

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION
AND TRANSMISSION SITING

In the Matter of:

ELECTRONIC APPLICATION OF HORSESHOE)	
BEND SOLAR, LLC FOR A CERTIFICATE OF)	
CONSTRUCTION FOR AN APPROXIMATELY)	CASE NO.
60 MEGAWATT MERCHANT ELECTRIC)	2020-00190
SOLAR GENERATING FACILITY IN GREEN)	
COUNTY, KENTUCKY PURSUANT TO KRS)	
278.700 AND 807 KAR 5:110)	

ORDER

On February 12, 2021, and May 26, 2021, Horseshoe Bend Solar, LLC (Horseshoe Bend) filed petitions, pursuant to 807 KAR 5:001, Section 13; 807 KAR 5:110, Section 5; KRS 61.878(1)(c)(1), (i), and (j), requesting that the Commission grant confidential protection for an indefinite period of time for designated materials contained in certain of its responses to Siting Board Staff's First Request for Information and for certain of its responses to Siting Board Staff's Post-Hearing Data Requests.

In support of its February 12, 2021 petition, Horseshoe Bend seeks confidential treatment for its response to Siting Board Staff's First Request for Information (Staff's First Request), Item 1, which contains copies of leases that Horseshoe Bend has entered into with participating landowners in connection with the proposed solar facility site. Horseshoe Bend contends that the subject leases contain highly sensitive information, which if publicly disclosed would place Horseshoe Bend at a competitive disadvantage, both in negotiating similar type leases with potential lessors in the future as well as

assisting competitors in the energy sector who may negotiate against them for future sites.

In its May 26, 2021 petition, Horseshoe Bend seeks confidential treatment for its response to Siting Board Staff's Post-Hearing Data Requests (Staff's Post-Hearing Requests), Item 4, which contains communications regarding construction noise from an adjacent neighbor of a 50MWac solar project called "Bluestone" that was originally developed by Horseshoe Bend's parent company, Carolina Solar Energy, in Virginia. Horseshoe Bend asserts that this information should be kept confidential because it is correspondence with private individuals where the communications were under conditions in which the candor of the correspondents depends on assurances of confidentiality. Horseshoe Bend contends that the neighbor who provided the information on construction noise may not have known that their communications would be subject to public disclosure, as this is not a circumstance where the private individuals were communicating with a public agency to provide input on how they believed the agency should handle a certain matter. Horseshoe Bend goes on to cite KRS 61.878(1) which protects "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Horseshoe Bend argues that that the information the neighbor provided regarding construction noise contains information of a personal nature; specifically, an individual providing comment may not want to be publicly identified. On this basis Horseshoe Bend requests confidential protection in perpetuity of the identity of the individual who provided the note mentioned in the narrative supplemental response to Item 4 of the Post-Hearing Data Requests.

Having considered the petitions and the material at issue, the Siting Board finds that the February 12, 2021 petition should be granted in part and denied in part. The Siting Board finds that for the designated material contained in Horseshoe Bend's responses to Staff's First Request, Item 1, and the leases contained therein, only the material terms of the leases meet the criteria for confidential treatment. Material terms is defined for the purposes of this order as the lease amount, escalation of lease payments, and remedies available to the parties of the lease for nonperformance of the terms. All remaining information in the leases does not meet the criteria for confidentiality. Ultimately, the above detailed material terms of the leases provided in Horseshoe Bend's responses to Staff's Initial Request, Items 1 are exempted from public disclosure pursuant to KRS 61.878(1)(c)(1), (i), and (j), 807 KAR 5:001, Section 13, and 807 KAR 5:110, Section 5.

Next the Siting Board finds the response to Staff's Post-Hearing Requests, Item 4, fails to meet the criteria for confidential treatment under the statute, and the motion to hold as confidential the alleged letter from an adjacent land owner who lives near their Bluestone facility in Virginia is without merit for multiple reasons. On May 14, 2021, Horseshoe Bend filed a response to post hearing data request, stating that the noise mitigation measures of using sound blankets draped over the perimeter fence during pile driving to buffer the noise, which were discussed and ordered in previous cases, were in its opinion not feasible. But Horseshoe Bend said that it would investigate the possibility of using the blankets, and would file a supplemental response regarding that potential solution by May 21, 2021. On May 26, 2021, Horseshoe Bend filed a supplemental response which stated use of sound blankets is not a standard practice in the utility scale

solar industry and proposed instead of noise mitigation to limit pile driving within 500 feet of any neighboring non-participating residential home to hours between 8 a.m. and 6 p.m. daily, and to limit construction hours to 8 a.m. to 6 p.m. Monday through Saturday and 1 p.m. to 6 p.m. on Sundays within 500 feet of a church. As part of its supplemental response Horseshoe Bend provided the communication at issue.

The communication at issue is a handwritten letter from a landowner who lived near the Bluestone facility, a facility similar to Horseshoe Bend and developed by Horseshoe Bend's parent company. In the letter the landowner indicates she and her husband lived close to the Bluestone site during construction and could hear nothing while in their home and that there was no more noise than any other construction noise. This letter did not indicate a date or the circumstances under which it was obtained or that there was any confidential information in it or that any confidentiality was expected by the person who wrote it. This letter is contained in the confidential file. It was hand written on small lined paper and dated May 20, 2021, and signed by Jane B. Peterson. It contains no address or addressee, and all indications are that it was solicited by Horseshoe Bend and submitted to the Siting Board as an exhibit in support of its attempt to eliminate mitigation measures. The Bluestone project was announced publicly on October 12, 2016, and it was stated in a newspaper article to be up and running in 2018. The person quoted in the newspaper is the same witness who supported the responses to the post hearing data requests in this case. Ultimately, it is clear to the Siting Board that Horseshoe Bend solicited this hand written statement dated May 20, 2021, for the purpose of filing it in this case.

Horseshoe Bend states in its motion for confidential treatment that KRS 61.878(1) permits non-disclosure of correspondence with private individuals, particularly when the correspondence is given “under conditions in which the candor of the correspondents depends on assurances of confidentiality”, citing 00-ORD-168. Additionally, Horseshoe Bend contends the person who wrote the letter “may not have knowledge that their communications would be subject to public disclosure” and that KRS 61.878(1) protects information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy”. However, KRS 61.871 declares that the public policy of this state is to provide for the free and open examination of public records and that the statutory exceptions provided by KRS 61.871 shall be strictly construed “even though such examination may cause inconvenience or embarrassment to public officials or others”. Even the the Attorney General’s opinion in 00-ORD-168 cited by Horseshoe Bend supports disclosure, strictly construing the circumstance under which confidential treatment is appropriate; as it states that “the exception . . . is generally reserved for that narrow category of public records that reflects letter exchange by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality”.

The Siting Board finds that there is nothing in the letter or the signature of the author which is privileged, or would “constitute a clearly unwarranted invasion of personal privacy” if disclosed or available for review by the public. Furthermore, Horseshoe Bend has failed to demonstrate that there was ever an expectation of confidentiality, and even if there were, the expectation would not be reasonable under the circumstances. Both because it is clear to the Siting Board that Horseshoe Bend solicited this note for the

purpose of filing it in this case and because there is no information in the letter for which confidentiality would be the expectation such as the address of its author of, it therefore fails to meet the criteria for confidential treatment and is not exempted from public disclosure.

The local members of the Siting Board, Judge Executive John Frank and Mr. Paul Jim Sidebottom, did not participate in this decision.

IT IS THEREFORE ORDERED that:

1. Horseshoe Bend's February 12, 2021 petition for confidential treatment for is granted in part and denied in part.
2. Horseshoe Bend's February 12, 2021 petition for confidential treatment for the leases contained in its responses to Staff's First Request, Item 1 is granted solely for the material terms of the lease as defined within this Order.
3. Horseshoe Bend's February 12, 2021 petition for confidential treatment for all non-material terms of the leases contained in its responses to Staff's Initial Request, Item 1 is denied.
4. Horseshoe Bend's May 26, 2021 petition for confidential treatment is denied.
5. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for an indefinite period or until further Order of this Siting Board.
6. Use of the designated material granted confidential treatment by this Order in any Siting Board proceeding shall comply with 807 KAR 5:001, Section 13(9).

7. Horseshoe Bend shall inform the Siting Board if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

8. 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, 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 Horseshoe Bend 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.

9. 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 Horseshoe Bend to seek a remedy afforded by law.

10. 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.

11. If Horseshoe Bend objects to the Siting Board's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. 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.

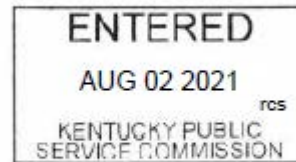
12. Within 30 days of the date of service of this Order, Horseshoe Bend shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

13. The designated material for which Horseshoe Bend requests confidential treatment that 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 Horseshoe Bend to seek any remedy afforded by law.

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By the Kentucky State Board on Electric
Generation and Transmission Siting

The local members of the Siting Board, Judge Executive John Frank and Mr. Paul Jim
Sidebottom, did not participate in this decision.



ATTEST:


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

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