

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

In the Matter of:)
)
Application of Pine Grove Solar, LLC for a Certificate)
of Construction for an Approximately 50 Megawatt) **Case No. 2022-00262**
Merchant Electric Solar Generating Facility in)
Madison County, Kentucky Pursuant to KRS 278.700)
and 807 KAR 5:10)

PINE GROVE SOLAR LLC’S PETITION FOR CONFIDENTIAL TREATMENT

Pine Grove Solar, LLC (“Pine Grove Solar”), by counsel, moves the Kentucky Siting Board on Electric Generation and Transmission Siting (the “Siting Board”) for an order granting confidential treatment to certain information and documents filed the response to the Siting Board’s First Request for Information. Specifically, Pine Grove Solar requests confidential treatment for information contained in documents responsive to Items 36 and 37. In support of this motion, Pine Grove Solar states as follows:

Administrative Regulation 807 KAR 5:110, Section 5 sets forth the procedure by which certain information filed with the Commission shall be treated as confidential. Specifically, the party seeking confidential treatment must establish “each basis upon which the petitioner believes the material should be classified as confidential” in accordance with the Kentucky Open Records Act, KRS 61.878. 807 KAR 5:110 Section 5(2)(a)(1).

The Kentucky Open Records Act exempts certain records from the requirement of public inspection. *See* KRS 61.878. In particular, KRS 61.878(1)(c)(1) 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.

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.” Ky. OAG 97-ORD-66 at 10 (Apr. 17, 1997). One “obvious disadvantage” is created when proprietary information is disclosed “without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *See Marina Management Service, Inc. v. Commonwealth of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995). The information and documents referenced below are all confidential and proprietary and the disclosure of which would present an unfair commercial disadvantage to Pine Grove Solar.

Through Item 36, the Siting Board seeks copies of leases or purchase agreements, including options, (collectively “Leases”) that Pine Grove Solar has executed in development of this project. Previously, the Siting Board has held that material terms of lease agreements are confidential. In *Electronic Application of Sebree Solar, LLC for a Certificate to Construct an Approximately 250 Megawatt Merchant Solar Electric Generating Facility and an Approximately 4.5 Mile Nonregulated Electric Transmission Line in Henderson County, Kentucky and Webster County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110*, No. 2021-00072 at 3-4 (Feb. 7, 2022), the Siting Board defined material terms as:

(1) the lease amount; (2) terms of escalation of lease payments; (3) remedies available to the parties of the lease for nonperformance of the terms; (4) 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 (5) the structure of the lease term including the outside date for the rent commencement date.

See also In the Matter of: Electronic Application of AEUG Fleming Solar, LLC for a Certificate of Construction for an Approximately 188 Megawatt Merchant Electric Solar Generating Facility in Fleming County, Kentucky Pursuant to KRS 278.700 and 807 KAR 5:110, No. 2020-00206 (July 30, 2021).

The material terms contained in the Leases contain proprietary commercial information relating to pricing and other sensitive information that if made publicly available would work a significant competitive disadvantage against Pine Grove Solar. Pine Grove Solar is providing the Siting Board copies of the Leases with redacted material terms and also is providing the Siting Board unredacted copies of the Leases filed under seal.

Additionally, Pine Grove Solar requests confidential treatment for the contract that it entered with a non-participating, adjacent landowner (the “Agreement of Good Will”). In addition to having contractual terms similar to those determined to be exempt from public disclosure under KRS 61.878(1)(c)(1) as described above, the Kentucky Open Records Act safeguards records with information “of a personal nature” that would “constitute a clearly unwarranted invasion of personal privacy.” KRS 61.878(1)(a). The Agreement of Good Will is a unique contractual arrangement that Pine Grove Solar entered with the owners of the adjacent, non-participating parcel. As the signatory landowners are not participating in the Pine Grove Solar project, they are not engaging in activity that the Siting Board or the Public Service Commission regulates. Thus, the non-participating landowners have not affirmatively acted to place themselves under the jurisdiction of the Siting Board. Pine Grove Solar and the signatories have exercised their right to enter a contract, which constitutes the formation of an agreed upon relationship that is private and is not compulsorily disclosed to the public.

Kentucky courts have long recognized the right to an individual's privacy. This right has been described as "the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity," *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929) and "the right to be let alone . . . or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned." *Brents v. Morgan*, 299 S.W.967, 969-70 (Ky. 1927). The *Brents* Court continued its analysis with the following citation:

The right of privacy is incident to the person and not to property. Its foundation is in the conception of an inviolate personality and personal immunity. It is considered as a natural and an absolute or pure right springing from the instincts of nature. It is of that class of rights which every human being had in his natural state and which he did not surrender by becoming a member of organized society. The fundamental rights of personal security and personal liberty include the right of privacy, the right to be let alone. The right of personal security embraces the right to the enjoyment of life which means more than the mere right to breathe. The right to enjoy life is a right to enjoy life in the way most agreeable and pleasant, and the right of privacy is nothing more than a right to live in a particular way.

Brents, 299 S.W. 967 at 971 (citing 8 21 R. C. L. par. 3, p. 1197). The landowners who signed the Agreement of Good Will merely entered a private contractual agreement, separate from the Pine Grove Solar project, as part of their fundamental right to contract in privacy. This private agreement has no bearing on the development of the solar project, nor does it fall within the same category of Leases or other contractual agreements Pine Grove Solar has executed for the construction of the applied for project. The Agreement of Good Will is an agreement separate from activities relating to the generation of solar activity. Disclosure of the contents of this agreement would inhibit both Pine Grove Solar's and the non-participating landowners' right to contract in private.

Additionally, Pine Grove Solar and the landowners contemplated that the Agreement of Good Will would remain confidential. Paragraph 19 of the Agreement specifically states that the parties to the contract will treat the contents of the Agreement confidentially. Pine Grove Solar

may “disclose the existence of this Agreement, but not the content nor substantive terms and conditions of the Agreement.” Publication of the terms and conditions of the contract would inherently trample the parties’ right to contract without providing any benefit to the public through the disclosure of the material terms of the contract.

For the foregoing reasons for an indefinite amount of time, Pine Grove Solar respectfully requests confidential treatment of the Leases and the Agreement of Good Will.

RESPECTFULLY SUBMITTED,

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