

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENERGY)	CASE NO.
CORP. FOR A WAIVER PURSUANT TO KRS)	2020-00215
278.2219)	

ORDER

This matter arises from certain petitions requesting confidential treatment, pursuant to 807 KAR 5:001, Section 13, and KRS 61.878, filed by Kenergy Corp. (Kenergy). Kenergy filed petitions on August 31, 2020, September 2, 2020, September 3, 2020, September 18, 2020, and October 8, 2020.

August 31, 2020 Petition

In the August 31, 2020 petition, Kenergy requests confidential protection for its responses to Items 1, 2, 3, 4c, and 4d of Commission Staff's First Request for Information (Response to Staff's First Request), and Items 3, 4, 6a, 6c, 7, 9, 10, and 15 of the Attorney General's First Request for Information (Response to Attorney General's First Request), including Kenergy's engagement letter with Conexon.

In support of its motion, Kenergy states that the information contained in its responses to these items contain confidential information from the feasibility study Kenergy obtained, or information derived from that feasibility study. Kenergy also states the engagement letter is proprietary to Conexon. Kenergy states that the feasibility study discusses the various government subsidies that may be available to Kenergy and the

rules and regulations of the program prohibit public reference to them.¹ In the confidential filing, Kenergy references portions of the Code of Federal Regulations² that Kenergy claims require it to keep the above-referenced information confidential. Kenergy cited no other statute or regulation in support of its petition. Kenergy seeks confidential protection for this information for nine months subsequent to the date the petition was filed.

September 2, 2020 Petition

In the September 2, 2020 petition, Kenergy requests confidential protection for nine months for its Supplemental Response to Staff's First Request, Item 3 and an attachment submitted with its response. In support of its request, Kenergy states that the information concerns various government subsidies that may be available to Kenergy and that the program rules and regulations governing these programs prohibit reference to them.³

September 3, 2020 Petition

In the September 3, 2020 petition, Kenergy requests confidential protection for nine months for its Supplemental Response to the Attorney General's First Request, Item 3, including documents filed with the response and a video share file link. Again, in support of its petition, Kenergy states that the information concerns various government subsidies that may be available to Kenergy and that the program rules and regulations prohibit reference to them.⁴

¹ Petition for Order Issuing Kenergy Corp. Confidential Protection (filed Aug. 31, 2020) at paragraph 2.

² Because Kenergy made reference to the regulations in a confidential filing, the Commission cannot cite to the regulation specifically.

³ Supplemental Petition for Order Issuing Kenergy Corp. Confidential Protection (filed Sept. 2, 2020) at paragraph 2.

September 18, 2020 Petition

On September 18, 2020, Kenergy filed two petitions requesting confidential treatment. The petition discussed in this Order is the petition entitled “Third Petition for Order Issuing Kenergy Corp. Confidential Protection.” The Commission will address the other September 18, 2020 petition by separate order. In it, Kenergy seeks confidential protection for nine months for its Response to the Attorney General’s Second Request, Items 1, 3b, 4, 5, 8, 9, and 12 as well as for portions of the supplemental testimony of Jeffery Hohn. Again, as grounds for finding the information confidential, Kenergy simply states: “The foregoing responses and testimony call for confidential information concerning various government subsidies that may be available to Kenergy and the rules and regulations of the program prohibits public reference to them.”⁵

October 8, 2020 Petition

In the October 8, 2020 petition, Kenergy requests confidential protection for nine months for information cited in its Brief, and once again, the reason Kenergy gives in support of its petition is that the information concerns various government subsidies that may be available to Kenergy and the rules and regulations of the program prohibit public reference to them.⁶

⁴ Second Supplemental Petition for Order Issuing Kenergy Corp. Confidential Protection (filed Sept. 3, 2020) at paragraph 2.

⁵ Third Petition for Order Issuing Kenergy Corp. Confidential Protection (filed Sept. 18, 2020) at paragraph 2.

⁶ Fourth Petition for Order Issuing Kenergy Corp. Confidential Protection (filed Oct. 8, 2020) at paragraph 2.

DISCUSSION

The Commission notes that other than referencing the feasibility study and stating that the engagement letter is considered proprietary by Conexon, Kenergy does not state that any of the information for which it seeks confidential treatment consists of projections compiled for it for a fee by a third party. Further, the Commission notes that none of the petitions contain any argument for finding the designated material confidential under KRS 61.878, as required by 807 KAR 5:001, Section 13(2)(a)(1).

Finally, the Commission notes that although Kenergy repeatedly states that the materials designated in the petitions concern various government subsidies that may be available to Kenergy and the rules and regulations of the program prohibit public reference to them, Kenergy fails to state with specificity how any of the designated materials constitute a prohibited communication according to applicable federal regulations. The Commission does not desire to expose Kenergy or Kenect, Inc. to the possibility of penalties under any federal regulation. It is possible the decisions articulated in this Order would have been different if Kenergy had expanded on the requirements, prohibitions, and possible penalties related to the government program to which it refers. However, the Commission has evaluated the designated material according to the requirements of KRS 61.878(1)(c)(1) and considered the prohibitions articulated in the applicable federal regulations as presented by Kenergy. Should Kenergy choose to request rehearing of these issues, the Commission urges Kenergy to state with specificity why the information denied confidential treatment should be considered confidential with citations to and discussions of the requirements of 807 KAR 5:001 Section 13(2)(a)(1), KRS 61.878, and any applicable federal regulations.

Having considered the petitions and the material at issue, the Commission finds that Items 1, 2, and 3 of Kenergy's Response to Staff's First Request, and Items 3, 4, 7, 9, 10, and 15 of Kenergy's Response to the Attorney General's First Request contained in the August 31, 2020 petition; Item 3 of Kenergy's Supplemental Response to Staff's First Request, contained in the September 2, 2020 petition; Kenergy's Supplemental Response to the Attorney General's First Request, Item 3, including documents filed with the response and a video share file link mentioned in the September 3, 2020 petition; Items 1, 3b, 4, 5, 8, 9, and 12 of Kenergy's Response to the Attorney General's Second Request, and answers to questions 10 and 16, and Exhibit D to the Supplemental Testimony of Jeffery Hohn, contained in the September 18, 2020 petition; and the portions of Kenergy's Brief mentioned in the October 8, 2020 petition, meet the criteria for confidential treatment and are exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1). The Commission makes this finding because the information contains projections prepared for Kenergy for a fee by Conexon using methodology developed by Conexon. Kenergy would suffer a commercial disadvantage if its competitors had access to these projections. Additionally, the designated information, as it relates Conexon's methodology, is considered proprietary and confidential by Conexon. Public disclosure of the information would permit an unfair advantage to Conexon's competitors, which would, in turn, result in the pool of experts available to Kenergy being reduced. The Commission agrees that consultants, such as Conexon, would not be willing to consult with Kenergy if information they deem to be confidential and proprietary were to be publicly disclosed. The Commission finds that

publicly disclosing this information would disadvantage Kenergy in seeking the services of expert consultants in the future.

Further the Commission finds Item 4d of Kenergy's Response to Staff's First Request, mentioned in the August 31, 2020 petition; and answers to questions 8 and 10, and Exhibit A to the Supplemental Testimony of Jeffery Hohn, mentioned in the September 18, 2020 petition meet the criteria for confidential treatment and are exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1). In making this finding the Commission considered the applicable federal regulations as presented by Kenergy in its petitions and KRS 61.878(1)(c)(1) and determined the public disclosure of the designated material could subject Kenergy to possible penalties imposed by a government agency. Such an event would provide Kenergy's competitors with an unfair commercial advantage.

Finally, the Commission finds that Item 4c of Kenergy's Response to Staff's First Request and Items 6a and 6c of Kenergy's Response to the Attorney General's first Request mentioned in the August 31, 2020 petition; the attachment accompanying Kenergy's Supplemental Response to Staff's First Request, Item 3, mentioned in the September 2, 2020 petition; and answers to questions 6, 9, 12, 13, and 15 in the Supplemental Testimony of Jeffery Hohn mentioned in the September 18, 2020 petition do not meet the criteria for confidential treatment and are not exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1). In fact, much of this information is publicly available on a government agency's website.

IT IS THEREFORE ORDERED that:

1. Kenergy's September 3, 2020 and October 8, 2020 petitions are granted

2. Kenergy's August 31, 2020, September 2, 2020, and September 18, 2020 petitions are granted in part and denied in part.

3. The designated materials contained in Item 4c of Kenergy's Response to Staff's First Request, Items 6a and 6c of Kenergy's Response to the Attorney General's first Request, and answers to questions 6, 9, 12, 13, and 15 in the Supplemental Testimony of Jeffery Hohn are not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

4. If Kenergy objects to the Commission's determination that the requested information not be granted confidential treatment, it must seek either a 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 Commission's determination of which materials should be granted confidential treatment.

5. Within 30 days of the date of service of this Order, Kenergy shall file a revised version of Item 4c of Kenergy's Response to Staff's First Request, Items 6a and 6c of Kenergy's Response to the Attorney General's first Request, and answers to questions 6, 9, 12, 13, and 15 in the Supplemental Testimony of Jeffery Hohn for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

6. The material for which Kenergy'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 in order to allow Kenergy to seek a remedy afforded by law.

7. The designated information contained in Items 1, 2, 3, and 4d of Kenergy's Response to Staff's First Request; Items 3, 4, 7, 9, 10, and 15 of Kenergy's Response to the Attorney General's First Request; Item 3 of Kenergy's Supplemental Response to Staff's First Request; Item 3 of Kenergy's Supplemental Response to the Attorney General's First Request, including documents filed with the response and a video share file link; Items 1, 3b, 4, 5, 8, 9, and 12 of Kenergy's Response to the Attorney General's Second Request; and answers to questions 8, 10, and 16 and Exhibit A and Exhibit D to the Supplemental Testimony of Jeffery Hohn; along with portions of Kenergy's Brief shall not be placed in the public record or made available for public inspection for nine months or until further Order of this Commission.

8. Use of the material in question in any Commission proceeding shall be in compliance with 807 KAR 5:001, Section 13(9).

9. Kenergy shall inform the Commission if the material in question becomes publicly available or no longer qualifies for confidential treatment.

10. 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, Kenergy 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 Kenergy is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

11. The Commission shall not make the requested material 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 Kenergy to seek a remedy afforded by law.

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By the Commission



ATTEST:



Deputy Executive Director

Case No. 2020-00215

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