open Records Act.⁶ The Kentucky Open Records Act exempts from disclosure:

Records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would present an unfair commercial advantage to competitors of the entity that disclosed the records.⁷

This exception “is aimed at protecting records of private entities which, by virtue of involvement in public affairs, must disclose confidential or proprietary records to a public agency, if disclosure of those records would place the private entities at a competitive disadvantage.”⁸ Bobwhite’s request for confidential treatment of the Landowner Agreements is based on this exception to the Kentucky Open Records Act.

2. The Order’s Narrow Definition of “Material Term” Would Create a Competitive Disadvantage for Bobwhite.

In denying Bobwhite’s request to afford the Landowner Agreements confidential treatment in their entirety, the Siting Board concluded that “only the material terms of the leases and

⁶ 807 KAR 5:110, Section 5(2)(a)(1).

⁷ KRS 61.878(1)(c)(1)

⁸ 97- ORD-66 at 10 (Ky. OAG Apr. 22, 2008).

easement agreements meet the criteria for confidential treatment.”⁹ The Siting Board defined “material terms” to include “the lease amount, escalation of lease payments, and remedies available to the parties of the lease for nonperformance of the terms” because disclosure of those terms would permit a competitor of Bobwhite an unfair commercial advantage.¹⁰ As for the remaining terms in the Landowner Agreements, the Siting Board concluded:

The remaining terms governing the leases do not meet that criteria for confidentiality because they are general contract language that would permit a competitor of Northern Bobwhite an unfair commercial advantage, and for those non-material terms the request for confidential treatment should be denied.¹¹

The Siting Board’s narrow definition of material term ignores the other key commercial and negotiated terms in the Landowner Agreements.

The Landowner Agreements reflect the result of negotiations between Bobwhite and the landowners. While these negotiations addressed the items labeled by the Siting Board as “material terms,” they also covered other key commercial terms integral to the Landowner Agreements.

These include:

- The length of Bobwhite’s option to execute the agreement along with any option extension rights and the lengths of such option extensions;
- Rights of both parties to the Landowner Agreements to terminate the agreements;
- 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;
- The structure of the lease term including the outside date for the rent commencement date;
- Indemnification provisions, particularly to the extent that such provisions are negotiated by the parties;
- Representations and warranties provided by the parties;
- Provisions relating to the lease assignments or transfers; and
- Sensitive landowner specific terms – things that may have been offered to a specific landowner that were not offered to other landowners.

⁹ Order at 2.

¹⁰ Order at 2-3.

¹¹ Order at 3.

These additional key provisions are not “general contract language” as identified in the Order. They are not akin to boilerplate “Governing Law,” “Amendment,” “Entire Agreement,” “Interpretation,” “Counterparts,” or other similar provisions in agreements. Instead, these key provisions combine with the “material terms,” as that term is defined in the Order, to provide the full picture of the rights and responsibilities allocated in the Landowner Agreements. These terms are unique to Bobwhite’s Landowner Agreements and may differ from terms included in leases and other agreements from other renewable energy developers.

Disclosure of the terms described above would provide other renewable energy developers and potential lessors with knowledge of the full terms and conditions that Bobwhite agreed to in these transactions. These third-parties would gain an insight into how Bobwhite allocates the full spectrum of rights and responsibilities in these agreements as well as the compensation paid. Knowledge of these terms would put Bobwhite at a competitive disadvantage in future negotiations with landowners, and, accordingly, such terms should be afforded confidential treatment along with the “material terms” defined in the Order.¹²

Conclusion

For the foregoing reasons, Northern Bobwhite Solar LLC respectfully submits that the Siting Board should grant rehearing to consider whether the definition of “material terms” included in its September 27, 2021 Order should be expanded to include all key commercial terms in the Landowner Agreements that were the subject of negotiation between Bobwhite and the landowner.

¹² The Commission has previously afforded confidential treatment for similar negotiated contract terms. *See*, Order, *In the Matter of: Elec. Application of Big Rivers Elec. Corp. for Approval of Solar Power Contracts*, Case No. 2020-00183 (Ky. P.S.C. March 25, 2021); Order, *In the Matter of: Big Rivers Elec. Corp. Filing of Wholesale Contracts Pursuant To KRS 278.180 and KAR 5:011 § 13*, Case No. 2014-00134 (Ky. P.S.C. Sept. 10, 2014); Order, *In the Matter of: Elec. Purchased Gas Adjustment Filing of Columbia Gas of Kentucky, Inc.*, Case No. 2018-00253 (Ky. P.S.C. Feb. 13, 2019).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. Gish', enclosed within a large, loopy blue oval.

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