

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

In the Matter of:

ELECTRONIC APPLICATION OF CALDWELL)	
SOLAR, LLC FOR A CERTIFICATE OF)	
CONSTRUCTION FOR AN APPROXIMATELY)	CASE NO.
200 MEGAWATT MERCHANT ELECTRIC SOLAR)	2020-00244
GENERATING FACILITY IN CALDWELL)	
COUNTY, KENTUCKY)	

ORDER

On December 3, 2021, Caldwell Solar, LLC (Caldwell Solar) filed a petition, pursuant to 807 KAR 5:110, Section 5, and KRS 61.878, requesting that the Siting Board grant confidential protection for five years for the material terms of leases accompanied with Caldwell Solar’s related narrative in response to the Siting Board Staff’s First Request for Information (Staff’s First Request)¹ Item 20 and for the entirety of the Parcel Map attached to the response to Item 74.

Caldwell Solar filed a second petition on January 17, 2022, requesting the Siting Board grant confidential protection for five years to Caldwell Solar’s responses to Siting Board Staff’s Second Request for Information (Staff’s Second Request),² Items 1 and 2. Specifically, Caldwell Solar asks for protection for Figure 2 Caldwell Karst Report Phase I, Figure 2 Caldwell Karst Report Phase II, and the Caldwell Solar Site Plan Karst Feature Overlay (karst reports).

¹ Staff’s First Request for Information (KSB Nov.19, 2021).

² Staff’s Second Request for Information (KSB Dec. 21, 2021).

Caldwell Solar filed a third petition on March 11, 2022, requesting confidential treatment for its response to the Siting Board Staff's Post Hearing Data Request (Staff's PHDR)³ Item 3 which provided Phase I Environmental Site Assessments dated June 4, 2020, and August 19, 2021.

The Siting Board is a public agency subject to Kentucky's Open Records Act,⁴ which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884."⁵ The exceptions to the free and open examination of public records contained in KRS 61.878, should be strictly construed.⁶ The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.⁷

REVIEW OF PETITIONS

December 3, 2021 Petition

Caldwell Solar argued that material terms about price and financial provisions in the leases it provided in response to Staff's First Request Item 20, and the parcel map attachments provided in response to Item 74 should be accorded confidential treatment. Caldwell stated that the leases reveal commercially sensitive information regarding the internal operation of Caldwell Solar, including how it evaluates potential projects. Caldwell particularly identified areas related to "the lease amounts; escalation of lease payments; remedies available to the parties of the lease for nonperformance of the terms;

³ Staff's Post hearing Data Request (KSB Feb. 25, 2022).

⁴ KRS 61.870 through 61.81.884.

⁵ KRS 61.872(1).

⁶ KRS 61.878.

⁷ 807 KAR 5:110, Section 5(2)(d).

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; and so forth.”⁸ Caldwell Solar argued these are “trade secrets” as defined by KRS 365.880(4) and thus require confidential treatment.⁹ Caldwell Solar relied on KRS 61.878(1)(c)(1) and argued there would be an unfair commercial advantage to competitors if the agency disclosed the records. Caldwell Solar further argued that the leases and the map contain the names and addresses of non-parties which it believes should be afforded confidential protection.

Having considered the petition and the material at issue, the Siting Board finds that Caldwell Solar’s petition is be granted in part and denied in part. The Siting Board finds that certain designated material terms contained in Caldwell Solar’s leases are records that meet the criteria for confidential treatment and are exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:110, Section 5. This is defined as including:

1. The lease amounts;

⁸ Caldwell Solar’s Petition for Confidential Treatment of Information (filed Dec. 3, 2021) at 1.

⁹ Uniform Trade Secrets Act: Definitions for KRS 365.880 to 365.900.

KRS 365.880(4):

"Trade secret" means information, including a formula, pattern, compilation, program, data, device, method, technique, or process, that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

2. 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.

The above-detailed material terms of the leases provided in response to the Staff's Second Request are exempted from public disclosure because the terms are details that could permit a competitor of Caldwell Solar an unfair commercial advantage as provided in KRS 61.878(1)(c)(1), and 807 KAR 5:110, Section 5.

In addition, individuals have a right of personal privacy in relation to their contact information. KRS 61.878(1)(a) exempts from public disclosure “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” For this reason, the Siting Board finds that the personal contact information in the leases such as phone numbers and email addresses will also be kept confidential pursuant to KRS 61.878(1)(a) and 807 KAR 5:110, Section 5.

Regarding the parcel map, to the extent it reflects ownership of real property with names and the property address as found in the public records of the county, such references are not exempt from public disclosure, and the parcel map is not confidential in its entirety. However, if the map includes a phone number, email address, or a personal

private address of an owner different from the actual property address, such information shall be redacted and is entitled to confidential protection.

The remaining terms governing the leases do not meet the criteria for confidentiality because they are general contract terms, typical of such contracts, and for those non-material terms, the request for confidential treatment is denied.

The Siting Board has previously held that leases in their entirety are not entitled to confidential protection because of the failure to meet the requisite standard for exemption from disclosure. Therefore, any further terms of the leases aside from those specified in the Order do not meet the criteria for confidential treatment and are not exempt from public disclosure pursuant to KRS 61.878 (1)(c)(1) and 807 KAR 5:110, Section 5.

January 17, 2022 Petition

Caldwell Solar seeks confidential protection from public disclosure of the karst reports, which contain studies of karst found on and around the proposed site, and the related map overlay showing the location of such features. These were submitted in response to Staff's Second Request, Items 1 and 2. Caldwell Solar argued that possession of this information by its competitors as to these natural features and related adjustments to the project would put it at a competitive disadvantage. Caldwell Solar argued that these studies are exempted by KRS 61.878(1)(c)(1). Caldwell Solar stated that it paid for this information to be collected, and the findings in the karst reports reveal commercially sensitive information regarding the internal operation of Caldwell Solar, including how it evaluates potential projects. Caldwell Solar again argued that "trade secrets" as defined by KRS 365.880(4), are involved. It also relied on

KRS 61.878 (1)(c)(1) and argued there would be an unfair commercial advantage to competitors if the agency disclosed the records.

The Siting board does not find any information in the two karst reports that would qualify for an exemption from disclosure. Specific examples were not given in the petition, and based on the Siting Board's review, it does not appear that these documents—generated by consultants and not Caldwell Solar—contain any specific information regarding how Caldwell Solar evaluates projects. The Siting Board further notes that these studies are routinely submitted in applications to the Siting Board and have never been accorded confidential treatment. These studies and reports thus do not meet the criteria for confidential treatment and are not exempt from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:110, Section 5. The petition is denied as to these karst reports.

March 11, 2022 Petition

Caldwell Solar has provided two Phase 1 environmental site assessments in response to Staff's Post Hearing Request Item 3. Caldwell Solar argued that these are entitled to confidential treatment because they are proprietary, were paid for by the Applicant or other related entities and that they contain some personal information about property owners in the area.

Caldwell Solar cited to "trade secrets" as defined by KRS 365.880(4). This is not an action under the Uniform Trade Secrets Act. Caldwell Solar argued that the environmental site assessments fall within the scope of the KRS 61.878(1)(c)(1) exemption from disclosure, and that disclosure would result in competitive harm. The Siting Board does not find the information contained in the environmental assessment to

be covered by the exemption cited. No specific examples were cited in the petition other than names and addresses of owners of the property. To the extent that personal email addresses, telephone numbers, or personal private addresses different from the property address of owners as reflected in the county records, may appear in these environmental site assessments, those are entitled to protection from disclosure under KRS 61.878(1)(a) and 807 KAR 5:110, Section 5.

IT IS THEREFORE ORDERED that:

1. Caldwell Solar's petition for confidential treatment filed December 3, 2021, is granted as to material terms of the leases as defined above and for any additional personal information that may appear in the leases or related maps.

2. Caldwell Solar's petition for confidential treatment filed January 17, 2022, for its karst reports is denied.

3. Caldwell Solar's petition for confidential treatment filed March 11, 2022, is granted as to any personal information as defined above that is found in the environmental assessments or related maps, but denied as to the environmental site assessments.

4. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for five years or until further order of this Siting Board.

5. Use of the designated material granted confidential treatment by this Order in any Siting Board proceeding shall comply with 807 KAR 5:110, Section 5.

6. Caldwell Solar shall inform the Siting Board if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

7. 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 Caldwell Solar 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.

8. 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 Caldwell Solar to seek a remedy afforded by law.

9. 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.

10. If Caldwell Solar objects to the Siting Board's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to 807 KAR 5:110, Section 5(4), or judicial review of this Order pursuant to KRS 278.712(5). 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.

11. Within 30 days of the date of service of this Order, Caldwell Solar 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.

12. The designated material for which Caldwell Solar's request for confidential treatment 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 Caldwell Solar to seek a remedy afforded by law.

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KENTUCKY STATE BOARD ON ELECTRIC
GENERATION AND TRANSMISSION SITING

[Signature]
Chairman, Public Service Commission

[Signature]
Vice-Chairman, Public Service Commission

Commissioner, Public Service Commission

[Signature]
Secretary, Energy and Environment Cabinet,
or her designee

by KAC
w/ permission

[Signature]
Secretary, Cabinet for Economic Development,
or his designee

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Larry Curling, ad hoc member

[Signature]
Dixie Gale Cherry, ad hoc member

ATTEST:

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



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