

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

In the Matter of:

ELECTRONIC APPLICATION OF)
HUMMINGBIRD ENERGY LLC FOR A)
CERTIFICATE OF CONSTRUCTION)
FOR AN APPROXIMATELY 200)
MEGAWATT MERCHANT ELECTRIC)
SOLAR GENERATING FACILITY AND)
NONREGULATED ELECTRIC)
TRANSMISSION LINE IN FLEMING)
COUNTY, KENTUCKY PURSUANT TO)
KRS 278.700 AND 807 KAR 5:110)

Case No. 2022-00272

RESPONSE TO CONSULTANT’S REPORT

Hummingbird Energy LLC (“Hummingbird” or “Applicant”) provides the following response to the Harvey Economics (HE) Review and Evaluation of the Hummingbird Solar, LLC Site Assessment Report (“Harvey Economics Report” or “Report”). Hummingbird appreciates the thorough review and analysis of the proposed project and proposed location. The Report’s recommendations are generally agreed to with minor recommended clarifications as described below.

General Statement Regarding Recommendations

As noted on many of the recommendations below, the Applicant agrees with the spirit of the recommendation but has concerns regarding the implementation and enforcement of the recommendation if adopted in the Kentucky State Board on Electric Generation and Transmission Siting (the “Board”). House Bill 4 of the 2023 Kentucky legislative session gave authority for enforcement of the Board’s orders to the Kentucky Department for Environmental Protection

following conclusion of construction on projects approved by the board. The Division of Waste management has already issued proposed regulations designed to implement the new law. Because the Applicant will have one agency determining the appropriate mitigation measures (this Board) and an entirely separate agency (the Division of Waste Management) ensuring compliance with those mitigation measures, clear and objective mitigation measures are more critical ever. As such, many of Applicant's comments are designed to add clarity and objectivity to the recommendations provided by Harvey Economics.

A. Site development plan:

Recommendation:

5. A detailed, Project-specific construction schedule should be submitted to the Siting Board. At a minimum, that information should include detailed descriptions of Project phasing, explanations of the timing and specific activities included in each phase, revised workforce estimates, if applicable, and estimates of delivery truck and commuter vehicle traffic by roadway.

Response:

Applicant agrees to submit an updated construction schedule prior to commencing construction, but requests that the Board not require estimates of delivery truck and commuter vehicle traffic by roadway, as that information is likely to changes on a nearly day-to-day basis.

Recommendation:

6. The Siting Board will determine whether any information provided in the construction schedule or revised workforce estimates is likely to create a materially different pattern or magnitude of

impacts than described in this report. If not, no further action is required. If so, the Applicant will support the Siting Board's effort to revise its assessment of impacts and mitigation requirements.

Response:

This mitigation measure should be limited to the site plan as the Applicant has already agreed to submission of an updated construction schedule prior to commencing construction.

Recommendation:

11. The Applicant will develop an emergency response plan prior to the start of construction. The Applicant will meet with local emergency management representatives to ensure familiarity with plans and procedures. The emergency response plan will be revised following completion of construction to reflect operational measures, and a meeting will be held with local emergency response representatives for an updated review.

Response:

The emergency response plan should not need to be revised following construction and requiring such is out of line with standard Board requirements. Additionally, the Board should not require a meeting with a party outside of the Board's jurisdiction. The Applicant has no control over whether the relevant emergency responders will meet with the Applicant. Applicant recommends this recommendation not be adopted.

Recommendation:

12. The Applicant will post contact information for Project representatives and emergency agencies on signs at each entrance to the Project site.

Response:

Applicant intends to provide contact information for the Project but should not be required to post emergency agency information. Requiring posting of emergency agency information potentially invites liability if the wrong agency is contacted or if 911 should be called, but is not. Applicant recommends this recommendation not be adopted.

B. Compatibility with scenic surroundings

Recommendation:

2. The Applicant will not remove any existing vegetation except to the extent it must be removed for the construction and operation of Project components.

Response:

Applicant suggests removing “must be removed” and replacing with “practicality requires removal”.

Recommendation:

3. The Applicant shall implement planting of native evergreen species as a visual buffer to mitigate viewshed impacts, particularly in areas directly adjacent to the Project without existing vegetation.

Response:

This recommendation is subjective in implementation and redundant of the Applicant’s vegetative screening plan and should not be adopted.

Recommendation:

4. The Applicant shall carry out visual screening consistent with the plans proposed in its Application, including the Site Assessment Report, and ensure proposed new vegetative buffers are successfully established and develop as expected over time. Should vegetation used as buffers fail to thrive over time, the Applicant shall replace them as appropriate.

Response:

The phrase “fail to thrive over time” is subjective and should be removed or replaced with something objective, such as the vegetation must be replaced as plants die.

Recommendation:

6. Any changes to the vegetative buffering plan or site infrastructure layout (i.e., panels, inverters, etc.) included in the Application materials will be submitted to the Siting Board for review. If the Siting Board deems those changes to be significant, the Siting Board may require the Applicant to further modify the buffering plan.

Response:

This recommendation is redundant with site plan obligations and should not be adopted.

Recommendation:

7. The Applicant’s proposed mitigation measures commit to plantings a minimum of six feet in height at the time of planting and eight feet high at within five years.

Response:

Applicant suggests removing “within five years” and replacing with “maturity”. Applicant is unable to control the growth rate of trees but has committed to the trees being at least 8 feet by full maturity.

Recommendation:

8. Landscape screening will extend and connect to existing site vegetation, if any, to help create a more natural transition between existing vegetation and Applicant developed vegetation.

Response:

Applicant suggests limiting this provision to locations where the screening plan has indicated landscape screening will be utilized, otherwise this measure is overly broad and should not be adopted.

Recommendation:

10. The Applicant shall use grasses and pollinator seed mixes that support native birds, insects and other species as part of the planned landscaping buffers.

Response:

This recommendation is broad, vague, and subjective in implementation. Applicant suggests limiting pollinator requirements to the standard 2 acres.

Recommendation:

11. The Applicant will use anti-glare panels and operate the panels in such a way that glare from the panels is minimized or eliminated.

Response:

This recommendation is subjective and redundant. Solar panels are designed to absorb sunlight and minimize glare. Applicant suggests that the Board requires Applicant to operate the panels in accordance with FAA and other applicable agency requirements.

Recommendation:

12. The Applicant will coordinate with adjacent homeowners affected by glare to further minimize or reduce the duration of glare to the reasonable satisfaction of the affected property owner.

Response:

This recommendation is both subjective in implementation and redundant with the complaint resolution plan, and should not be adopted.

Recommendation:

13. The Applicant will post road signs warning of potential glare along affected portions of Breeze Road and Foxport Road, as identified in the Glare Hazard Analysis.

Response:

Screening should prevent any potential glare impacts to Breeze Road and Foxport Road. Additionally, any potential glare would be green or yellow and occurring only during very short durations at particular times of the year. Finally, many local and state jurisdictions restrict the number and size of signs that may be placed along public roadways, meaning this recommendation may conflict with applicable law. Applicant requests that this recommendation not be adopted.

Recommendation:

14. The Applicant will work with homeowners, business owners and churches to address concerns related to the visual impact of the Project on its neighbors.

Response:

This recommendation is both subjective in implementation and redundant with the complaint resolution plan, and should not be adopted.

C. Potential changes in property values and land use:

Recommendation:

1. No unique mitigation measures are recommended related to potential impacts to property values or adjacent land uses because other mitigation can limit property value impacts. However, the Applicant's close coordination with impacted and concerned homeowners will be needed to minimize potential visual impacts and impacts from noise, traffic or other Project activities.

Response:

This recommendation is subjective, vague, and conflicts with evidence already in the record. Further, this recommendation is redundant with the complaint resolution plan and should not be adopted.

D. Anticipated peak and average noise levels:

Recommendation:

3. If pile driving activity occurs within 1,500 feet of a noise sensitive receptor, the Applicant shall implement applicable Best Management Practices to suppress the noise generated during the pile

driving process (i.e., semi-tractor and canvas method; sound blankets on fencing surrounding the Project site; or any other comparably effective method).

Response:

This is subjective and likely impractical to achieve compliance. To the extent this recommendation is adopted, Applicant suggests removing the phrase “best management practices” which is particularly subjective.

Recommendation:

4. The Applicant shall implement Best Management Practices to reduce noise levels with regard to construction-related activity occurring near residential neighborhoods (i.e., utilizing construction equipment fitted with exhaust systems and mufflers when available; using back-up alarms that are the minimum increment above background noise allowable by OSHA requirements; staging materials and equipment away from these locations when feasible; etc.).

Response:

This recommendation is subjective and potentially puts construction workers at greater risk for injury. Additionally, this recommendation should be addressed via the complaint resolution program. Applicant recommends the Board not adopt this recommendation.

E. Road and rail traffic, fugitive dust, and road degradation:

Recommendation:

1. The Applicant should revisit construction traffic impacts once a construction plan is in place. These revised traffic assessments should be reported to the Siting Board for determination about the adequacy of the agreed upon traffic mitigation measures.

Response:

This recommendation is redundant with the traffic study and subjective in implementation. Applicant recommends the Board not adopt this recommendation.

Recommendation:

5. The Applicant should work with the Commonwealth road authorities and the FCRD to perform road surveys, before and after construction activities, on all roads to be used by construction vehicles.

Response:

Applicant agrees with the spirit of this recommendation, but as written the recommendation is redundant with the traffic study and subjective in implementation. Additionally, it requires a meeting with a third party that may not wish to meet with the Applicants. Applicant recommends the Board not adopt this recommendation.

Recommendation:

6. The Applicant will fix or pay for damage resulting from any vehicle transport to the Project site. For damage resulting from vehicle transport in accordance with all permits, those permits will be controlling.

Response:

Applicant recommends limiting this to “damage to roads caused by the project”. As written, this recommendation is overly broad.

Recommendation:

8. The Applicant should work with the local community and authorities to ensure that construction commuting schedules and major deliveries do not cause undue impacts during peak hours.

Response:

This recommendation is subjective and vague in implementation, and redundant of the existing traffic study. Further, some delivery routes and schedules for oversize loads are regulated by the state. Applicant recommends this recommendation not be adopted.

Recommendation:

10. The Applicant shall develop and implement a traffic management plan to minimize the impacts on traffic flow and keep traffic and people safe. Any such traffic management plan shall also identify any noise concerns during the construction phase and develop measures that would address those noise concerns.

Response:

Applicant recommends the noise element be removed from this recommendation, if adopted, as traffic noise is highly variable.

Recommendation:

12. The Applicant will monitor the development schedules of other solar facilities in the area. If construction schedules with either or both of the other projects coincide with Hummingbird, efforts should be made to jointly manage traffic impacts.

Response:

This recommendation is subjective, impractical to implement, and unnecessary. If constructions were to overlap with the other projects in the county the consultant's report states that only one intersection may be impacted. Applicant recommends this recommendation not be adopted.

F. Economic impacts:

Recommendation:

1. The Applicant should attempt to hire local workers and contractors to the extent they are qualified to perform the construction and operations work.

Response:

While Applicant agrees with the spirit of this recommendation, compliance with implementation of this recommendation is subjective. Applicant recommends this recommendation not be adopted.

Recommendation:

2. The Applicant should consider opportunities to optimize local benefits; for example, by purchasing materials, if possible, in the local area during construction and operation.

Response:

While Applicant agrees with the spirit of this recommendation, compliance with implementation of this recommendation is subjective. Applicant recommends this recommendation not be adopted.

G. Decommissioning:

Recommendation:

3. The Applicant will notify Fleming County officials of upcoming decommissioning activities at least 30 days prior to the commencement of decommissioning.

Response:

State law outlines the requirements for decommissioning and notice of same. Applicant recommends this recommendation not be adopted.

Recommendation:

5. The Applicant shall file a bond with Fleming County Fiscal Court, equal to the amount necessary to effectuate the explicit or formal decommissioning plan, naming Fleming County as an obliged or a third-party (or secondary, in addition to individual landowners) beneficiary of that bond, so that Fleming County will have the authority to draw upon the bond to effectuate the decommissioning plan as needed. For land in which there is no bonding requirement otherwise, Fleming County shall be the primary beneficiary of the decommissioning bond for that portion of the Project. The bond(s) shall be in place at the time of commencement of operation of the Project.

Response:

This recommendation does not comply with KRS 278.706(2) and should not be adopted.

Recommendation:

7. If the Applicant proposes to retrofit the current proposed facility, it shall demonstrate to the Siting Board that the retrofit facility will not result in a material change in the pattern or magnitude of impacts compared to the original project. Otherwise, a new Site Assessment Report

will be submitted for Siting Board review. The term retrofit is defined as the facility being re-designed such that the facility has a different type of operations or function, i.e., no longer operates as a solar electric generation facility.

Response:

Applicant recommends adopting the standard Board provision concerning these issues, which states: [Hummingbird] shall commit to removing the debris and replaced facility components from the Project site upon replacement. Replaced components shall be properly disposed of at a permitted facility”. Applicant further disagrees with the requirement to inform the Board of retrofits, because the Board will not have jurisdiction over the facility once construction is complete.

Recommendation:

8. The Applicant shall also prepare a new Site Assessment Report for Siting Board review if the Applicant intends to retire the currently proposed facility and employ a different technology.

Response:

Applicant recommends against adoption of this recommendation as Applicant’s recommendation above addresses this issue.

Recommendation:

9. The Applicant or its assigns must provide notice to the Siting Board if during any two-year period, it replaces more than twenty percent of its facilities. The Applicant shall commit to removing the debris and replaced facility components from the Project site and Fleming County upon replacement. If the replaced facility components are properly disposed of at a permitted

facility, they do not have to be physically removed from Fleming County. However, if the replaced facility components remain in Fleming County, the Applicant must inform the Siting Board of where the replaced facility components are being disposed of.

Response:

Applicant recommends removing the requirement to inform the Board of where facility components are disposed. At the time of disposal, the Energy and Environment Cabinet will have jurisdiction over the facility.

H. Public outreach and communication:

Recommendation:

1. The Applicant should reach out to the churches in the area to address any concerns about the Project.

Response:

Applicant notes that multiple public meetings were held for this project and church members attended those meetings and spoke with project representatives. No concerns were raised by individuals identifying themselves as church representatives. Further, this recommendation is both subjective in implementation and redundant with the complaint resolution plan, and should not be adopted.

Recommendation:

2. The Applicant should continue to pursue public outreach and engagement activities within Fleming County.

Response:

While Applicant agrees with the spirit of this recommendation, this recommendation is highly subjective in implementation and potentially redundant with the complaint resolution plan, and should not be adopted.

Recommendation:

4. The Applicant should update the Project website throughout construction and operations to describe current status and Project activities.

Response:

While Applicant agrees with the spirit of this recommendation, this recommendation is both subjective in implementation and potentially redundant with the complaint resolution plan, and should not be adopted.

I. Complaint resolution program:

Recommendation:

1. The Applicant should develop, publicize and implement a complaint resolution plan that describes the process for filing complaints during construction and during operations, and this plan should be provided to Fleming County and the Siting Board. The complaint resolution plan should explain how the complaint will be addressed; the timeframe in which a complainant can expect a response; and an explanation of how the resolution will be determined if the complainant is not satisfied with the response from the Applicant.

Response:

Applicant recommends the Board simply require the Applicant to adopt a complaint resolution program prior to commencement of construction.

Recommendation:

2. The Applicant should submit to the Siting Board, annually, a status report associated with the complaint resolution process, recounting the individual complaints, how the Applicant addressed those complaints and the ultimate resolution of those complaints, and whether or not the resolution was to the complainant's satisfaction.

Response:

Applicant believes that regular updates regarding the complaint resolution program to the Board is improper, given the Kentucky Energy and Environment Cabinet will have jurisdiction over the facility following the commencement of operation.

Respectfully submitted,



Gregory T. Dutton
FROST BROWN TODD LLP
400 W. Market Street, 32nd Floor
Louisville, KY 40202
(502) 589-5400
(502) 581-1087 (fax)
gdutton@fbtlaw.com
Counsel for Hummingbird Energy LLC