

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

**In the Matter of:** )  
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**Application of Banjo Creek Solar, LLC for a** )  
**Certificate of Construction for an Approximately 120** ) **Case No. 2022-00263**  
**Megawatt Merchant Electric Solar Generating Facility** )  
**in Graves County, Kentucky Pursuant to KRS 278.700** )  
**and 807 KAR 5:10** )

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**BANJO CREEK SOLAR’S PETITION FOR CONFIDENTIAL TREATMENT**

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Banjo Creek Solar, LLC (“Banjo Creek”), 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 in the response to the Siting Board’s First Request for Information. Specifically, Banjo Creek requests confidential treatment for information contained in documents responsive to Item 1. In support of this motion, Banjo Creek states as follows:

Administrative Regulation 807 KAR 5:110, Section 5 sets forth the procedure by which certain information filed with the Siting Board 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). Once it is established that a document is confidential or proprietary, the party must show “disclosure to competitors would give them substantially more than a trivial unfair advantage[.]” *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997), (abrogated on other grounds by *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004)). 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 Banjo Creek and its affiliates.

Through Item 1, the Siting Board seeks copies of leases or purchase agreements, including options, separate agreements, or deeds (collectively “Leases”) that Banjo Creek has executed in development of this project that Banjo Creek and its affiliates see specifically as proprietary in nature and that which have been historically protected as such. Real property agreements such as purchase options and leases have historically been accepted as confidential details specific between two private parties. Additionally, an entire system of recording of memorandum of such real property agreements has been adopted and established nationwide to protect the confidentiality of the key information contained therein. Furthermore, the Kentucky Supreme Court has noted that “information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary’ and falls within the wording of KRS 61.878(1)(c)(2).”

*Hoy v. Kentucky Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995). While the *Hoy* holding involved the disclosure of financial information, the Attorney General has found this category to include “corporate assets of a non-financial nature that have required the time and money to develop and concern the inner working of the private entity.” Ky. OAG 20-ORD-019 at 3 (Feb. 5, 2020). The key factor being the insight the information provides “into the internal operations of the entity making the disclosure to the public agency.” *Id.*

The Siting Board has already held that material terms of lease agreements are confidential.<sup>1</sup> While material terms are proprietary, the entirety of the Leases sought by the Siting Board is proprietary and confidential. The Leases are a corporate non-financial asset of Banjo Creek and are an integral part to the inner workings of Banjo Creek depicting its “methods for determining a contract price” and the “business risks assumed” by Banjo Creek. *See* Ky. OAG 17-ORD-002 at 3 (Jan. 5, 2017). The solar industry is a highly competitive market and requires legal expertise in drafting the lease agreements involved in this industry. Ky. OAG 20-ORD-019 at 4 (Feb. 5, 2020) (noting “existence of a highly competitive market is a relevant factor in favor of nondisclosure”). The Leases have been specifically crafted for Banjo Creek’s commercial needs. The Leases contain unique clauses and legal protections, which required Banjo Creek’s time and money to develop. Without the entirety of the Leases being redacted, Banjo Creek’s competitors will be able to ascertain information without the hurdles systematically associated with acquisition of such information about Banjo Creek. Additionally, by viewing the legal protections and the business risk assumed by Banjo Creek, a competitor would be able “to ascertain the economic status” of

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<sup>1</sup> *See, e.g., 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.

Banjo Creek. *Marina Management Service*, 906 S.W.2d at 319. Similarly, future lease holders and sellers could use the Leases against Banjo Creek in future negotiations.

Banjo Creek has spent a large amount on legal fees and time to have the Leases drafted, and it would not be fair to allow its competitors in a highly competitive market to copy the Lease Agreements. Moreover, the law firms hired by Banjo Creek to draft the Leases would suffer from disclosure as its competitors would be able to draft a similar lease agreement without putting in the work required to write such an agreement.

It is not just the material terms contained in the Leases that are proprietary, but it is the overall structure and inclusion of certain clauses that if made publicly available would work a significant competitive disadvantage against Banjo Creek. Banjo Creek is providing the Siting Board with redacted copies of the Leases and is providing the Siting Board unredacted copies of the Leases filed under seal.

For the foregoing reasons for an indefinite amount of time, Banjo Creek respectfully requests confidential treatment of the Leases.

RESPECTFULLY SUBMITTED,

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